Date and Time: Monday, October 23, 2023 11:49:00 AM CST

Job Number: 208661548

Documents (100)

1. [In re JPMorgan Chase Bank Home Equity Line of Credit Litig., 794 F. Supp. 2d 859]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

2. [Colo. Civ. Rights Comm'n v. Wells Fargo Bank & Co., 2011 U.S. Dist. LEXIS 71463]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

3. [WorldHomeCenter.Com v. PLC Lighting, Inc., 851 F. Supp. 2d 494]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

4. [Adobe Sys. v. Norwood, 2011 U.S. Dist. LEXIS 72293]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

5. [Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., 795 F. Supp. 2d 847]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

6. Nokia Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 72389

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

7. Walters v. McMahen, 795 F. Supp. 2d 350

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

8. Drake v. Cox Communs., Inc., 2011 U.S. Dist. LEXIS 73529

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

9. Stanislaus Food Prods. Co. v. USS-POSCO Indus., 2011 U.S. Dist. LEXIS 72764

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

10. Van Hoose v. Gravois, 70 So. 3d 1017

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

11. Brady v. NFL, 644 F.3d 661

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

12. Oregon v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 76562

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

13. Patel v. Smith, 2011 U.S. Dist. LEXIS 74645

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

14. Cal. ex rel. Harris, 651 F.3d 1118

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

15. Windstar Holdings LLC v. Range Res. Corp., 2011 U.S. Dist. LEXIS 75208

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

16. [E-Z Roll Off, LLC v. County of Oneida, 2011 WI 71]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

17. [Phillips v. BAC Home Loans Servicing, LP, 2011 U.S. Dist. LEXIS 75692]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

18. [Sato v. Wachovia Mortg., FSB, 2011 U.S. Dist. LEXIS 75418]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

19. [Sweetwater Valley Farm, Inc. v. Dean Foods Co. (In re Southeastern Milk Antitrust Litig.), 801 F. Supp. 2d 705]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

20. [In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

21. [United States v. Am. Express Co., 2011 U.S. Dist. LEXIS 78835]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

22. [In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

23. [Lakeland Reg'l Med. Ctr., Inc. v. Astellas US LLC, 2011 U.S. Dist. LEXIS 80723]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

24. [CamSoft Data Sys. v. Southern Elecs. Supply, Inc., 2011 U.S. Dist. LEXIS 82263]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

25. [TradeComet.com LLC v. Google, Inc., 435 Fed. Appx. 31]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

26. [Invista S.A.R.L. v. Frontech, Inc., 2011 U.S. Dist. LEXIS 171400]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

27. *Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

28. *Navien Am., Inc. v. Allen, 2011 Conn. Super. LEXIS 2036*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

29. *Massengale v. City of Jefferson, 2011 U.S. Dist. LEXIS 84940*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

30. *Allen v. Dairy Farmers of Am., Inc., 2011 U.S. Dist. LEXIS 85753*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

31. *In re Optical Disk Drive Antitrust Litig., 2011 U.S. Dist. LEXIS 101763*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

32. Am. Airlines, Inc. v. Sabre, Inc., 2011 U.S. Dist. LEXIS 86830

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

33. Dynegy Mktg. & Trade v. Multiut Corp., 648 F.3d 506

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

34. ZF Meritor LLC v. Eaton Corp., 800 F. Supp. 2d 633

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

35. Lorillard Tobacco Co. v. R.J. Reynolds Tobacco Co., 2011 NCBC 30

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

36. In re: Cathode Ray Tube Antitrust Litig., 2011 U.S. Dist. LEXIS 118951

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

37. *Loren Data Corp. v. GXS, Inc., 2011 U.S. Dist. LEXIS 88222*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

38. *Black v. JP Morgan Chase & Co., 2011 U.S. Dist. LEXIS 103727*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

39. *In re Wellbutrin XL Antitrust Litig., 2011 U.S. Dist. LEXIS 90075*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

40. *In re Wellpoint Out-Of-Network "UCR" Rates Litig., 865 F. Supp. 2d 1002*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

41. *RealPage, Inc. v. Yardi Sys., 2011 U.S. Dist. LEXIS 90095*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

42. *In re Wellbutrin XL Antitrust Litig., 282 F.R.D. 126*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

43. *Silicon Econs., Inc. v. Fin. Accounting Found., 2011 U.S. Dist. LEXIS 92322*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

44. *City of New York v. Group Health Inc., 649 F.3d 151*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

45. *Doe v. Williams, 2011 Me. Super. LEXIS 162*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

46. *Emilia No Bolanos v. Alter, 2011 U.S. Dist. LEXIS 166658*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

47. *FTC v. Lundbeck, Inc., 650 F.3d 1236*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

48. U.S. Ring Binder L.P. v. World Wide Stationery Mfg. Co., 804 F. Supp. 2d 588

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

49. Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health, 654 F.3d 919

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

50. Behrend v. Comcast Corp., 655 F.3d 182

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

51. Eastman Kodak Co. v. Epson Imaging Devices Corp. (In re TFL-LCD Antitrustlitigation), 2011 U.S. Dist. LEXIS 95053

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

52. Ethypharm S.A. France v. Abbott Labs., 805 F. Supp. 2d 59

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

53. [Gorospe v. New Century Mortg. Corp., 2011 U.S. Dist. LEXIS 93992]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

54. [Delong v. TaxMasters, Inc., 2011 U.S. Dist. LEXIS 94883]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

55. [In re TFT-Lcd Antitrust Litig., 2011 U.S. Dist. LEXIS 97466]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

56. [Sineitti v. Conoco Phillips Co., 2011 Cal. App. Unpub. LEXIS 6455]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

57. [Cahn v. Oversee, 2011 U.S. Dist. LEXIS 164904]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

58. *Samsung Elecs. Co. v. Panasonic Corp., 2011 U.S. Dist. LEXIS 155157*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

59. *United States ex rel. Bunk v. Birkart Globistics GmbH & Co., 2011 U.S. Dist. LEXIS 158057*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

60. *Electrograph Sys., Inc. v. Epson Imaging Devices Corp. (In re: TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 96739*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

61. *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

62. *Agnew v. NCAA, 2011 U.S. Dist. LEXIS 98744*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline:

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63. Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

64. United States v. Comcast Corp., 808 F. Supp. 2d 145

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

65. United States v. Comcast Corp., 2011 U.S. Dist. LEXIS 116381

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

66. ClearPlay, Inc. v. Nissim Corp., 2011 U.S. Dist. LEXIS 99154

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

67. In re Puerto Rican Cabotage Antitrust Litig., 815 F. Supp. 2d 448

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

68. *In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

69. *Worldhomecenter.com, Inc. v. KWC Am., Inc., 2011 U.S. Dist. LEXIS 104496*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

70. *PCI Int'l Consultants, Inc. v. Flavor & Food Ingredients, Inc., 2011 U.S. Dist. LEXIS 117224*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

71. *Metris U.S.A., Inc. v. Faro Techs., Inc., 882 F. Supp. 2d 160*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

72. *EMC Nat'l Life Co. v. Employee Benefits Sys., 827 F. Supp. 2d 979*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

73. *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

74. [Colabella v. AICPA, 2011 U.S. Dist. LEXIS 110982]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

75. [In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 U.S. Dist. LEXIS 110635]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

76. [Carpenter Tech. Corp. v. Allegheny Techs., Inc., 2011 U.S. Dist. LEXIS 112556]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

77. [Gulf States Reorganization Group, Inc. v. Nucor Corp., 822 F. Supp. 2d 1201]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

78. [Tese-Milner v. Diamond Trading Co., Ltd., 2011 U.S. Dist. LEXIS 111514]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

79. *Vandenberg v. Aramark Educ. Servs., 81 So. 3d 326*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

80. *Marsh v. Anesthesia Services Medical Group, Inc., 200 Cal. App. 4th 480*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

81. *Marsh v. Anesthesia Servs. Med. Group, 2011 Cal. App. Unpub. LEXIS 7632*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

82. *Miller v. Wright, 2011 U.S. Dist. LEXIS 116533*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

83. *In2 Networks, Inc. v. Honeywell Int'l, 2011 U.S. Dist. LEXIS 117589*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

84. *Fitzgerald v. Am. Sav. Bank, F.S.B., 2011 U.S. Dist. LEXIS 118541*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

85. *In re Photochromic Lens Antitrust Litig., 2011 U.S. Dist. LEXIS 119257*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

86. *Apple Inc. v. Samsung Elecs. Co., 2011 U.S. Dist. LEXIS 120416*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

87. *In re Magnesium Oxide Antitrust Litig., 2011 U.S. Dist. LEXIS 121373*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

88. *Expedite, Inc. v. Plus, Bags, Cars & Serv, LLC, 2011 U.S. Dist. LEXIS 147740*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

89. *Williams v. Mission Viejo Emergency Med. Assocs., 2011 Cal. App. Unpub. LEXIS 7990*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

90. *In re Visa Check/MasterMoney Antitrust Litig., 2011 U.S. Dist. LEXIS 122680*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

91. *Meyer v. Cmty. College of Beaver County, 30 A.3d 587*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

92. *Adesokan v. United States Bank, N.A., 2011 U.S. Dist. LEXIS 125591*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

93. *In re Cipro Cases I & II, 200 Cal. App. 4th 442*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

94. *Rose Acre Farms, Inc. v. Columbia Cas. Co., 662 F.3d 765*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

95. *Burgess v. Williams, 2011 U.S. Dist. LEXIS 127085*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

96. *Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

97. *E-Pass Techs. v. Moses & Singer, LLP, 2011 U.S. Dist. LEXIS 128018*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

98. *Lopeti v. Alliance Bancorp, 2011 U.S. Dist. LEXIS 165859*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

99. *CompuCredit Holdings Corp. v. Akanthos Capital Mgmt., LLC, 661 F.3d 1312*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

100. *Heald v. Nat'l City Mortg., 2011 U.S. Dist. LEXIS 130194*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Apr 23, 2009 to Dec 31, 2022

In re JPMorgan Chase Bank Home Equity Line of Credit Litig.

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

June 30, 2011, Decided

Master Docket No. 10 C 3647

Reporter

794 F. Supp. 2d 859 *; 2011 U.S. Dist. LEXIS 71442 **

In Re: JPMORGAN CHASE BANK HOME EQUITY LINE OF CREDIT LITIGATION

Prior History: *In re JP Morgan Chase Bank Home Equity Line of Credit Litig., 716 F. Supp. 2d 1363, 2010 U.S. Dist. LEXIS 58842 (J.P.M.L., 2010)*

Core Terms

suspended, Plaintiffs', suspension, Regulation, reduction, allegations, property value, consumer, line of credit, declines, argues, unfair, reinstatement, appraisal, unjust enrichment, borrowers, pleaded, annual fee, valuation, fair dealing, percent, contract provision, court concludes, implied covenant of good faith, circumstances, origination, fraudulent, inaccurate, breached, violates

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

Defendant has moved to dismiss the complaint for failure to state a claim for relief. *Fed. R. Civ. P. 12(b)(6)*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. In evaluating a motion to dismiss, the court accepts plaintiffs' well-pled factual allegations as true and draws reasonable inferences in plaintiffs' favor.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

Real Property Law > Financing > Secondary Financing > Home Equity Credit Lines

HN2[] **Truth in Lending, Disclosure**

Congress enacted the Truth in Lending Act (TILA) to enhance economic stabilization and competition in the consumer credit industry through the informed use of credit. *15 U.S.C.S. § 1601*. TILA's stated purpose is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare the various credit terms available to him and avoid the uninformed use of credit and to protect the consumer against inaccurate and unfair credit billing. TILA also regulates home equity lines of credit, permitting lenders to alter them only under certain circumstances.

Banking Law > Consumer Protection > Truth in Lending > General Overview

Real Property Law > Financing > Secondary Financing > Home Equity Credit Lines

***HN3*[]** **Consumer Protection, Truth in Lending**

The Truth in Lending Act (TILA), *15 U.S.C.S. § 1601 et seq.*, explains that a home equity line of credit (HELOC) may be reduced during any period in which the value of the consumer's principal dwelling which secures any outstanding balance is significantly less than the original appraisal value of the dwelling. *15 U.S.C.S. § 1647(c)(2)(B)*. Regulation Z similarly allows HELOC reduction or suspension if the value of the dwelling that secures the HELOC declines significantly below the dwelling's appraised value. *12 C.F.R. § 226.5b(f)(3)(vi)(A)*.

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

***HN4*[]** **Truth in Lending, Liability for Violations**

To come within the meaning of "consumer" for the purposes of asserting a Truth in Lending Act (TILA), *15 U.S.C.S. § 1601 et seq.*, claim, the transactions at issue must be primarily for personal, family, or household purposes. *15 U.S.C.S. § 1602(h)*.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

***HN5*[]** **Federal Declaratory Judgments, Discretionary Jurisdiction**

The Declaratory Judgment Act provides that, in a case of actual controversy within its jurisdiction, any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. *28 U.S.C.S. § 2201*. The decision to entertain a declaratory judgment action lies within the discretion of the district court and is not precluded by the availability of another form of relief. *Fed. R. Civ. P. 57*.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

***HN6*[]** **Contract Interpretation, Good Faith & Fair Dealing**

California law recognizes a cause of action for the implied covenant of good faith and fair dealing. The breach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Payment Delays & Denials

***HN7*[]** **Bad Faith & Extracontractual Liability, Payment Delays & Denials**

An insurer's obligations extend beyond simply paying the benefits to which its insured is entitled. Tactics that delay, frustrate, or oppress the insured can support a claim for relief even if the insured eventually receives the payment due under the policy.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Real Property Law > Financing > Secondary Financing > Home Equity Credit Lines

HN8[] **Contract Interpretation, Good Faith & Fair Dealing**

Allegations that a lender offering a home equity line of credit reduced or suspended the account by claiming that the property value had declined without a sufficient factual basis, failed to provide specific information as to how it reached that conclusion, and then required the borrower to pay the cost of an appraisal to show otherwise are sufficient to state a claim for breach of the implied covenant of good faith and fair dealing.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN9[] **Contract Interpretation, Good Faith & Fair Dealing**

In Delaware, the implied covenant of good faith and fair dealing inheres in every contract and requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct that has the effect of preventing the other party to the contract from receiving the fruits of the bargain. The implied covenant cannot be invoked to override the express terms of the contract. To state a claim, plaintiff must identify a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract. A general allegation that defendant acted in bad faith is insufficient.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN10[] **Contract Interpretation, Good Faith & Fair Dealing**

Minnesota's implied covenant of good faith and fair dealing requires that one party not unjustifiably hinder the other party's performance of a contract and that a party not take advantage of the failure of a condition precedent when the party itself has frustrated performance of that condition. The covenant does not extend to actions beyond the scope of the underlying contract, but Minnesota law does not require a plaintiff asserting an implied covenant breach to first establish breach of an express contractual provision.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN11[] **Contract Interpretation, Good Faith & Fair Dealing**

Arizona's implied covenant of good faith and fair dealing prohibits either party from acting in a way that will impair the right of the other to receive the benefits that flow from their agreement or contractual relationship. To state a claim under this theory, a plaintiff need only allege that defendant's actions potentially impaired plaintiff's contractual rights.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN12[] Equitable Relief, Quantum Meruit

A restitution claim in California requires receipt of benefit and unjust retention of that benefit at the expense of others. In Minnesota, an unjust enrichment claim requires a showing that (1) a benefit was conferred by the plaintiff on the defendant; (2) the defendant accepted the benefit; and (3) the defendant retained the benefit although retaining it without payment is inequitable. Texas allows recovery on an unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage. Delaware law requires a showing of (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy at law. Although the definitions thus differ slightly, all essentially require the inequitable or unjustified retention of a benefit or enrichment at plaintiff's expense.

Real Property Law > Financing > Secondary Financing > Home Equity Credit Lines

HN13[] Secondary Financing, Home Equity Credit Lines

A creditor may collect only bona fide and reasonable appraisal and credit report fees if such fees are actually incurred in investigating whether the condition permitting the freeze continues to exist. A creditor may not, in any circumstances, impose a fee to reinstate a credit line once the condition has been determined not to exist. 12 C.F.R. Pt. 226, Supp. 1, 5b(f)(3)(vi)-3. In addition, while the creditor is allowed to shift the burden to request reinstatement to the borrower, once the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist. 12 C.F.R. Pt. 226, Supp. 1, 5(b)(f)(3)(vi)-4. Together, these provisions suggest that the creditor may shift the burden of incurring an appraisal fee to the consumer.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN14[] Trade Practices & Unfair Competition, State Regulation

California's unfair competition law (UCL) prohibits any unlawful, unfair, or fraudulent business act. Cal. Bus &a Prof. Code *§ 17200*. Under California law, such a claim may be brought by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. *Cal. Bus. & Prof. Code § 17204*. In other words, the law allows prosecution by a private plaintiff, although the remedies available under those circumstances are generally limited to injunctive relief and restitution. The term "fraudulent business act" is not further defined in the statute, but the statute has the broad purpose of protecting both consumers and competitors by promoting fair competition in commercial markets for goods and services.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN15[] State Regulation, Claims

The Illinois Supreme Court has explained its interpretation of the state's Consumer Fraud Act as requiring that litigant plead (1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; (3) the occurrence of the deception in the course of conduct involving trade or commerce; and (4) actual damage to plaintiff (5) proximately caused by the deception. *815 ILCS 505/2* and *815 ILCS 505/10a(a)*. The Illinois Supreme

Court has explained that plaintiff must prove that he or she was actually deceived by the misrepresentation in order to establish the element of proximate causation.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Civil Procedure > Remedies > Injunctions > General Overview

HN16[] **Trade Practices & Unfair Competition, State Regulation**

Minnesota law provides that the act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable. *Minn. Stat. § 325F.69*. The statute does not require actual reliance if a plaintiff seeks an injunction, but Minnesota courts have required proof of actual reliance on defendant's fraudulent conduct to support an award of damages.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN17[] **Trade Practices & Unfair Competition, State Regulation**

The California courts currently employ two separate definitions of "unfair." The first asks the court to weigh the utility of defendant's conduct against the gravity of the harm to the alleged victim. The second treats conduct as unfair if it threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws, but that definition has not been held applicable in consumer claims. As for the "unlawful" prong of the law, *Cal. Bus & Prof. Code § 17200* has been interpreted to render violations of federal, state, or local law unlawful practices which are independently actionable.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN18[] **State Regulation, Claims**

In California, a business practice is unfair within the meaning of the unfair competition law if it is unscrupulous and causes injury to consumers that outweighs the benefits. The determination of whether a business practice is unfair is usually a question of fact and inappropriate for a motion to dismiss.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

HN19[] **Trade Practices & Unfair Competition, State Regulation**

In Illinois, the question of whether a business practice is unfair within the meaning of the Illinois Consumer Fraud Act depends on (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; or (3) whether it causes substantial injury to consumers. Illinois law also explains, however, that the consumer fraud law does not require lenders to make more extensive disclosures than are required by the Truth in Lending Act, *15 U.S.C.S. § 1601 et seq.*

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN20[] **State Regulation, Claims**

The Minnesota Uniform Deceptive Practices Act, *Minn. Stat. § 325D.44, subd. 1*, which prohibits a person from representing that goods or services have characteristics they do not have or otherwise creating a likelihood of confusion or misunderstanding. Claims brought pursuant to this act are based on conduct by defendant and do not require reliance by the plaintiff. The Minnesota statutes affords injunctive relief as well as costs and attorneys fees, in addition to relief available under other state statutes or common law. *Minn. Stat. § 325D.45*.

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For William Cavanagh, Plaintiff: Evan M Meyers, KamberEdelson LLC, Chicago, IL; Gregory Linkh, PRO HAC VICE, Murray Frank & Sailer LLP, New York, NY.

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For Michell Kimball, Plaintiff: Jay Edelson, LEAD ATTORNEY, Irina Slavina, Edelson McGuire, LLC, Chicago, IL.

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For Mary Jane Yakas, Plaintiff: Jack Landskroner, LEAD ATTORNEY, PRO HAC VICE, Landskroner - Grieco - Madden, LLC, Cleveland, OH; Christopher Collins, Frank James Janecek, **[**2]** Jr., PRO HAC VICE, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For JPMorgan Chase Bank N.A., Chase Bank USA, N.A., Defendants: Victoria R. Collado, LEAD ATTORNEY, LeAnn Pedersen Pope, Michael G. Salemi, Tiffany Lin Sorge Smith, Burke, Warren, MacKay & Serritella, PC, Chicago, IL.

Judges: REBECCA R. PALLMEYER, United States District Judge.

Opinion by: REBECCA R. PALLMEYER

Opinion

[*866] **MEMORANDUM OPINION AND ORDER**

A home equity line of credit ("HELOC") is a revolving line of credit secured by a holder's primary residence. In this class action, eight individuals to whom Defendant had extended HELOCs charge Defendant with having reduced or suspended those HELOCs without a permissible reason for doing so, thus violating the Federal Truth-in-Lending Act, *15 U.S.C. § 1601 et seq*, and its implementing regulation, Regulation Z, 12 C.F.R. 226. Plaintiffs also allege that Defendant's suspension or reduction of their HELOCs, and the manner in which those reductions or suspensions were carried out, constitute breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violations of California, Illinois, and Minnesota consumer protection **[**3]** laws. This action comes to the court after having been consolidated by the United States Judicial Panel on Multidistrict Litigation. Defendant moves to dismiss the Complaint in its entirety, arguing that federal law and relevant contractual provisions permit Defendant to reduce or suspend Plaintiffs' HELOCs. Defendant challenges Plaintiffs' claims on a host of other grounds as well.

For the reasons explained here, the court concludes that Plaintiffs have adequately pleaded a violation of TILA and Regulation Z by alleging that Defendant suspended or reduced HELOCs in the absence of a significant decline in the value of the property securing the HELOC. Defendant is correct that the failure to consider present available equity, the use of "automated valuation models," the use of "unlawful triggering events," and reduction or suspension absent a "sound factual basis" are not independent bases for relief. Those practices are, however, relevant in considering whether Defendant reduced or suspended HELOCs even though the properties securing them suffered no significant decline in value. The court is also satisfied that Plaintiffs have adequately pleaded that the HELOCs at issue were obtained **[**4]** primarily for personal, family, or household purposes, as required by TILA. The court declines to dismiss Plaintiffs' claims for declaratory relief, as such relief may be sought as an alternative to the remedies provided for by TILA and Regulation Z. The court concludes, further, that Plaintiffs' allegations that Defendant reduced or suspended their HELOCs without adequate justification are sufficient to state claims for breach of contract under Minnesota, California, Texas and Delaware law. Certain other state law claims survive, as well, including Plaintiffs' unfair conduct claims under the California and Illinois consumer protection laws, and their claim under the Minnesota Deceptive Practices Act.

BACKGROUND

Plaintiffs William Cavanagh, Robert M. Frank, Maria I. Frank, Shannon Hackett, Michael Malcolm, Daryl Mayes, Michael Walsh, and Robert Wilder, have brought a consolidated class action complaint against Defendant JPMorgan Chase, alleging that the bank reduced or suspended their home equity lines of credit ("HELOCs") in violation of the Federal Truth-in-Lending Act, *15 U.S.C. § 1601 et seq*, and its implementing regulation, Regulation Z, 12 C.F.R. 226. [1] (Compl. ¶¶ 1, 2.) Plaintiffs **[*867]** **[**5]** also allege breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violations of California, Illinois, and Minnesota consumer protection laws. (*Id.*)

HELOCs, as noted, are revolving lines of credit used by consumers for significant expenditures including education, home improvements, medical bills, and debt consolidation. (*Id.* ¶ 3.) Because HELOCs are secured by the borrower's primary residence (meaning default can result in foreclosure), lenders base the amount of a HELOC, in part, on the level of equity in the home. (*Id.* ¶ 4.) The HELOC agreements entered into between Plaintiffs and Defendant [2] allow Plaintiffs to utilize a HELOC in exchange for an annual fee payable for each one-year "draw period." (*Id.* ¶ 5.) Under the terms of the agreement, Defendant is permitted to reduce or suspend the HELOC in the event that "[t]he value of the Property declines significantly below the value as determined by us at the time you applied for your" HELOC. [3] (*Id.* ¶ 6; Group **[**6]** Ex. A at 14.) *See also* *15 U.S.C. § 1647(c)(2)(B)* (Truth in Lending Act provision allowing HELOC reduction when the value of the property "is significantly less than the original appraisal value of the dwelling"); *12 C.F.R. § 226.5b(f)(3)(vi)(A)* (TILA implementing regulation, Regulation Z, explaining that a reduction is permitted when the value of the property "declines significantly below the dwelling's

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[1] As discussed below, Plaintiffs filed a consolidated complaint after their cases were transferred to this court by the United States Judicial Panel on Multidistrict Litigation.

[2] Plaintiffs did not all sign identical agreements, but the agreements are similar in relevant respects, as described herein. The agreements are attached as Group Exhibit A to Plaintiffs' Consolidated Amended Complaint. (Dkt. 41.) Several Plaintiffs signed agreements with Chase Manhattan, Bank One, and Washington Mutual, which have since been acquired by or merged with J.P. Morgan to become JPMorgan Chase. Some Plaintiffs signed their agreements with JPMorgan Chase **[**7]** itself.

[3] Each agreement contains similar language regarding when Defendant is permitted to reduce or suspend the amount of a HELOC.

appraised value"). In order to determine whether a significant decline in value warranting HELOC reduction or suspension had occurred, Defendant used "automated valuation models" ("AVMs"), which, Plaintiffs allege, unreasonably undervalued homes and lacked validation mechanisms necessary to ensure accuracy. (Compl. ¶¶ 10, 11.)

At the time it suspended or reduced a HELOC, Defendant sent the borrower a two-page form letter explaining, first, that home values throughout the nation were falling [4] and, second, that Defendant's estimate of the individual Plaintiff's particular property value "no longer supports the full amount of [the] credit line." (*Id.* ¶ 15; *see also* Group Ex. B.) In several cases, the letters were sent the day after or the day before the account's reduction or suspension; in other cases, the letters are not dated, or the dates do not appear in the copies submitted to the court. (*See* Group Ex. B at 4, 10.) In most cases, the letters did not contain any additional information, such as the estimated decrease in the value of the property, or an explanation of how that decrease was determined. (*Id.* ¶ 16.) The letters explained that in order to request reinstatement of the HELOC, the customer must order and pay for an **[*868]** appraisal to be conducted by an appraiser chosen by Defendant. (*Id.* ¶ 18.) Plaintiffs contend that these notices did not disclose Defendant's valuation of **[**8]** the property at the time of the HELOC origination, nor provide any other information that would assist the consumer in determining whether or not to appeal the action and request reinstatement. (*Id.* ¶ 19.) Plaintiffs allege, further, that those borrowers whose HELOCs were suspended nevertheless continued to be charged an annual fee and did not receive a refund of their annual fee for any portion of the draw period during which the HELOC remained suspended. (*Id.* ¶ 22.)

Individual Plaintiffs' Allegations

Although Plaintiffs' factual circumstances are not identical, all allege unwarranted reductions in their lines of credit, as follows:

- Plaintiff William Cavanagh entered into a HELOC agreement in February 2008 **[**9]** for a $400,000 line of credit secured by a mortgage on his primary residence in Edina, Minnesota. (*Id.* ¶¶ 23, 36.) At the time of origination, Cavanagh's property was valued by Chase at $950,000, and he had $650,000 in available equity (the precise method by which Chase arrived at this original valuation is not specified). (*Id.* ¶ 36.) In January 2009, Cavanagh received a letter from Defendant announcing that future draws on his HELOC would be suspended effective January 10, and that his home's value had been estimated using a "proven valuation method" at $736,290. (*Id.* ¶ 37.) Cavanagh hired an appraiser, who determined that his home value had actually *increased* to $1.1 million, and several weeks later Defendant reinstated Cavanagh's HELOC. (*Id.* ¶¶ 38, 39.) The suspension caused Cavanagh to lose access to the HELOC, his primary line of credit, for several months, and increased his credit utilization rate, potentially damaging his credit score and increasing his credit costs. (*Id.* ¶¶ 40, 41.)

- Robert M. and Maria I. Frank entered into a HELOC agreement with Washington Mutual in April 2003 for a $100,000 line of credit secured by their home in Auburn, California. (*Id.* ¶ 24, 42.) The home **[**10]** was valued at $389,000 at the time of origination, and by April 2009, the Franks had paid down their mortgage from $177,000 to $122,000. (*Id.*) On April 16, 2009, Defendant reduced the Franks' HELOC from $100,000 to $13,100 based on an estimated decrease in their property value. (*Id.* ¶ 43.) Defendant estimated the value of the home at $345,600, which, coupled with the mortgage payments made to that date, Plaintiffs assert, actually reflected an increase in the available equity in the property from $112,000 to $123,600. (*Id.* ¶ 47.)

- Shannon Hackett entered into a HELOC agreement with Chase in May 2004 for a $100,000 line of credit secured by Hackett's home in Evanston, Illinois, which was valued at $445,000 by Defendant's "automated

[4] Washington Mutual's letter explained that "[w]ith home values continuing to fall in many parts of the country, a recent review of your account identified a decline in the value of the property securing your HELOC since the date you applied for your HELOC or increase." (Group Ex. B at 10.) Chase's letter similarly explained that, "[w]ith home values falling in many parts of the country, we've used a proven valuation method to estimate your home's value . . . ." (Group Ex. B at 8.)

valuation model." (*Id.* ¶ 50.) Hackett's $283,125 balance on her first mortgage left unencumbered equity, after accounting for the HELOC, of $61,857. (*Id.* ¶ 51.) Defendant reduced Hackett's HELOC from $100,000 to $57,000 in December 2008 after determining her home value had declined to $400,000; Hackett alleges she did not learn about this HELOC reduction until February 2010, when she began inquiring into a later HELOC suspension. (*Id.* ¶ 52.) Specifically, **[**11]** on November 5, 2009, Hackett received a letter from Defendant announcing that the HELOC had been suspended because the property value **[*869]** had declined to $358,000. (*Id.* ¶ 53.) Hackett paid for an appraisal of the property, which took place on November 9, 2009, and resulted in a valuation of $400,000. (*Id.* ¶ 55.) She requested reinstatement of the HELOC on December 9, 2009. (*Id.*) Defendant refused to reinstate the HELOC, contending that the value of Hackett's home was insufficient to support any line of credit. (*Id.* ¶¶ 56, 57.) Plaintiffs acknowledge that the amount of available equity in Hackett's home in 2009 had decreased to $41,540, but they allege that this decrease was just 32.8 percent from that available at the time of the HELOC origination, which they argue is not a "significant decline" for purposes of Section I and III, TILA, and Regulation Z. (*Id.* ¶¶ 60-62.)

• Michael Malcolm entered into a HELOC agreement in March 2006 for a $122,000 line of credit secured by his $1 million Mountain View, California home. (*Id.* ¶¶ 26, 65.) Defendant suspended Malcolm's HELOC on August 7, 2009, based on a "proven valuation method" that put the home's value at $826,000 (no other details of this **[**12]** valuation were provided). (*Id.* ¶ 66.) Malcolm paid for an appraisal (the date on which it was conducted is not specified), which showed that his property value had actually increased to $1.07 million. (*Id.* ¶¶ 68, 69.) Defendant reinstated Malcolm's line of credit after he filed his original lawsuit. (*Id.* ¶ 69.)

• Daryl Mayes entered into a HELOC agreement with Washington Mutual in November 2006 for a $17,000 line of credit secured by his $172,000 home in Arlington, Texas. (*Id.* ¶ 71.) The amount of available equity in Mayes's home at the time of origination was $34,690. (*Id.* ¶ 72.) Defendant suspended Mayes's HELOC on March 26, 2009. Although it did not specify the property's current valuation or the reduction in value, Defendant explained that "a recent review of your account identified a decline in the value of the property securing your HELOC." (*Id.* ¶ 73; Group Ex. B at 10.) After numerous phone calls to Defendant, on June 20, 2009, Mayes secured a valuation report from Defendant, in which Defendant valued his property at $151,000. (Compl. ¶ 76.) An appraisal conducted ten days prior to his receipt of notice of the suspension, obtained in connection with a refinancing of Mayes's primary **[**13]** mortgage (also held by Defendant), determined the home's value to be $165,000. (*Id.* ¶ 77.) Defendant nevertheless refused to reinstate Mayes's HELOC, invoking a new policy that required a loan-to-value ratio of 70 percent; Plaintiff Mayes contends the required ratio was 80 percent at the time of origination. (*Id.* ¶ 78.) Because Mayes had paid off a portion of his mortgage after the HELOC origination, the available equity in his property had decreased by just 2.2 percent between the HELOC origination and suspension, and, even without considering the additional equity, had decreased by only 20 percent. (*Id.* ¶¶ 82, 84.)

• Michael Walsh entered into a HELOC agreement with Washington Mutual in August 2003 for a $100,000 line of credit secured by his $490,000 home in Garden Grove, California. (*Id.* ¶ 87.) Defendant reduced the HELOC from $100,000 to $16,300 effective April 16, 2009. (*Id.* ¶ 88.) Defendant told Walsh during a May 15, 2009, phone call that it had valued his home at $502,589 at origination, and its value had since fallen to $466,300. (*Id.* ¶ 91.) Plaintiff alleges that "[d]espite the fact Chase's own AVM purportedly showed the property to be worth $466,300, during **[*870]** that same telephone **[**14]** call the customer service representative notified Walsh, inexplicably, that he would need an appraisal value of $412,353 to reinstate his HELOC?that is, Chase informed Walsh that its own AVM had valued his property at $54,000 *more* than would be needed to keep his HELOC open." (*Id.*)

• Robert Wilder entered into a HELOC agreement, similar to those entered into by other Plaintiffs, with Bank One in July 2003 for a $250,000 line of credit secured by Wilder's $900,000 Scottsdale, Arizona home. (*Id.* ¶ 94.) Defendant suspended Wilder's HELOC effective April 17, 2009, based on a valuation of $811,800. (*Id.* ¶ 95.) Wilder obtained an appraisal, which he forwarded to Defendant in June 2009, that showed his property value had increased to $970,000. (*Id.* ¶ 101.) Defendant reinstated his HELOC after he filed this lawsuit (the precise date is not specified). (*Id.*)

Plaintiffs sought centralization of their various cases pursuant to *28 U.S.C. § 1407(a)*, which allows for "coordinated or consolidated pretrial proceedings . . . when civil actions involving one or more common questions of fact are pending in different districts." The United States Judicial Panel on Multidistrict Litigation granted Plaintiffs' **[**15]** request on June 7, 2010. *In re: JPMorgan Chase Bank Home Equity Line of Credit Litigation, 716 F. Supp. 2d 1363 (U.S. Jud. Pan. Mult. Lit. 2010)*. The panel noted that the common factual allegations included that Defendant "improperly suspended or reduced plaintiffs' respective home equity line of credit accounts and, relatedly, used inappropriate automated valuation models in assessing the value of the underlying properties." *Id.*

DISCUSSION

HN1[] Defendant has moved to dismiss the complaint for failure to state a claim for relief. *FED. R. CIV. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. In evaluating a motion to dismiss, the court accepts Plaintiffs' well-pleaded factual allegations as true, and draws reasonable inferences in Plaintiffs' favor. *Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008)*.

I. Violations of TILA and Regulation Z

HN2[] Congress enacted the Truth in Lending Act to enhance "economic stabilization" and competition in the consumer credit industry through the "informed use of credit." **[**16]** *15 U.S.C. § 1601*. TILA's stated purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare . . . the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing. . . ." *Id.* As relevant to this case, the Act also regulates HELOCs, permitting lenders to alter them only under certain circumstances.

Plaintiffs allege that Defendant violated TILA and its implementing regulation, Regulation Z, in four different respects: (1) suspending and reducing HELOCs in the absence of a significant decline in the value of the property securing the HELOC, and failing to reinstate such HELOCs when appropriate (Compl. ¶¶ 113-15); (2) using inaccurate and unreliable methods to value Plaintiffs' homes (*Id.* ¶¶ 116-20); (3) failing to consider the amount of available equity in Plaintiffs' homes before concluding their home values **[*871]** had declined significantly for TILA and Regulation Z purposes (*Id.* ¶ 121); and (4) using unlawful triggering events in deciding to suspend or reduce HELOCs. (*Id.* ¶¶ 122-26.) The court examines each in turn.

A. Reduction or Suspension of HELOCs Absent [**17] Significant Decline

Plaintiffs' central claim is that their HELOCs were reduced or suspended in the absence of a significant decline in the value of their properties, a practice prohibited by TILA and Regulation Z. ***HN3***[] TILA explains that a HELOC may be reduced "during any period in which the value of the consumer's principal dwelling which secures any outstanding balance is significantly less than the original appraisal value of the dwelling." *15 U.S.C. § 1647(c)(2)(B)*. Regulation Z similarly allows HELOC reduction or suspension if "[t]he value of the dwelling that secures the [HELOC] declines significantly below the dwelling's appraised value . . . ." *12 C.F.R. § 226.5b(f)(3)(vi)(A)*.

The Federal Reserve Board's Official Commentary to Regulation Z explains that "what constitutes a significant decline . . . will vary according to individual circumstances." 12 C.F.R. Pt. 226, Supp. 1, 5b(f)(3)(vi)-6 ("Official Commentary" or "Commentary"). The Commentary goes on to explain, however, that "if the value of the dwelling declines such that the initial difference between the credit limit and the available equity (based on the property's appraised value for purposes of the plan) is reduced by fifty **[**18]** percent, this constitutes a significant decline." *Id.* Thus, for example, if a $100,000 home, with a $50,000 first mortgage, secures a HELOC of $30,000, then the difference between the credit limit and available equity is $20,000. If the value of that home decreases by $10,000, the difference between the credit limit and the available equity would decrease by $10,000 as well, from $20,000 to $10,000—a 50 percent reduction, and a "significant decline" for purposes of the statute. *Id.* The statute and regulation do not explain what steps must be taken prior to suspension. The Act states only that "a creditor [need not] obtain an appraisal before suspending credit privileges . . . [but that] a significant decline must occur before suspension can occur." *Id.*

Defendant argues that Plaintiffs have not sufficiently alleged that their HELOCs were reduced or suspended in the absence of a significant decline in value, and that their allegations amount to no more than the type of "threadbare recitals" that *Iqbal* determined were insufficient to survive a motion to dismiss. (Def.'s Br. at 14-15 (quoting *Iqbal, 129 S.Ct. at 1940*).) According to Defendant, its valuations did, in fact, demonstrate declines **[**19]** in value of between 7 and 23 percent, which, it contends, are significant for purposes of the statute. (Def.'s Br. at 15.) Further, Defendant urges that "[w]hile some Plaintiffs . . . allege that they subsequently obtained appraisals showing their properties' values had recovered to support reinstatement," those circumstances are insufficient to establish a TILA violation. (*Id.*) In Defendant's view, "[i]f a borrower could allege a TILA violation any time he subsequently obtained an appraisal warranting reinstatement, this would gut the TILA and Regulation Z provisions permitting the lender to suspend the line." (*Id.* at 15-16.)

The court does not share Defendant's understanding of Plaintiffs' allegations. Plaintiffs have specifically alleged that Defendant suspended or reduced HELOCs based on property-value estimates that were rebutted within close temporal proximity to the valuations Defendant provided. Such a pattern supports an inference that Defendant's valuations are not reliable indicators, or that Plaintiffs' property values did not actually decline to the extent **[*872]** Defendant claimed. The court disagrees, further, with Defendant's assertion that allowing such a claim to survive would **[**20]** "gut" the applicable laws—if such a claim could not be supported with a subsequent or contemporaneous appraisal, it is difficult to see how it could ever be supported.

Notably, numerous courts have declined to dismiss similar complaints where plaintiff offered nothing more than unadorned allegations that a "significant decline" did not occur prior to suspension or reduction of the HELOC. *In re Citibank HELOC Litig., No. C-09-0350 MMC, 2010 U.S. Dist. LEXIS 95938, 2010 WL 3447724, at *3 (N.D. Cal. Aug. 30, 2010)* (denying motion to dismiss where plaintiff pleaded that there had not been a significant decline, without any additional specifics); *Malcolm v. JPMorgan Chase Bank, N.A., No. 09-4496-JF (PVT), 2010 U.S. Dist. LEXIS 23770, 2010 WL 934252, at *3 (N.D. Cal. March 15, 2010)* (denying motion to dismiss where appraisal conducted during the same month as the HELOC reduction revealed an increase in the value of the home); *Hickman v. Wells Fargo Bank N.A., 683 F. Supp. 2d 779, 785-86 (N.D. Ill. 2010)* (St. Eve, J.) (denying motion to dismiss though plaintiff "did not specifically allege any factual support for his allegation that the value of his home did not decline significantly").

Plaintiffs have adequately alleged that their HELOCs were suspended **[**21]** or reduced in the absence of a significant decline in the value of the property securing the HELOC.

B. Consideration of Available Equity

Plaintiffs also allege that Defendant violated TILA and Regulation Z by failing to consider the present available equity [5] in the property securing the HELOC before suspension or reduction. Defendant contends that TILA does not require such consideration. (Def.'s Br. at 7.)

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[5] For purposes of this opinion, the court uses the term "present available equity" to refer to the amount of unencumbered equity in the subject property at the time of the HELOC reduction or suspension. "Available equity" refers to the amount of unencumbered equity at the time of HELOC origination. The difference between these two figures represents the payments that have been made in the interim on the subject property's principal, minus the reduction in value that has occurred (as well as any additional liabilities to which the property has become subject, which does not appear to be a factor in this case).

As discussed previously, TILA and Regulation Z do not explicitly discuss the issue of present available equity. The Official Commentary does discuss available equity in setting **[**22]** out its "safe harbor" provision. [6] The Commentary, however, illustrates that provision without reference to the amount of present available equity. Instead it references the amount of available equity at the HELOC's inception. **[*873]** Defendant also notes that the Commentary explains that the safe harbor requires lenders to consider whether the equity has been reduced to fifty percent of that "*initial* difference" between the available equity and the credit limit. 12 C.F.R. Pt. 226, Supp. 1, 5b(f)(3)(vi)-6 (emphasis added). This suggests, Defendant urges, that the borrower's equity as of the time of a HELOC suspension is not a factor. That view is bolstered, according to Defendant, by a proposed rule that "clarifies that in determining whether a decline results in a 50 percent equity cushion reduction, the creditor may, but does not have to, consider any changes in available equity based on the status of the first mortgage." *Truth in Lending: Proposed Rules, 74 Fed. Reg. 43,428, 43,491 (Aug. 26, 2009)*.

At least one district court found this argument persuasive. In *Raeth v. National City Bank, 755 F. Supp. 2d 899 (W.D. Tenn. 2010)*, the court concluded that a lender need not consider the **[**24]** amount of present available equity before suspending or reducing a HELOC. *Id. at 903-04*. That court noted that TILA and Regulation Z do not contain any reference to the "present equity level" (or "present available equity," as this court defines it). The "sole operative variable" the Commentary references, the court noted, is the value of the home. *Id. at 904*. The court observed, further, that while "[t]he level of equity at origination is essential to the safe harbor because it sets the baseline by which the decline will be judged," the example offered in the Commentary makes "no reference to the present level of equity—it could be unchanged or it could be irrelevant." *Id. at 903*. Finding the reference to "available equity" ambiguous, the court declined to read into the statute a requirement that the lender consider present available equity. The court also rejected policy arguments in favor of such a requirement. *Id. at 904*. Specifically, plaintiff in *Raeth* had argued that reading the statute without the equity requirement would discourage borrowers from paying off their mortgages, and that because the purpose of the statute is to "prevent unfair lending practices" it should be read **[**25]** in favor of consumers. *Id.* The court determined that requiring consideration of present equity could have the opposite effect: "[M]aking it more difficult for creditors to protect themselves against perceived risk could harm consumers if loans were subsequently made available to consumers only on more onerous terms." *Id.*

Plaintiffs distinguish *Raeth* on the ground that in that case, the value of the borrower's property had dropped such that, even considering the present available equity, there was an overall decline within the safe harbor provision. (Response at 12 n.5.) In this case, by contrast, even without considering present available equity, none of the named Plaintiffs' homes fall within the 50 percent safe harbor provision. (*Id.*) Plaintiffs note, further, that they are not alleging that Defendant's refusal to take account of available equity constitutes an independent claim for relief; instead, "any allegations . . . regarding failure to consider equity . . . are alleged as being demonstrative of unfair and potentially fraudulent practices." (*Id.*)

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[6] The Official Commentary's "safe harbor" provision is considered controlling law, absolving a lender from liability for reductions that occur based on declines in value within the "safe harbor" **[**23]** parameters. *See* *Hamm v. Ameriquest Mortg. Co., 506 F.3d 525, 528 (7th Cir. 2007)* ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act [TILA] or Regulation [Z] should be dispositive.") (citation and quotation omitted).

The safe harbor provision reads, in full:

> 6. Significant decline defined. What constitutes a significant decline for purposes of *§ 226.5b(f)(3)(vi)(A)* will vary according to individual circumstances. In any event, if the value of the dwelling declines such that the initial difference between the credit limit and the available equity (based on the property's appraised value for purposes of the plan) is reduced by fifty percent, this constitutes a significant decline in the value of the dwelling for purposes of *§ 226.5b(f)(3)(vi)(A)*. . . . This provision does not require a creditor to obtain an appraisal before suspending credit privileges although a significant decline must occur before suspension can occur.

12 C.F.R., Pt. 226, Supp. 1, 5b(f)(3)(vi)-6.

In this court's view, present available equity should in fact play some role in a responsible creditor's lending decision—after all, **[**26]** the amount of a HELOC is based on the amount of equity in the home; it makes little sense to suggest that an increase in the amount of that equity will have no bearing on the HELOC. The *Raeth* court is correct that not allowing lenders to appropriately protect themselves against risk could create incentives to impose more onerous terms on consumers, but that is not an obvious result from a holding that recognizes the relevance of present available equity. In the wake of **[*874]** the economic downturn, Plaintiffs here have seen their HELOCs reduced, allegedly not for legitimate reasons like a decline in home values, but instead mostly to insulate the lender from risk. According to Plaintiffs, Defendant's arbitrary reductions, unrelated to the actual value of the home or the home's equity, contravene TILA's purposes of "economic stabilization" for consumers and informed credit usage and potentially compromise the borrower's credit score. [7] While financial institutions must be able to safeguard against risk, TILA and Regulation Z restrict their ability to do so rashly and arbitrarily—by allowing a reduction or suspension only in the event of a "significant decline"—precisely because of the effect **[**27]** such actions have on consumers.

The court need not decide whether Defendant's failure to consider equity increases itself violates TILA, as Plaintiffs' allegations survive regardless. For now, this allegation, as Plaintiffs argue, serves only to illustrate the practices it alleges violate TILA and Regulation Z.

C. Use of Inaccurate and Unreliable Valuation Methods

Plaintiffs also allege that in determining that their properties had suffered significant declines in value, Defendant relied on inaccurate, unreliable, and unreasonable valuation methods. Specifically, Plaintiffs allege that the "automated valuation models" ("AVMs") that Defendant uses are "flawed and inaccurate" and "generat[e] false positives resulting in reductions or suspensions in the absence of the required significant decline in value." (Response at 15.)

Defendant argues that this claim should **[**28]** be dismissed because the law permits a lender to use AVMs in order to estimate home values. Indeed, Regulation Z "does not require a creditor to obtain an appraisal" before suspending a HELOC. 12 C.F.R. Pt. 226, Supp. 1, 5b(f)(3)(vi)-6. Defendant also points to a proposed rule explaining that "appropriate valuation methods may include, but are not limited to" AVMs. *Truth in Lending: Proposed Rule, 74 Fed. Reg. 43,428, 43,492 (Aug. 26, 2009)*. Further, Defendant argues, Plaintiffs' suggestion that Defendant must ensure its AVMs are accurate finds no support in TILA or Regulation Z, neither of which "contains any requirements regarding validating, back-testing or verifying AVM models." (Def.'s Br. at 11.)

Plaintiffs, for their part, concede that the use of AVMs is not "*per se* improper," and that Defendant's "failure to adequately validate and back-test AVMs, while contrary to the FDIC's recommendations" also do not *per se* violate the Act. (Response at 15.) Instead, Plaintiffs argue that the use of these AVMs "contributes to, and results in, Chase's unlawful suspensions of HELOCs in the absence of significant declines in home values." (*Id.* at 16.)

The court's ruling on this motion does not **[**29]** turn on the propriety of Defendant's use of AVMs. The ultimate question is whether Defendant reduced or suspended HELOCs in the absence of a significant decline in property values, in violation of TILA and Regulation Z. *15 U.S.C. § 1647(c)(2)(B)*; *12 C.F.R. § 226.5b(f)(3)(vi)(A)*. To the extent Defendant's use of AVMs contributed to improper reductions or suspensions of HELOCs, it is relevant, but Plaintiffs do not contend that the use of AVMs in and of itself violated TILA or Regulation Z. The court **[*875]**

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[7] *See, e.g., FDIC Outlook: The U.S. Consumer Sector*, online at http://www.fdic.gov/bank/analytical/regional/ro20044q/na/2004winter_03.html ("HELOC borrowers who increase their draws may not be aware that the higher their use of this revolving line of credit, the more it negatively affects their credit score.") (visited June 28, 2011).

concludes that the fact that TILA and Regulation Z permit the use of AVMs also does not require dismissal of this claim. [8]

D. Use of Unlawful Triggering Events

Defendant contends that Plaintiffs' challenge to the use of "triggering events" in deciding to suspend or revoke HELOCs must be rejected "because it purports to impose TILA prohibitions beyond those contained in TILA or Regulation Z." (Def.'s Br. at 11-12.) The focus of this argument is on Plaintiffs' allegation that Defendant suspended or revoked HELOCs based on a 5 percent decline in property value. (Compl. ¶ 123.) Plaintiffs Walsh, Wilder, and Frank allege specifically that Defendant's customer service representative told them (in conversations not further detailed in the complaint) "that [Defendant] was entitled to suspend or reduce their respective HELOCs because their home values had decreased by 5%." (*Id.*) In effect, Plaintiffs allege, Defendant violates the law by creating its own metrics for reduction or suspension decisions that are independent of the exhaustive list set forth in TILA and Regulation Z. [9] Indeed, the Commentary **[**31]** does explain that "a contract cannot contain a provision allowing the creditor to freeze a line due to an insignificant decline in property value since the regulation allows that response only for a significant decline." 12 C.F.R. Pt. 226, Supp. 1, 5b(f)(3)(i)-2.

Defendant insists that TILA and Regulation Z do not provide threshold values for determining whether a "significant decline" has occurred, and therefore "a lender is free to consider the individual circumstances surrounding the decline." (Def.'s Br. at 12-13.) Because Plaintiffs have not alleged "that, in their particular circumstances, a 5 [percent] decline was not a 'significant decline' in value," Defendant argues, their claim must be dismissed. (*Id.*) Plaintiffs respond that they have alleged that the declines upon which Defendant based its reduction or suspension decisions were not significant. Those allegations are sufficient, Plaintiffs urge; forcing Plaintiffs to "identify a specific value that would constitute a significant decline **[**32]** under TILA . . . is inappropriate at the pleadings stage." (Response at 17.) The court agrees. Plaintiffs have adequately alleged that their HELOCs were reduced or suspended in the absence of a significant decline. The allegation regarding the purported 5 percent standard is merely an example of an allegedly impermissible reason given by Defendant for suspending or reducing a HELOC.

Defendant also argues that Plaintiffs lack standing to challenge its suspension or revocation of HELOCs based on this theory because "each Plaintiff alleges [Defendant] suspended or reduced their HELOCs based on a decline [in] property value in excess of 5 [percent]." (Def.'s Br. **[*876]** at 13.) Plaintiffs are correct, however, that "[Defendant] can make such assertions only if [Defendant] completely ignores Plaintiffs' allegations regarding the actual values of their respective homes." (Response at 17.) Plaintiffs acknowledge that Defendant *claimed* to have taken action in response to declines in value that exceeded 5 percent, but Plaintiffs also contend that any actual decline was not in fact "significant"—in other words, the allegation is that Defendant's claims as to the amount of the decline were incorrect, **[**33]** and that action was taken in response to what were actually insignificant declines. The court declines to strike Plaintiffs' allegations regarding Defendant's reliance on a "triggering event" other than a significant decline in value.

E. Lack of a Sound Factual Basis

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[8] Defendant has submitted supplemental authority in support of its argument that Plaintiffs' allegations do not state a claim for violations of TILA or Regulation Z, and, in particular, that the use of AVMs does not run afoul of those laws. In the cited case, however, the plaintiff had not made "a single allegation anywhere . . . that purports to correct the alleged mistaken property value reached by Wells Fargo". *Brigliadora v. Wells Fargo Bank, N.A., No. 8:10-CV-01944-EAK-TGW, 2011 U.S. Dist. LEXIS 60620, 2011 WL 2217485, at *4 (M.D. Fla. June 7, 2011)*. In other words, the *Brigliadora* plaintiff **[**30]** did not rebut the valuation that was a product of Wells Fargo's use of AVMs. Plaintiffs here, by contrast, have specifically alleged that their property values had not suffered declines that can be deemed significant.

[9] Again, the court notes, Plaintiffs have not presented these circumstances as an independent violation, but because Defendant argues as though they have, the court addresses the argument here.

Defendant next argues that Plaintiffs' allegation it reduced or suspended HELOCs without a "sound factual basis" for doing so is improper because TILA and Regulation Z do not impose such a requirement. (Def.'s Br. at 14.) Again, however, Plaintiffs have not alleged that a suspension or reduction without a "sound factual basis" is an independent harm, but rather urge that it is "demonstrative of unfair and potentially fraudulent practices." (Response at 12 n.5.) Defendant's objection to this allegation is overruled.

F. Failure To Allege HELOCs Were Obtained For Personal, Family, or Household Purposes

Finally, Defendant argues that Plaintiffs fail to adequately allege that their HELOCs were used primarily for personal, family, or household purposes. (Def.'s Br. at 16.) Both parties agree that ***HN4***[] to come within the meaning of "consumer" for the purposes of asserting a TILA claim (the relevant portion applies only to consumer transactions), **[**34]** the transactions at issue must be "primarily for personal, family, or household purposes." *15 U.S.C. § 1602(h)*.

In their Complaint, each Plaintiff does allege that his or her HELOC was obtained "primarily for personal, family and/or household purposes, including household items and personal expenses." (Compl. ¶ 28.) These allegations are repeated with slight variation as to each Plaintiff. (*Id.* ¶¶ 23-29.) Defendant alleges that these are "[c]onclusory allegations that simply restate statutory language." (Def.'s Br. at 17.) Defendant cites to two cases as support for its contention that an allegation of this type is insufficient. In the first, a motion to dismiss was granted in part because plaintiff alleged only that the HELOC was for "basic expenses." *Hamilton v. Wells Fargo Bank, N.A., No. 09-04152 CW, 2010 U.S. Dist. LEXIS 43074, 2010 WL 1460253, at *2 (N.D. Cal. April 12, 2010)*. In the second, *Schulken v. Washington Mutual, No. C 09-02708 JW, 2010 U.S. Dist. LEXIS 143387, at *10 (N.D. Cal. March 3, 2010)*, plaintiff alleged that the "purposes of the loan included home renovations" but not that such purposes were the primary reason for the HELOC. *Id.*

In the Complaint before this court, Plaintiffs do specifically allege that the HELOC **[**35]** was used "primarily" for consumer purposes. Though conclusory, these allegations are not implausible within the meaning of *Iqbal* or *Twombly* such that a more detailed factual showing must be made at the pleadings stage. Defendant offers nothing to suggest these funds were used for non-consumer purposes, and offers the court no reason to question Plaintiffs' assertions. If Plaintiffs were required to provide detailed records concerning the nature of their HELOC expenditures at this stage, the already-lengthy Complaint would become unwieldy. The court declines to dismiss Plaintiffs' Complaint based on the lack of detail concerning HELOC expenditures.

[*877] II. Declaratory Relief

Defendant argues that Plaintiffs' declaratory judgment claim (Count II) should be dismissed because TILA's statutory scheme provides a complete remedy, and a declaratory judgment would serve no useful purpose. (Def.'s Br. at 18.)

HN5[] The Declaratory Judgment Act provides that "[i]n **[**36]** a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201*. The decision to entertain a declaratory judgment action lies within the discretion of the district court, and is not precluded by the availability of another form of relief. *FED. R. CIV. P. 57*; *Wilton v. Seven Falls Co., 515 U.S. 277, 282, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)*; *City of Highland Park v. Train, 519 F.2d 681, 693 (7th Cir. 1975)*.

Plaintiffs argue that "it is unknown at this time whether TILA damages will sufficiently compensate the Class." (Response at 20-21.) Further, Plaintiffs argue, as Defendant "does not consider itself required to use accurate AVMs or to otherwise act with a sound factual basis when suspending accounts . . . a declaration affirming that Chase's conduct violates TILA may prove more beneficial to the Class members than any fractional share of a statutory damages award." (*Id.* at 21.) Because TILA's statutory remedies may indeed prove insufficient, the court declines to strike Plaintiffs' request for declaratory relief. **[**37]** *Cf. Hickman v. Wells Fargo Bank, N.A., No. 09 C*

5090, 2010 U.S. Dist. LEXIS 108342, 2010 WL 3833669, at *4 (N.D. Ill. May 11, 2010) (declining to strike declaratory relief claim pleaded in the alternative).

III. Breach of Contract

Plaintiffs allege that Defendant breached its contracts in several ways, most significantly that it reduced or suspended HELOCs when no significant decline in property value justifying such action had occurred, and that it did so through the use of faulty AVMs, unlawful triggering events, and lack of consideration of available equity. (Compl. ¶¶ 135-40.) Plaintiffs also allege that Defendant's annual fees and other fees also constituted contractual breaches. (*Id.* ¶¶ 141-42.)

Defendant challenges Plaintiffs' breach of contract claims on a variety of grounds, urging, first, that Plaintiffs have not identified any express contractual provision that has been breached. (Def.'s Br. at 19.) Defendant argues, further, that neither the allegations of improper suspensions or reductions of HELOCs, nor the alleged improper collection of fees, states a breach of contract. (*Id.*) [10]

A. Absence of an Express Contractual Provision

Defendant's initial contract defense is another version of one the court has already addressed. Specifically, Defendant urges that Plaintiffs have not identified a specific contract provision that has been breached. (Def.'s Br. at 19), but Plaintiffs respond by pointing to the portion **[*878]** of the HELOC agreement that allows Defendant to reduce a credit limit if "the value of your property declines significantly below the property's appraised value . . . [including], for example, a decline **[**39]** such that the initial difference between the Credit Limit and the available equity is reduced by fifty percent and may include a smaller decline depending on the individual circumstances." (Response at 22; Compl. ¶ 135; Group Ex. A at 6, 14, 22, 29, 36, 47, 53.) Defendant responds that it has not breached this provision because Plaintiffs have not adequately pleaded that their property values did not significantly decline. (Reply at 9.) For the reasons explained earlier, the court concludes that Plaintiffs have indeed so alleged. This objection is overruled.

B. Implicit Contractual Provisions

Defendant also challenges Plaintiffs' claims based on implied contractual terms. These include allegations that Defendant failed to consider available equity in a home before deciding to revoke or suspend a HELOC; used unlawful triggering events in making those decisions; and relied improperly on the use of automated valuation models. (Def.'s Br. at 19.) Citing *Edwards v. Arthur Andersen LLP, 44 Cal.4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (Cal. 2008)*, Plaintiffs contend that provisions of TILA and Regulation Z are incorporated by law into the contract, and "insofar as [Defendant's] conduct plausibly violates TILA, **[**40]** such conduct also plausibly states a claim for breach of contract." (Response at 23.) Because the court is able to resolve Defendant's objections to Plaintiffs' Complaint without determining whether the contract incorporates TILA and Regulation Z, the court need not decide the issue. In any event, should Plaintiffs prevail on their claims that Defendant has violated TILA, a claim that the conduct also constitutes a breach of contract would not obviously yield any additional relief.

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[10] The court notes that Plaintiffs' contract claims are governed by the laws of different states. "[T]he choice-of-law rule **[**38]** for pendent state claims should be that of the forum [state]." *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc., 805 F.2d 663, 681 (7th Cir. 1986)*. In Illinois, "the law applicable to a contract is that which the parties intended . . . [w]hen that intent is expressed." *Hofeld v. Nationwide Life Ins. Co., 59 Ill.2d 522, 529, 322 N.E.2d 454, 458 (1975)*. The HELOC agreements require the use of Minnesota law (Cavanagh, Group Ex. A at 5), California law (Frank, Group Ex. A at 6; Malcolm, Group Ex. A at 5; Walsh, Group Ex. A at 6), Delaware law (Hackett, Group Ex. A at 7), Texas law (Mayes, Group Ex. A at 5), and Arizona law (Wilder, Group Ex. A at 5).

i. Available Equity

Defendant contends that no contractual provision requires that it take into consideration available equity before suspension or reduction of a HELOC. The court agrees. Plaintiffs point to a provision in their HELOC agreements explaining that Defendant may reduce or suspend a HELOC when

> [t]he value of the Property declines significantly below the value as determined by us at the time you applied for your Credit Line Account. This includes, for example, a decline such that the difference between the Credit Line and the available equity is reduced by fifty percent . . . and may include a smaller decline depending on individual circumstances.

(Group Ex. A at 14.). As the court reads this provision, **[**41]** it does not require Defendant to consider available equity in deciding whether to suspend or revoke a HELOC. The mention of "available equity" refers to a situation in which action *might* be taken. The preceding sentence explains when Defendant is permitted to take action, and refers only to the value of the property, not to available equity. Further, the term "available equity" could be understood either to mean the available equity at the time of origination, or the present available equity at the time of suspension or reduction. The former interpretation accords more closely with the court's earlier reading of Regulation Z and the Commentary. *See infra* I.A. The court concludes that no express contractual provision requires Defendant's consideration of available equity at the time of any revocation or suspension.

To the extent Plaintiffs contend consideration of available equity is implied in the contract, the court is unpersuaded. As **[*879]** discussed earlier, TILA and Regulation Z do not appear to dictate that present available equity be considered, and any suggestion that TILA and Regulation Z are incorporated therefore would not require Defendant to consider present available equity as **[**42]** a contractual matter.

The court notes that, while Plaintiffs devote a section of their brief to arguing that Defendant's failure to consider available equity is an independent contract violation, they appear to withdraw that argument in a footnote that acknowledges, "any allegations in the instant Complaint regarding failure to consider equity . . . are alleged as being demonstrative of unfair and potentially fraudulent practices." (Response at 12 n.5.) The court concludes that it must dismiss any breach of contract claim premised solely on failure to consider present available equity in making a reduction or suspension decision.

ii. Triggering Events

Defendant next argues that Plaintiffs' allegation that Defendant relied on "unlawful triggering events" in suspending or revoking HELOCs constitutes an "impermissibl[e] attempt to bootstrap nonexistent TILA statutory violations into a breach of contract claim." (Reply at 11.) Plaintiffs argue that because "the HELOC contracts provide an exhaustive list of grounds upon which [Defendant] can base a HELOC suspension or reduction . . . [Defendant's] reliance on different grounds—*i.e.*, insignificant property value declines—would **[**43]** breach the contract." (Response at 24.) Thus, Plaintiffs assert, Defendant breached the parties' contract by reducing or suspending Plaintiffs' HELOCs on the basis of insignificant declines in property values. (*Id.*) The court agrees with Plaintiffs that a reduction or suspension in the absence of a significant property value decline constitutes a breach of contract—but that is the same claim alleged previously. Plaintiffs previously identified the express contractual provision breached and explained in what way it was breached. *See supra* III.A. To the extent Plaintiffs are attempting to assert an additional breach of contract claim here, it is stricken as duplicative.

iii. Use of AVMs

Defendant asks the court to dismiss Plaintiffs' claim to the extent it is premised on the use of AVMs because no contractual provision or law prohibits their use. The court agrees that Defendant's use of AVMs, does not by itself, constitute breach of contract. Thus, though Plaintiffs mention Defendant's "reliance on flawed AVMs" in passing (*see, e.g.*, Compl. ¶¶ 10-12, 138, 150, 155, 159), they offer no contractual provision that addresses the use of

AVMs. This practice may be demonstrative or supportive **[**44]** of Plaintiffs' breach of contract claims, but is not independently actionable.

iv. Loan-To-Value Ratios

Plaintiffs contend that Defendant breached its contract with HELOC borrowers by suspending or revoking HELOCs based on changes in its own internal loan-to-value ("LTV") ratio policies. (Response at 24.) An account's failure to "meet the bank's new internal LTV ratio requirements is not one of the enumerated grounds" for which an account can be suspended or reduced, Plaintiffs note: "[N]othing in [Defendant's] contract allows it to base suspensions and reductions on unilateral changes to its internal LTV ratio requirements that are made *after* its customers sign their HELOC contracts." (*Id.*)

Defendant argues that Plaintiffs have not identified any contractual provisions that govern Defendant's use of LTV ratios. (Def.'s Br. at 20.) The HELOC agreement, however, does provide an enumerated list of circumstances under which Defendant is able to suspend or revoke a **[*880]** HELOC; [11] TILA and Regulation Z also limit the circumstances when such action may be taken to enumerated occurrences. Defendant's decision to modify its own internal loan-to-value ratios is not on either list, and Defendant does **[**45]** not point to any provision that authorizes its action. Were Defendant able to modify the HELOC terms based on any circumstance *not* enumerated in the agreement or applicable laws, the contract and laws governing HELOCs would become meaningless. Defendant allegedly told Mayes that his HELOC would be suspended because of a change in Defendant's LTV ratio, and similarly told Wilder in suspending his HELOC that his ratio was "high." (Response at 24.) Plaintiffs have stated a plausible claim that HELOCs were reduced or suspended due to Defendant's unilateral decision to change its LTV ratio, and not in response to a significant decline in home value, as the party's contracts require. Defendant's motion to dismiss this breach of contract theory is denied.

v. Annual Fee

Defendant next challenges Plaintiffs' assertion that Defendant breached the HELOC agreement by charging customers an annual fee for use of a HELOC account even after the account had been suspended. It appears that Plaintiff Hackett is the only named Plaintiff who paid a fee after suspension. Defendant argues that Hackett herself has not alleged she was *charged* a fee after suspension of the HELOC (Reply at 12); instead, she alleges only that Defendant failed to refund the annual fee after her account was suspended. (Compl. ¶ 22.) In any event, Defendant asserts, the agreement permits such a charge unless the account has been terminated and the loan balance paid off. (Def.'s **[**47]** Br. at 21.) Thus, the HELOC agreement Hackett entered into explains that "[u]nless you terminate your Credit Account and pay the outstanding balance, the Annual Participation Fee will be charged to your Credit Account annually. . . . " (Group Ex. A at 22.)

The *Hickman* court examined a similar claim. Plaintiff there alleged that Wells Fargo breached its contract by charging a $75 annual fee after reducing his HELOC. *683 F. Supp. 2d at 792*. The court noted that HELOC contract terms require the borrower "to be responsible for full payment of the balance of [the] Account as well as all other account obligations, according to the terms of this Agreement." *Id.* Another portion of the agreement explained that each year the HELOC was open, "a $75 non-refundable Annual Fee will be charged to [plaintiff's] account." *Id.* The contract also provided for situations in which the credit limit could be reduced. *Id.* The court concluded that because

[11] The Washington Mutual agreement entered into by Plaintiff Frank provides an illustrative list. It explains that a HELOC may be reduced or suspended if: the property value declines significantly; the bank believes the borrower cannot meet his or her obligations; the borrower defaults on his or her obligations; the government prohibits charging the APR specified in the agreement; government action affects the priority of the bank's security **[**46]** interest in the property; the government informs the bank "that continued advances may constitute an unsafe and unsound business practice"; or the maximum APR has been reached. (Group Ex. A at 14.) Defendant explains the reductions or suspensions at issue in this case solely by reference to the provision permitting such action where there has been a significant decline in property value; it does not contend that the reductions or suspensions are justified by reference to any other enumerated provision.

the contract contained no provision excusing payment of the annual fee in the event of a HELOC reduction, and because the contract expressly held plaintiff responsible for all account obligations and fees in the event of a reduction, plaintiff had not pleaded **[**48]** any breach of contract **[*881]** claim with respect to the annual fee. *Id.* Plaintiffs attempt to distinguish *Hickman* because it involved an account reduction, rather than suspension, but the terms of Hackett's HELOC contract do not support such a distinction. [12]

Plaintiffs have failed to state a claim for breach of contract in connection with Defendant's charging an annual fee.

IV. Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant argues that Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing should be dismissed because they fail to identify a contract term that creates an implied duty, or, alternatively, their claims do not actually state a breach of the implied duty. Whether Plaintiffs **[**49]** can pursue claims for a breach of the implied covenant of good faith and fair dealing turns on state law and requires the court to address the state law relevant to each named Plaintiff's claims. The court notes that Plaintiffs have acknowledged that Texas law does not support a contractual cause of action for breach of the implied covenant of good faith and fair dealing, and have withdrawn Plaintiff Mayes's claim based on Texas law. (Response at 28 n. 13.)

A. California

Claims for the implied covenant of good faith and fair dealing by Plaintiffs Frank, Malcolm and Walsh are governed by California law. [13] (Frank, Group Ex. A at 6; Malcolm, Group Ex. A at 5; Walsh, Group Ex. A at 6). ***HN6***[] California law recognizes a cause of action for the implied covenant of good faith and fair dealing. Thus, in *Brehm v. 21st Century Ins. Co., 166 Cal. App. 4th 1225, 1236, 83 Cal. Rptr. 3d 410, 417 (Cal. App. 2008)*, the court observed that "breach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing." Defendant attempts to limit the reach of that holding by noting that in another portion of its opinion, the court **[**50]** explains that "the principle that no breach of the covenant of good faith and fair dealing can occur if there is no coverage or potential for coverage under the [insurance] policy is quite different from the argument that no breach of the implied covenant can occur if there is no breach of an express contractual provision." *Id. at 1236, 83 Cal. Rptr. 3d at 417*. But this citation only supports Plaintiffs' argument—it confirms that a breach of the implied covenant can occur even in the absence of a violation of an express contractual provision, so long as the contract is in force. *Brehm* goes on at some length to explain that in that case, dealing with an insurance contract, ***HN7***[] "an insurer's obligations extend beyond simply paying the benefits to which its insured is entitled." *Id.* Tactics that delay, frustrate, or oppress the insured can support a claim for relief even if the insured eventually receives the **[*882]** payment due under the policy. *Id.* *Guz v. Bechtel Nat. Inc., 24 Cal.4th 317, 327, 100 Cal. Rptr. 2d 352, 8 P.3d 1089, 1095 (2000)*, cited by Defendant, is to the same effect; it explains that the implied covenant cannot substantively alter the terms of a contract, but the covenant does require "mutual fairness **[**51]** in applying a contract's actual terms . . . ."

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[12] Hackett's agreement explains that

> You agree to pay us a non-refundable Annual Participation Fee of $25.00 during the Draw Period and any extension of the Draw Period. Unless you terminate your Credit Account and pay the outstanding balance, the Annual Participation Fee will be charged to your Credit Account annually during the Draw Period in the Monthly Statement Period ending on your anniversary month which we assign to your Credit Account.

(Group Ex. A at 22.)

[13] Plaintiffs do not discuss what state law they believe applies to each Plaintiff's implied covenant claim, but as their claims are based on contractual performance, this court applies the same choice-of-law provisions to these claims. *See* *Amakua Development LLC v. Warner, 411 F. Supp. 2d 941, 948 (7th Cir. 2006)*.

This court concludes that California law therefore allows claims for the breach of the implied covenant of good faith and fair dealing in the execution of a contract's terms, so long as the implied covenant does not impose obligations inconsistent with the express terms of the written agreement.

At least one of the transferor courts so concluded in this case. There, in examining one Plaintiff's claims before consolidation, the district judge in Northern California determined that Plaintiff stated a claim for breach of the implied covenant of good faith and fair dealing based on Defendant's suspension of a HELOC. *Malcolm, 2010 U.S. Dist. LEXIS 23770, 2010 WL 934252, at *6*. ***HN8***[] "Allegations that Defendant claimed that the property value had declined without a sufficient factual basis, failed to provide specific information as to how it reached that conclusion, and **[**52]** then required the borrower to pay the cost of an appraisal to show otherwise are sufficient to state a claim for breach of the implied covenant of good faith and fair dealing." *Id.*

Defendant insists that allegations that it suspended or reduced HELOCs without considering present available equity, based its decisions on inaccurate and unreliable valuation methods, and charged excessive fees,\ do not state claims for the breach of any implied duty. (Def.'s Br. at 24.) At this stage, however, the court is satisfied that Plaintiffs have pleaded sufficient facts to suggest Defendant arbitrarily suspended their agreements based on valuations inconsistent with the actual declines in value experienced by the properties at issue. Plaintiffs have alleged that the appraisals they obtained after being notified of a suspension or reduction of their HELOCs diverge significantly from the valuations relied upon by Defendant in making the decision to revoke or suspend their HELOCs. [14] Plaintiffs assert, further, that they received delayed notifications from Defendant, did not receive notifications at all, received conflicting and inaccurate information, were charged excessive fees in connection with **[**53]** their HELOC suspensions and revocations, or had their attempts to secure reinstatement of their HELOCs frustrated. The court concludes these allegations are sufficient to state a claim that Defendant violated the covenant of good faith and fair dealing in connection with the HELOCs.

B. Delaware

Plaintiff Hackett's claim is governed by Delaware law. (Hackett, Group Ex. A at 7.) ***HN9***[] In Delaware, "[t]he implied covenant of good faith and fair dealing inheres in every contract and requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 888 (Del. Ch. 2009)* (citation and quotation omitted) (cited by Defendant). As in California, "[t]he implied covenant cannot be invoked to override the express terms of the contract." *Id.* To state a claim, plaintiff must identify "a specific **[**54]** implied contractual **[*883]** obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract." *Id.* (citation and quotation omitted). A general allegation that defendant acted in bad faith is insufficient. *Id.*

The court concludes that Plaintiff Hackett has also adequately pleaded a claim for breach of the implied covenant. Plaintiff Hackett makes the same general allegations as do the other Plaintiffs, that the contract's terms were carried out improperly, but also alleges that she was charged a $30 fee to have a document faxed to her that Defendant was already obligated to provide. (Compl. ¶ 152.) This allegation is also sufficient to state a claim for breach of the implied covenant based on oppressive execution of the contract's terms.

C. Minnesota

Plaintiff Cavanagh's claim is governed by Minnesota law. (Cavanagh, Group Ex. A at 5.) ***HN10***[] Minnesota's implied covenant of good faith and fair dealing "requir[es] that one party not 'unjustifiably hinder' the other party's performance of [a] contract" and that a party not "take advantage of the failure of a condition precedent when the

[14] Plaintiffs do not break out their allegations on this claim by individual Plaintiff, but rather allege generally that the implied covenant was breached by Defendant in some or all of these ways as to each Plaintiff. (Compl. ¶¶ 146-62.)

party itself has frustrated performance of that condition." *In re Hennepin County 1986 Recycling Board Litig., 540 N.W.2d 494, 502 (Minn. 1995)* **[**55]** . The covenant "does not extend to actions beyond the scope of the underlying contract," but Minnesota law does not require a plaintiff asserting an implied covenant breach to first establish breach of an express contractual provision. *Id. at 503*. For the reasons stated previously, the court concludes that Plaintiff Cavanagh states a claim for breach of the implied covenant of good faith and fair dealing.

D. Arizona

Plaintiff Wilder's claim is governed by Arizona law. (Wilder, Group Ex. A at 5.) The court notes that Defendant offers no specific discussion of Wilder's claim and does not dispute that the implied covenant can be enforced under Arizona law. (Def.'s Br. at 23.) The transferor court in the Central District of California found that Wilder stated a claim for breach of the implied covenant of good faith and fair dealing based by alleging that Defendant required him to pay for his appraisal up front and failed to provide information about the HELOC suspension sufficient to enable him to determine whether to appeal the determination and request reinstatement. *Wilder v. JPMorgan Chase Bank, N.A., No. SACV 09-0834 DOC (RNBx), 2009 U.S. Dist. Lexis 124242, at *12 (C.D. Cal. Nov. 25, 2009)*.

The **[**56]** court noted that ***HN11***[] Arizona's implied covenant of good faith and fair dealing prohibits either party from acting in a way that will "impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *2009 U.S. Dist. Lexis 124242 at *11* (quoting *Rawlings v. Apodaca, 151 Ariz. 149, 153-54, 726 P.2d 565, 569-70 (Ariz. 1986))*. To state a claim under this theory, the court observed, a plaintiff need only allege that defendant's actions "potentially impair Plaintiff's right to the benefit of HELOC funds." *Id.* This court declines to depart from that conclusion. Plaintiff Wilder's allegations are sufficient to state a claim under essentially the same standard as those previously discussed.

V. Restitution and Unjust Enrichment

Plaintiffs have also challenged Defendant's conduct under an unjust enrichment theory. They allege that Defendant has been unjustly enriched in at least three ways: (1) by having received the benefit of appraisals paid for by Plaintiffs; (2) by retaining funds otherwise borrowed by **[*884]** Plaintiffs and profiting by lending those funds to other borrowers; (3) by retaining annual fees paid by Plaintiffs after their HELOCs were reduced or suspended.

A. Express [57] Contracts**

Defendant first argues that the HELOC contract governs the relationships between the parties and precludes any claim for unjust enrichment. Defendant contends that California law does not recognize a claim for unjust enrichment at all, and that although Minnesota, Delaware, and Texas law recognize such a claim, it is barred where a contract exists. Plaintiffs argue that because they have pleaded their unjust enrichment claim in the alternative, it should survive the motion to dismiss. (Response at 35.)

The court is satisfied that a claim for unjust enrichment or restitution is recognized in each of the four forum states. California recognizes a claim for restitution (although there is some conflicting authority). *Malcolm, 2010 U.S. Dist. LEXIS 23770, 2010 WL 934252, at *7* (citing *Nordberg v. Trilegiant Corp., 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006))*; *Wilder, 2009 U.S. Dist. Lexis 124242 at *14* ("[T]he weight of authority indicates that California law recognizes a cause of action for unjust enrichment/restitution.").

Defendant is correct that Minnesota, Texas, and Delaware bar unjust enrichment claims where the parties' relationship is governed by contract, [15] but all four states allow such a claim to **[**58]** proceed when pleaded in the alternative. *Malcolm, 2010 U.S. Dist. LEXIS 23770, 2010 WL 934252, at *7 (California)*; *Excel Homes of Minnesota, Inc. v. Ivy Ridge Home Builders, Inc., No. C2-00-1686, 2001 Minn. App. LEXIS 532, 2001 WL 506782, at *3 (Minn. App. May 15, 2001)*; *Peters v. Norwegian Cruise Line Ltd., No. 01-05-00906, 2007 Tex. App. LEXIS 4461, 2007 WL 1633555, at *10 (Tex. App. June 7, 2007)*; *Narrowstep, Inc. v. Onstream Media Corp., No. 5114-VCP, 2010 Del. Ch. LEXIS 250, 2010 WL 5422405, at *16 (Del. Ch. Dec. 22, 2010)*. As Plaintiffs note, two courts upheld unjust enrichment claims in this case pre-consolidation on the basis that those claims were pleaded in the alternative. *See Wilder, 2009 U.S. Dist. Lexis 124242, at *15* ("It would be inappropriate to dismiss Plaintiff's claim before the Court has held that an express, enforceable contract governed the subject matter for which Plaintiff seeks restitution."); *Yakas v. Chase Manhattan Bank, U.S.A., N.A., No C 09-02964 WHA, 2010 U.S. Dist. LEXIS 5359, 2010 WL 367475, at *7 (N.D. Cal. Jan. 25, 2010)* ("At this point, the Court is unwilling to categorically exclude the possibility that unjust enrichment will turn out to be an appropriate remedy.").

The court agrees that the existence of an express contract potentially covering these claims is not fatal at this stage and declines to dismiss Plaintiffs' unjust enrichment claims on this basis.

B. Retention of Benefits

Defendant argues that any unjust enrichment claim should also fail because Plaintiffs do not allege Defendant wrongfully retained any actual benefit, an element of such a claim in California, Minnesota, Texas, and Delaware. The four states differ in minor ways in how **[*885]** they define unjust enrichment: ***HN12***[] A restitution claim in California requires "receipt of benefit and unjust **[**60]** retention of that benefit at the expense of others." *Malcolm, 2010 U.S. Dist. LEXIS 23770, 2010 WL 934252, at *7* (quoting *Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881, 883 (Cal. App. 2000))*. In Minnesota, an unjust enrichment claim requires a showing that "(1) a benefit [was] conferred by the plaintiff on the defendant; (2) the defendant accept[ed] the benefit; (3) the defendant retain[ed] the benefit although retaining it without payment is inequitable." *Zinter v. University of Minnesota, No. A10-2041, ___ N.W. 2d ___, 2011 Minn. App. LEXIS 64, 2011 WL 2175872 (Minn. App. June 6, 2011)*. Texas allows recovery on an unjust enrichment theory "when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Christus Health v. Quality Infusion Care, Inc., No. 01-09-00591-CV, ___ S.W.3d ___, 2011 Tex. App. LEXIS 4578, 2011 WL 2432117, at *3 (Tex. App. June 16, 2011)* (quoting *Heldenfels Bros., Inc. v. Corpus Christi, 832 S.W.2d 39, 41 (Tex. 1992))*. Delaware law requires a showing of "(1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy at law." *Ocwen Loan Servicing, LLC v. SFJV-2002-1, LLC, C.A. No. N10C-09-071 CLS, 2011 Del. Super. LEXIS 235, 2011 WL 2175995, at *2 (Del. Super. May 25, 2011)* **[**61]** (citation and quotation omitted). Although the definitions thus differ slightly, all essentially require the inequitable or unjustified retention of a benefit or enrichment at the plaintiff's expense.

Defendant argues that the retention of a "benefit" in the form of the up-to-date appraisal cannot be characterized as unjust because TILA and Regulation Z allow Defendant to charge up front for such appraisals. (Def.'s Br. at 30.) Defendant cites no authority for this proposition, but there is support for it. The *Hickman* court noted that "neither the statute, regulations nor Official Commentary contain any provisions prohibiting [creditors] from shifting the burden of obtaining and paying upfront for a property appraisal to borrowers." *Hickman, 683 F. Supp. 2d at 789*.

[15] *See Zupancich v. U.S. Steel Corp., No. 08-5847 ADM/RLE, 2009 U.S. Dist. LEXIS 44504, 2009 WL 1474772, at *3 (D. Minn. May 27, 2009)* ("In Minnesota, **[**59]** the existence of an express contract between the parties . . . precludes recovery under the theories of unjust enrichment and quantum meruit."); *Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 891 (Del. Ch. 2009)* ("A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim."); *Fortune Production Co. v. Conoco, Inc., 52 S.W.3d 671, 684 (Tex. 2000)* ("Generally speaking, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory.").

The *Raeth* court agreed, explaining that neither TILA, Regulation Z, or the Commentary "require a creditor to incur appraisal fees." *Raeth, 755 F. Supp. 2d at 905*. The *Raeth* court noted that the relevant provision explains that

> **HN13**[] a creditor may collect only bona fide and reasonable appraisal and credit report fees if such fees are actually incurred **[**62]** in investigating whether the condition permitting the freeze continues to exist. A creditor may not, in any circumstances, impose a fee to reinstate a credit line once the condition has been determined not to exist.

12 C.F.R. Pt. 226, Supp. 1, 5b(f)(3)(vi)-3. In addition, while the creditor is allowed to shift the burden to request reinstatement to the borrower, as it has done here, "[o]nce the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist." 12 C.F.R. Pt. 226, Supp. 1, 5(b)(f)(3)(vi)-4. Together, these provisions do suggest, as the *Raeth* and *Hickman* courts concluded, that the creditor may shift the burden of incurring an appraisal fee to the consumer. [16]

Such a shift, however, is premised on the assumption that a "condition allowing the freeze" existed in the first place. The allegation Plaintiffs make here is that no such condition ever existed, and **[**63]** that they were forced to incur fees [17] in order to **[*886]** rebut Defendant's claim of a significant decline in their property values—a decline that was solely a function of faulty valuation models. Whether this is the case has not yet been determined, but the allegation precludes a determination that no unjust benefit had been conferred upon Defendant. The court agrees with Defendant, however, that this claim is not available to any Plaintiff who did not pay for an appraisal based on a HELOC suspension or reduction, or to any Plaintiff who received a timely refund of his appraisal fee. One of the pre-consolidation courts reached this conclusion as well. *See Malcolm, 2010 U.S. Dist. LEXIS 23770, 2010 WL 934252, at *7* (dismissing certain unjust enrichment claims but concluding that the claim survived "as to the appraisal, [because] Defendant did receive and retain that benefit at Plaintiff's expense").

Plaintiffs also allege that Defendant wrongfully retained the funds it should have made available to Plaintiffs, enabling it to lend those funds to other customers at higher interest rates and to maintain necessary reserves. Defendant argues that this claim fails for lack of a specific allegation as to what benefit was wrongfully retained. (Def.'s Br. at 31.) In other words, "Plaintiffs make no specific allegations of what actual monetary benefits Chase allegedly wrongfully retained." (Reply at 18.) Plaintiffs contend that "the existence, nature and type of benefit retained by [Defendant] will be confirmed through discovery." (Response at 37.) The court shares Defendant's concern that Plaintiffs' claims are sketchy at this point, but notes that Plaintiffs have plausibly alleged that they have lost the time value of the money they would have had access to, were it not for the allegedly improper suspensions or reductions. As one pre-consolidation court explained, "Chase had the benefit **[**65]** of the use of the money that would otherwise be lent to Plaintiff between when the loan was frozen and when the loan was restored, and that benefit would have otherwise belonged to Plaintiff." *Wilder, 2009 U.S. Dist. Lexis 124242, at *7*. Defendant's motion to dismiss this claim is denied.

Finally, Defendant argues that Plaintiffs state no unjust enrichment claim stemming from collection of annual fees after the suspension of HELOCs because Plaintiffs have not pleaded that they were indeed charged an annual fee after the HELOC suspension. (Def.'s Br. at 31.) As discussed previously, *infra* III.B.v., no Plaintiff has alleged that he or she was *charged* an annual fee after the suspension of a HELOC. The question of whether an annual fee was unjustly retained, however, is a different question. If Plaintiffs succeed in showing that the HELOCs themselves were improperly suspended or reduced, Plaintiffs may have paid an annual fee in exchange for a HELOC whose

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[16] The court finds no provision in the HELOC agreements that explicitly addresses the reinstatement process or identifies which party is responsible to pay the costs of such a reinstatement, nor have the parties identified such a provision.

[17] Plaintiffs' complaint does not include detailed information concerning which Plaintiffs paid for appraisals, how much they paid, who they paid for the appraisals, whether they received refunds, or the amount of any refunds received. The complaint does allege that Cavanagh paid for an appraisal but did not receive full reimbursement **[**64]** (Compl. ¶ 39); that Hackett paid $385 for an appraisal (*id.* ¶¶ 55, 64); that Malcolm paid $385 for an appraisal, which was not reimbursed (*id.* ¶ 69); and that Wilder paid for an appraisal. (*Id.* ¶ 101.)

benefit of the bargain they did not actually receive. Plaintiffs have not addressed such a theory in their response brief, however. *See* *Bonte v. U.S. Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010)* ("Failure to respond to an argument . . **[**66]** . results in waiver."); *County of McHenry v. Ins. Co. of the West, 438 F.3d 813, 818 (7th Cir. 2006)* ("When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.") (citation and quotation omitted).

The court concludes Plaintiffs have adequately pleaded that Defendant was unjustly **[*887]** enriched by unjustifiably requiring appraisals at Plaintiffs' expense and by improper retention of credit to which Plaintiffs are entitled. Plaintiffs' unjust enrichment claims are otherwise dismissed.

VI. Consumer Protection Claims

Plaintiffs allege that Defendant violated California, Illinois, and Minnesota consumer protection laws through fraudulent activity designed to discourage borrowers from challenging their suspensions, and through unfair or unlawful conduct that resulted in improper suspensions or reductions of their HELOCs. Defendant seeks dismissal of these claims on the ground that they do not meet the heightened pleading standard imposed by *Federal Rule of Civil Procedure 9(b)* for claims involving fraudulent conduct. (Def.'s Br. at 31-32.) The unfair or unlawful conduct claims fail, Defendant argues, for the same reasons that the breach **[**67]** of contract claim should be dismissed. (*Id.* at 33-34.) The court concludes that Plaintiffs' fraud claims should be dismissed for failure to plead actual reliance, but that the unfair or unlawful conduct claims survive.

A. Fraud Claims

In support of their fraud claims, Plaintiffs allege that Defendant "made a false statement of material fact" [18] in the HELOC suspension and revocation notices it sent out by asserting that properties securing the HELOCs had suffered significant declines in value when, in fact, no significant declines had occurred. (Compl. ¶ 197.) Defendant made these false statements, Plaintiffs allege, in order to trigger its right to suspend or reduce HELOCs. (*Id.* ¶ 198.) Those statements "were likely to deceive reasonable HELOC borrowers into believing that their home values did in fact decline significantly and that their HELOC suspensions or reductions were proper, and were further likely to prevent or limit appeals of [Defendant's] HELOC[] suspensions and reductions." (*Id.*) Planitiffs also allege Defendant made false statements related to Plaintiffs' appeals of their HELOC suspensions and revocations. (*Id.* ¶ 199.) Plaintiffs allege that Defendant made these statements **[**68]** intending that customers, including Plaintiffs, rely on them and believe "there was nothing that could be done to have the account reinstated." (*Id.* ¶ 201.)

Defendant argues that Plaintiffs have not adequately alleged that they relied on the alleged fraud, were deceived by the alleged fraud, or incurred damages based on the allegedly deceptive conduct as required to state a fraud claim. (Def.'s Br. at 32.) The court first examines the state laws upon which Plaintiffs brings their claims, to determine whether some allegation of actual reliance is required.

i. [69] California**

[18] Although the Complaint uses slightly different terminology, in the court's view, and for purposes of this motion, a "false statement of material fact" of the type alleged by Plaintiffs is essentially the same allegation as the "fraudulent business act" required to state a UCL claim under California law, *Cal. Bus & Prof. Code § 17200*, a "deceptive act or practice" of the type required by Illinois law, *Oliveira v. Amoco Oil Co., 201 Ill.2d 134, 149, 776 N.E.2d 151, 160, 267 Ill. Dec. 14 (2002)*, and a "fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice," as required by Minnesota law, *Minn. Stat. § 325F.69*.

Planitiffs Frank, Walsh, and Malcolm [19] allege fraud based on ***HN14***[] California's unfair competition law ("UCL"), which prohibits "any unlawful, unfair or fraudulent **[*888]** business act." *Cal. Bus & Prof. Code § 17200*. Under California law, such a claim may be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." *Cal. Bus. & Prof. Code § 17204*. In other words, the law allows prosecution by a private plaintiff, although the remedies available under those circumstances are "generally limited to injunctive relief and restitution." *Clark v. Superior Court, 50 Cal.4th 605, 610, 112 Cal. Rptr. 3d 876, 235 P.3d 171, 174 (2010)* (citation and quotation omitted). The term "fraudulent business act" is not further defined in the statute, but the statute has the broad purpose of "protect[ing] both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kasky v. Nike, Inc., 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243, 249 (2002)*.

Defendant **[**70]** here focuses not on whether its conduct fits within that term but instead whether Plaintiffs have adequately pleaded reliance on that conduct. Defendant cites *In re Tobacco II Cases, 46 Cal.4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*, for the proposition that California law requires a plaintiff to show actual reliance on an alleged misrepresentation in order to succeed on a UCL fraud claim. (Def.'s Br. at 32.) *Tobacco II* was brought by plaintiffs who alleged that "tobacco industry defendants violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." *46 Cal.4th at 306, 207 P.3d at 25*. The court in that case did require plaintiffs to plead actual reliance on the tobacco industry advertisement. The court also explained, however, that "while a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct." *Id. at 328, 207 P.3d at 40*.

Plaintiffs argue that their allegations **[**71]** are sufficient under this standard. They rely on *Aron v. U-Haul Co. of California, 143 Cal. App. 4th 796, 49 Cal. Rptr. 3d 555 (Cal. App. 2006)*, which explained that a plaintiff alleging a fraudulent business practice must show only that the representations at issue "would be misleading to a reasonable consumer." *Id. at 807, 49 Cal. Rptr. 3d at 563*. In that case, the plaintiff alleged that U-Haul labeled a fee charged for returned trucks a "fueling fee" despite the fact that "fuel is not in fact replaced and this fact is not disclosed to the consumer." *Id. at 806, 49 Cal. Rptr. 3d at 562*. These allegations were adequate, the court concluded, because "there is no connection between the imposition of a fee or cost and whether the customer has in fact refueled the vehicle." *Id. at 807, 49 Cal. Rptr. 3d at 563*. Defendant argues that *Aron* is no longer good law because of the standing requirement imposed by Proposition 64, effective January 1, 2009, which requires that such a claim may be prosecuted only by "a person who has suffered injury in fact and has lost money or property *as a result of the unfair competition.*" *Cal. Bus. Code & Prof. Code § 17204* (emphasis added). *Tobacco II* cited **[**72]** this change in the law in holding that plaintiffs were required to plead actual reliance in addition to loss when pursuing a UCL fraud claim of the type alleged here. *Id. at 328, 207 P.3d at 40*.

ii. Illinois

HN15[] The Illinois Supreme Court has explained its interpretation of the state's Consumer Fraud Act as requiring that litigant plead "(1) a deceptive act or practice by the defendant, (2) the defendant's **[*889]** intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Oliveira, 201 Ill.2d at 149, 776 N.E.2d at 160* (interpreting *815 ILCS 505/2* and *815 ILCS 505/10a(a)*). The Illinois Supreme Court has explained that "a plaintiff must prove that he or she was actually deceived by the misrepresentation in order to establish the element of proximate causation." *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill.2d 100, 199, 835 N.E.2d 801, 861, 296 Ill. Dec. 448 (2005)*. Plaintiffs argue that this standard does not require "actual reliance," but in the court's view the requirement that a plaintiff be "actually deceived by the misrepresentation" is indistinguishable **[**73]** from a requirement that plaintiff "actually rely" on the misrepresentation.

[19] The court notes that Plaintiffs have withdrawn claims pursuant to the California UCL on behalf of Wilder because neither he nor Defendant are California residents. (Response at 38 n. 18.)

iii. Minnesota

HN16[] Minnesota law provides that "[t]he act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise [20], whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable . . . ." *Minn. Stat. § 325F.69*. The statute does not require actual reliance if a plaintiff seeks an injunction, but Minnesota courts have required proof of actual reliance on the defendant's fraudulent conduct to support an award of damages. *Thompson v. American Tobacco Co., 189 F.R.D. 544, 553 (D. Minn. 1999)* (rejecting class certification for cigarette smokers seeking relief in the form of the establishment of a "cessation program" because the court concluded it was "nothing more than a disguised attempt for compensatory damages" and would therefore "requir[e] proof of individual reliance," which would preclude class certification). Plaintiffs suggest that there is an exception to the requirement of a showing of individualized reliance **[**74]** "where the plaintiffs' damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers." (Response at 46 (quoting *Group Health Plan v. Philip Morris Inc., 621 N.W.2d 2, 13 (Minn. 2001))*. But the *Group Health* court did conclude that plaintiffs must prove causation: although "direct evidence of reliance by individual consumers" is not necessary, plaintiffs are required to "demonstrate that defendants' conduct had some impact on their members' use of tobacco products that caused their damages." *Id. at 13-14*. The court concludes that Minnesota law employs a flexible standard for proof of reliance and does not require a showing for each individual class member, but does require plaintiffs to prove they relied on defendant's alleged false statements.

Plaintiffs here have not pleaded that Defendant's statements actually did influence their decisions to pursue or not pursue HELOC appeals, or that they actually relied on the allegedly fraudulent statements made by Defendant. As such an allegation is necessary under the Illinois, Minnesota, **[**75]** and California consumer protection laws, Plaintiffs' fraud claims based on those laws are dismissed without prejudice.

B. Unfair Conduct Claims

Plaintiff also brings claims for "unfair" or "unlawful" conduct based on the unfair competition laws ("UCL") of Illinois and California, which, as explained here, differ **[*890]** from UCL claims for fraudulent conduct. Plaintiffs allege that Defendant engaged in unfair business practices through the use of "inaccurate and unsubstantiated" and "faulty and unreliable" AVMs, "in order to undervalue the property values of its customers and provide a false and improper basis for reducing credit limits." (Compl. ¶¶ 186, 187.) Thus, Plaintiffs allege, "Chase deprived borrowers of critical information needed to determine whether to seek credit line reinstatement" including the value of the property at HELOC origination and the value needed for reinstatement. (*Id.* ¶ 189.) Further, Defendant "pretextually suspended and reduced credit lines based on flawed and inaccurate AVMs and without properly considering the level of available equity in the properties and then took steps to discourage borrowers from appealing the suspensions." (*Id.*) Plaintiffs also allege that **[**76]** the $30 fee for faxing a two-page notice containing information it alleges Defendant was already obligated to provide was "outrageous and oppressive." (*Id.* ¶ 188.)

i. California

Plaintiffs Frank, Walsh, and Malcolm have invoked the California unfair competition law's prohibition of unfair or unlawful conduct. *Cal. Bus & Prof. Code § 17200*. These terms, like the "fraudulent business act" term discussed earlier, are not defined by the statute, "and courts have struggled to come up with a workable definition." *Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 593-94, 101 Cal. Rptr. 3d 697, 706 (Cal. App. 2009)* (citation and quotation omitted). ***HN17***[] The California courts currently employ two separate definitions of "unfair." The first

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[20] For the purposes of the statute, "merchandise" includes loans. *Minn. Stat. § 325F.68, subdivision 2*.

asks the court to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Davis, 179 Cal. App. 4th at 594, 101 Cal. Rptr. 3d at 707* (citation and quotation omitted). The second treats conduct as unfair if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws," but that definition has not been held applicable in consumer claims such as this one. *Id. at 594, 101 Cal. Rptr. 3d at 707*. **[**77]** As for the "unlawful" prong of the law, *Section 17200* has been interpreted to render "violations of federal, state or local law. . . unlawful practices which are independently actionable." *Countrywide Financial Corp. v. Bundy, 187 Cal. App. 4th 234, 256, 113 Cal. Rptr. 3d 705, 721 (Cal. App. 2010)*.

Plaintiffs' unfair or unlawful conduct claims should be dismissed, Defendant urges, because under California law, if the conduct at issue does not violate TILA, it does not constitute "unlawful" conduct for purposes of the state consumer protection laws. (Def.'s Br. at 34.) This argument is answered by the court's earlier conclusion that Plaintiffs have adequately stated a claim under the Truth in Lending Act. Such allegations were held sufficient to state a violation of the UCL in two pre-consolidation cases. *See* *Walsh v. Washington Mutual Bank, CV 09-4387 RGK (Anx), 2010 U.S. Dist. LEXIS 143385, at *13 (C.D. Cal. March 5, 2010)* (Ex. A to Response) ("By sufficiently alleging that Defendant's reduction of the HELOC violated TILA, Plaintiff adequately pleads an unlawful business practice under the UCL."); *Kimball v. Washington Mutual Bank, No. 09-cv-1261 MMA (AJB), 2010 U.S. Dist. LEXIS 109387, at *30 (S.D. Cal. April 15, 2010)* (Ex. **[**78]** C to Response) ("Because the Court has already declined to dismiss [TILA] claims, the Court finds that Plaintiff has stated a claim for relief under the 'unfair' and 'unlawful' prongs of California's UCL."). Here, similarly, Plaintiffs' claims based on the "unlawful" prong of the California UCL succeed because they have pleaded a violation of TILA and Regulation Z. (Response at 39.)

Defendant also argues that Plaintiffs' claims based on the "unfair" **[*891]** prong of the UCL fail because Defendant complied with TILA and Regulation Z. (Def.'s Br. at 34.) Again , however, the court's conclusion that Plaintiffs have adequately pleaded a violation defeats this defense. ***HN18***[] In California, a "business practice is unfair within the meaning of the UCL if it . . . is . . . unscrupulous and causes injury to consumers which outweighs the benefits." *McKell v. Washington Mutual Inc., 142 Cal. App. 4th 1457, 1473, 49 Cal. Rptr. 3d 227, 240 (Cal. App. 2006)*. The determination of whether a business practice is unfair is usually a question of fact and inappropriate for a motion to dismiss. *Id.* Defendant's motion to dismiss this claim is denied.

ii. Illinois

HN19[] In Illinois, the question of whether a business practice **[**79]** is unfair within the meaning of the Illinois Consumer Fraud Act depends on "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers." *Hickman, 683 F. Supp. 2d at 795* (citing *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc., 536 F.3d 663, 669 (7th Cir. 2008))*. Illinois law also explains, however, that the consumer fraud law does not require lenders to make "more extensive disclosure[s]" than are required by TILA. *Lanier v. Associates Finance, Inc., 114 Ill.2d 1, 17, 499 N.E.2d 440, 447, 101 Ill. Dec. 852 (1986)*. In *Hickman*, the court concluded that plaintiff did state an ICFA claim "by alleging that Defendant's conduct in reducing borrower's HELOC limits without a sufficient factual basis and using faulty and inaccurate AVMs was 'unfair, immoral, and unscrupulous.'" *Hickman, 683 F. Supp. 2d at 795*. The court determined that plaintiff nevertheless did not state a claim that defendant had deprived borrowers of information needed to seek credit reinstatement because compliance with TILA is a defense under the ICFA, and "the allegations in Plaintiff's **[**80]** Complaint establish that Defendant complied with the relevant notice and reinstatement provisions established by TILA, Regulation Z, and the Official Commentary." *Id. at 796*. *See also* *Swanson v. Bank of America, N.A., 566 F. Supp. 2d 821, 828 (N.D. Ill. 2008)* (ICFA does not prohibit conduct "specifically authorized by laws administered by any regulatory body . . . [or] conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency.") (quoting *815 ILCS 510/4(1)*, *815 ILCS 505/10b(1)*).

Plaintiffs' allegations state a claim that Defendant engaged in actions that violate the ICFA through its use of inaccurate AVMs to reduce or suspend HELOCs. Though Defendant's alleged failure to consider available equity may not by itself violate the ICFA, that failure is a factor to be considered in evaluating Defendant's other alleged wrongdoing. And the allegation that Defendant required Plaintiffs to pay for information it was obligated to provide is sufficient to state a claim based on oppressive conduct in violation of the ICFA. The ICFA claim survives this motion.

iii. Minnesota Deceptive Practices

Plaintiff Cavanagh also pleads a violation **[**81]** of ***HN20***[] the Minnesota Uniform Deceptive Practices Act, *Minn. Stat. § 325D.44, subdivision 1*, which prohibits a person from representing "that goods or services have . . . characteristics . . . they do not have" or otherwise creating a "likelihood of confusion or misunderstanding." Claims brought pursuant to this act are "based on conduct by the defendant and do not require reliance by the plaintiff." *Ford Motor Credit Co. v. Majors, No. A04-1468, 2005 Minn. App. LEXIS 448, 2005 WL 1021551, at *3 (Minn. App. May 3,* ***[*892]*** *2005)*. The Minnesota statutes affords injunctive relief as well as costs and attorneys fees, in addition to relief available under other state statutes or common law. *Minn. Stat. § 325D.45*.

Defendant argues that Plaintiffs do not meet the requirement of *Rule 8* or *Rule 9(b)* for this claim because they have offered merely a "formulaic recitation" of the cause of action. (Def.'s Br. at 33.) Plaintiffs allege that Defendant represented that Cavanaugh would receive a line of credit that would not be revoked or suspended absent a significant decline in the value of his home, but that in reality he received a HELOC with no such protections, and one in which the decision to reduce or suspend the HELOC did not depend **[**82]** on any actual change in the value of his property. These allegations are sufficient, in the court's view, to state a claim under Minnesota's law. The motion to dismiss this claim is denied.

CONCLUSION

Defendant's motion to dismiss [49] is granted in part and denied in part. The court dismisses Plaintiffs' breach of contract claim to the extent it relies on Defendant's charging an annual fee after HELOC suspension. Plaintiffs' fraud claims, brought under the California, Illinois, and Minnesota consumer protections laws, are also dismissed, as is Plaintiffs' claim for unjust enrichment based on the collection of annual fees. The motion is otherwise denied.

ENTER:

Dated: June 30, 2011

/s/ Rebecca R. Pallmeyer

REBECCA R. PALLMEYER

United States District Judge

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Colo. Civ. Rights Comm'n v. Wells Fargo Bank & Co.

United States District Court for the District of Colorado

July 1, 2011, Decided; July 1, 2011, Filed

Civil Action No. 10-cv-02427-MSK-MJW

Reporter
2011 U.S. Dist. LEXIS 71463 *

COLORADO CIVIL RIGHTS COMMISSION, Plaintiff, v. WELLS FARGO BANK AND COMPANY; WELLS FARGO BANK, N.A.; and WELLS FARGO MORTGAGE, Defendants.

Core Terms

diversity, real party in interest, parens patriae, remedies, quasi-sovereign, diversity jurisdiction, marital status, claim-by-claim, injunctive, damages, citizenship, asserting, civil penalty, practices

Counsel: [*1] For Colorado Civil Rights Commission, Plaintiff: Alison Faryl Kyles, Colorado Attorney General's Office-Department of Law, Denver, CO; Molly Allen Moats, Vincent Edward Morscher, Colorado Attorney General's Office, Denver, CO.

For Wells Fargo and Company, Wells Fargo Bank, N.A., Wells Fargo Mortgage, Defendants: D. Trey Jordan, Eric Paul Accomazzo, Bloom, Murr & Accomazzo, P.C., Denver, CO.

Judges: Marcia S. Krieger, United States District Judge.

Opinion by: Marcia S. Krieger

Opinion

OPINION AND ORDER GRANTING MOTION TO REMAND

THIS MATTER comes before the Court on Plaintiff Colorado Civil Rights Commission's ("CCRC") Motion to Remand **(#6)**, the Defendants' (collectively "Wells Fargo") Response **(#9)**, and CCRC's Reply **(#11).** Having considered the same, the Court **FINDS** and **CONCLUDES** as follows.

I. Jurisdiction

This case was removed from the District Court of the State of Colorado in Jefferson County to this Court by Wells Fargo based on diversity jurisdiction under *28 U.S.C. § 1332(a)*. CCRC's Motion to Remand argues that diversity jurisdiction does not exist. Therefore, the Court exercises its inherent authority to determine its own jurisdiction. *See United States v. Ruiz, 536 U.S. 622, 628, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002)*.

II. Issue Presented

The **[*2]** ultimate issue presented is whether the Court has subject matter jurisdiction over this action based on diversity of citizenship under *28 U.S.C. § 1332(a)*. In the Motion to Remand, CCRC contends that jurisdiction is lacking because the parties are not completely diverse. [1] CCRC contends that it acts as an arm of the State of Colorado which has no citizenship for federal diversity purposes. Wells Fargo responds that although this action is brought by CCRC rather than a particular individual, the claims are brought *on behalf of* an individual citizen of the state, notably Juliet A. Moores, who is a citizen of Colorado. This distinction, Wells Fargo contends, allows the Court to find diversity of citizenship. [2]

Thus, to determine whether diversity jurisdiction exists, the Court must first determine whether CCRC asserts claims for the State of Colorado in a *parens patriae* capacity.

III. Facts

According to the Complaint **(#1-1)**, Ms. Moores sought to refinance her mortgage loan on a residential property at 23499 Otowi Road, Indian Hills, Colorado. Although she was married, Ms. Moores sought to refinance the loan in her name without the involvement of her husband. She applied to Wells Fargo, which required Ms. Moores's husband to participate in and sign documents as a non-borrowing spouse. Although this was not acceptable to Ms. Moores, she did not withdraw her application, understanding that if she moved forward with the loan and complied with Wells Fargo's requirements, the interest rate was "locked in." Wells Fargo, however, mistakenly cancelled Ms. Moores's application. By the time it was reinstated, **[*4]** Ms. Moore's credit score had fallen four points and, as a result, Wells Fargo denied her loan application.

Ms. Moores submitted a complaint to the CCRC in which she alleged that Wells Fargo had unlawfully discriminated against her based on her marital status. [3] The CCRC found probable cause to believe that Wells Fargo had acted unlawfully, and as required by *Colo. Rev. Stat. § 24-34-504(4.1)*, formally notified Wells Fargo of Ms. Moores's complaint and its determination. Wells Fargo elected to have the claims resolved in a civil action rather than at an administrative hearing.

Pursuant to its statutory authority, *see Colo. Rev. Stat. § 24-34-505.5*, CCRC commenced this action in the Colorado District Court for Jefferson County. CCRC brought three claims asserting unlawful discrimination based on marital status in violation of Colorado's Fair Housing laws, *Colo. Rev. Stat. § 24-34-502*. [4] It requested numerous remedies without differentiation among the claims. The requested remedies can be categorized in four groups. The first **[*5]** group is comprised of forms of injunctive relief to address Wells Fargo's lending practices: (1) an order of the Court directing Wells Fargo to cease and desist in practices that discriminate based on marital

[1] The parties do not dispute that Wells Fargo has adequately demonstrated that the amount in controversy exceeds $75,000.

[2] Notably, this is a different argument than that presented in the Notice of Removal **(#1).** In that filing, Wells Fargo argued that the citizenship of the Plaintiff was Colorado based solely on CCRC's status as an agency the State of Colorado. *See Sturdevant v. Paulsen, 218 F.3d 1160, 1164 (10th Cir. 2000)* (citing *Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977))* **[*3]** (addressing the arm-of-the-state analysis). Regardless of the theory on which Wells Fargo proceeds, however, it retains the burden of demonstrating facts sufficient to support subject matter jurisdiction in this Court. *See Martin v. Franklin Capital Corp., 251 F.3d 1284, 1289-90 (10th Cir. 2001)*.

[3] Discrimination in housing practices, including the provision of financing, based on marital status is unlawful under Colorado law. *See Colo. Rev. Stat. § 24-34-502*.

[4] Claim One asserts unlawful discrimination in the terms, conditions, privileges/facilities, and services for Wells Fargo's alleged use of different qualification criteria for Ms. Moores and refusal to negotiate with her regarding **[*6]** the terms of the refinance loan. Claim Two asserts unlawful discrimination in the provision of housing based on Wells Fargo's requirement that Ms. Moores' husband sign the loan documents as a non-borrowing spouse. Claim Three asserts unlawful discrimination in a residential real estate transaction by subjecting Ms. Moores to stricter borrowing standards due to her marital status and requiring her non-borrowing spouse to sign the mortgage loan documents.

status; (2) a permanent injunction prohibiting future discrimination by Wells Fargo based on marital status; and (3) a mandatory injunction directing Wells Fargo to implement unspecified affirmative actions to ensure the future, non-discriminatory provision of housing services to Ms. Moores and others similarly situated. The second form of relief is a request for imposition of civil penalties against Wells Fargo as provided by *Colo. Rev. Stat. § 24-34-508(1)(f)*. The third type of relief requested is specific to Ms. Moores: (1) an award of damages for economic loss, emotional and mental distress; and (2) the costs and fees associated with her securing alternative financing. The fourth type of relief is for costs and attorney fees associated with this action.

IV. Standard of Review

Generally, the party invoking federal jurisdiction bears the burden of establishing subject matter jurisdiction. *See Martin, 251 F.3d at 1289-90*. When a case has been removed from state court, the defendant who removes the action bears the burden of establishing that removal is proper. *See McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*. Removal statutes are to be strictly construed and all doubts are resolved against removal. *See Fajen v. Found. Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982)*.

Removal of a case to federal court is only appropriate if the case could have been initiated in federal court in the first instance. *28 U.S.C. § 1441(a)*. In this case, removal is premised on diversity **[*7]** jurisdiction pursuant to *28 U.S.C. § 1332(a)*. Diversity jurisdiction exists when the case involves a dispute "between . . . citizens of different states" and the amount in controversy exceeds $75,000. *28 U.S.C. § 1332(a)(1)*. To meet the diversity requirement, there must be complete diversity between all plaintiffs and all defendants. Put another way, no defendant can be a citizen from the same state as any plaintiff. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)*. For purposes of diversity jurisdiction, states are not considered to be citizens of any state. *See Moor v. County of Alameda, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)*.

To determine citizenship, a court looks beyond the parties named in the Complaint, instead determining who are the real parties in interest to the controversy. *See Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)*. Generally, the term "real party in interest" pertains to the person or entity who has a substantial and substantive legal interest in the case. *See, e.g., United States ex rel. Eisenstein v. City of New York, 556 U.S. 928, 129 S. Ct. 2230, 2235, 173 L. Ed. 2d 1255 (2009)*; *Illinois v. SDS West Corp., 640 F.Supp.2d 1047, 1050 (C.D. Ill. 2009)*; Black's Law Dictionary, 9th ed. 2009 (defining real **[*8]** party in interest as "[a] person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome).

V. Analysis

Wells Fargo contends that the real party in interest in this action is Ms. Moores, who is a citizen of Colorado. CCRC admits that although Ms. Moores may benefit from the action, the real party in interest is the State of Colorado which seeks to exercises its quasi-sovereign interest on behalf of all citizens of Colorado.

At this juncture, it is not necessary to determine whether Ms. Moores is a real party in interest or would merely benefit by CCRC's success in this action. The primary question is whether the State of Colorado is a real party in interest exercising its quasi-sovereign interest in a *parens patriae* role. If so, this Court has no jurisdiction pursuant to *28 U.S.C. § §1332(a)* and *1441(b)*. [5]

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[5] Federal jurisdiction in cases brought by a State against a citizen of another State is granted by *28 U.S.C. § 1251(b)(3)* which establishes original but not exclusive jurisdiction over such actions by the United States Supreme Court.

The first issue is what approach should be used to determine whether **[*9]** the State of Colorado is the real party in interest and, if so, what interest it asserts. [6] There are two common approaches used to resolve this inquiry—th "claim-by-claim" approach and the "wholesale approach." The "claim-by-claim" approach is a bit of a misnomer because the approach actually focuses on the remedies requested, rather than the claims asserted. *See, e.g., West Virginia v. Comcast Corp., 705 F.Supp.2d 441, 450-51 (E.D. Penn. 2010)*; *Connecticut v. Levi Strauss & Co., 471 F.Supp. 363, 371 (D. Conn. 1979)*. The "wholesale approach" views the Complaint as a whole and determines whether, in its entirety, the Complaint seeks to protect a *parens patriae* interest.

Wells Fargo urges use of the "claim-by-claim" approach. It relies upon *Comcast Corp., 705 F.Supp.2d at 450-51*; *Levi Strauss, 471 F.Supp. at 371*; and *Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, to demonstrate the approach's utility. Upon careful review of these cases, the Court finds the "wholesale approach" to be better suited to the inquiry in this case.

The most recent authority cited by Wells Fargo is *West Virginia v. Comcast Corp., 705 F.Supp.2d 441, 450-51 (E.D. Penn. 2010)*. *Comcast* was an action brought pursuant to the Class Action Fairness Act of 2005 ("CAFA"), the jurisdiction for which is set out in *28 U.S.C. § 1332(d)*. This section creates a different test for diversity than that found in *28 U.S.C. 1332(a)*. The diversity test under CAFA is minimal diversity—only one member of the plaintiff class (either named or unnamed) must have diverse citizenship as compared to any one defendant. [7] As noted by the court in *Comcast*, the analytical framework chosen "has a powerful impact on the court's ultimate conclusion" as to whether a state is the real party in interest. **[*11]** The court in *Comcast* selected the "claim-by-claim" approach because the statutory objective of CAFA was to expand federal jurisdiction, the express language of CAFA required only a minimal showing of diversity, and because such analytical framework had been endorsed by the Fifth Circuit in a similar CAFA case, *Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir 2008)*.

Without commenting on the wisdom of use the "claim-by-claim" approach in CAFA cases, this matter is distinguishable. The applicable jurisdictional statute here is *28 U.S.C. § 1332(a)*, which requires complete diversity and is strictly interpreted because the matter was removed. In addition, the remedies sought by CCRC are not correlated to discrete claims, thereby making a division based on remedies inappropriate. Indeed, the state statutes that give rise to the requested remedies provide for both compensatory damages to those particularly harmed and injunctive relief and penalties that arguably benefit other citizens in Colorado.

Wells Fargo also relies upon *Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, which **[*12]** focused upon requested remedies in determining what relief the State of Hawaii could seek in a *parens patriae* capacity for violation of federal ***antitrust law***. Interpreting federal law, the Court held that the State of Hawaii could not pursue a claim for treble damages.

This case is also distinguishable from the instant matter in several respects. First, the issue in *Standard Oil Co.* did not concern whether there was federal court diversity jurisdiction; jurisdiction existed under *28 U.S.C. § 1331*. Second, the issue was limited to whether the State of Hawaii could assert a claim for treble damages pursuant to federal antitrust statutes. Third, the Court was not deciding whether the State of Hawaii was a real party in interest or the nature of the claims it brought; the Complaint clearly denominated the State of Hawaii as the plaintiff proceeding in *parens patriae.* Although the opinion elucidates the meaning of *parens patriae* actions by states and limits the ability of states to assert damage claims for violation of federal ***antitrust law***, it is not instructive with

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[6] States or state agencies generally participate as parties in lawsuits in four capacities: (i) to pursue the State's sovereign interests, which include the exercise of sovereign power (*i.e.*, making and enforcing laws within the State) and interactions with other States; (ii) in support of a proprietary interest, in which the State is essentially acting as a private party; (iii) to pursue the interests of a particular private party, in which the State is merely a nominal party; and (iv) in its capacity of *parens patriae*, **[*10]** literally parent of the country. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601-602, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*.

[7] *See e.g., Lowery v. Alabama Power Co., 483 F.3d 1184, 1193 n.24 (11th Cir. 2007)*.

regard to the methodology to be used to determine whether a state is a real party in interest asserting quasi-sovereign rights **[*13]** in a *parens patriae* capacity.

Finally, Wells Fargo relies on *Connecticut v. Levi Strauss & Co., 471 F.Supp. 363, 371 (D. Conn. 1979)*. *Levi Strauss* involved various claims by the State of Connecticut for violations of state law antitrust provisions. Similar to the case at hand in a procedural context, Connecticut sought remand to state court after the action it initiated was removed to federal court. Connecticut argued that there was no federal jurisdiction—neither federal question nor diversity jurisdiction. With regard to the diversity question, the Court evaluated each of the four types of monetary awards that Connecticut sought, characterizing each as an element of a "money claim." The Court determined that both elements of diversity jurisdiction—diversity and amount in controversy—were not simultaneously met for any single element. As to the requests to recover overcharges, to impose a civil penalty, and for attorney fees, the Court concluded that these were asserted by Connecticut in a *parens patriae* role. Therefore, Connecticut had no citizenship for purposes of diversity jurisdiction. As to the refund of overcharges, the Court concluded that while the real parties in interest **[*14]** were the consumers who had been overcharged, the amount in controversy was not met for any single consumer. Although this case utilized a "claim-by-claim" approach, it gave no justification for doing so, nor did it provide any reasoning for its decision to separate a single claim into "elements" determined by the type of monetary award sought.

These cases do not persuade this Court that a "claim-by-claim" analysis is useful here. In this case, all remedies sought are tied to all of the claims, the pertinent statutes upon which the claims are based expressly provide for all of the remedies requested, [8] and there is no stated justification such as in *Comcast* to depart from the "wholesale approach" used by the majority of courts. *See, e.g., Illinois v. AU Optronics Corp., 2011 U.S. Dist. LEXIS 61561, at *15-17 (N. D. Ill. Jun. 6, 2011)* (unpublished); *Connecticut v. Moody's Corp., 2011 U.S. Dist. LEXIS 780, at *10 (D. Conn. Jan. 5, 2011)* (unpublished); *SDS West, 640 F.Supp.2d at 1052*; *Hood v. Microsoft Corp., 428 F.Supp.2d 537, 545 (S.D. Miss. 2006)*; *Wisconsin v. Abbott Labs, 341 F.Supp.2d 1057, 1062 (W.D. Wis. 2004)*; *Kansas ex rel. Stovall v. Home Cable, Inc., 35 F.Supp.2d 783, 785-86 (D. Colo. 1998)*.

Thus, viewing the Complaint as a whole, the Court must determine whether CCRC is acting for the State of Colorado in its *parens patriae* role and whether the claims asserted aim to protect the State's quasi-sovereign interests. There is no dispute that CCRC is an agency of the state of Colorado charged with enforcement of state laws including those that form the basis of the claims in this action. Thus, the only question is whether CCRC seeks to enforce state law in service of Colorado's interest as *parens patriae* to eradicate unlawful discriminatory practices against Colorado citizens.

The doctrine of *parens patriae* recognizes that a State may bring an action to protect its "quasi-sovereign interests." These are interests that do not arise from a State's granted powers or its interest in property, but instead are general interests in the well-being of its citizens. There is no categorical test for determining the scope of quasi-sovereign interests, but the Supreme Court has provided **[*16]** some guidance in *Alfred Snapp & Son,Inc., v. Puerto Rico ex re. Barez, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*. *Snapp* teaches that to bring a *parens patriae* action, the State must articulate a concrete interest separate and apart from the interests of the particular private parties involved in the case. These interests can fall into either of two categories: (i) the health and well-being, both physical and economic, of its residents; and (ii) asserting its rights in the federal system.

The first category is the interest at issue in this case. For this interest, a state must allege more than an injury to an identifiable group of individual residents, instead it must identify an injury or issue that is relevant to the population at large. Although there is no tipping point in terms of percentage of the population affected, there must be some general interest for the populace. One clue as to whether there is a quasi-sovereign interest is whether the issue is one that a state would, if it could, attempt to remedy with its lawmaking powers. A court considers both the indirect effects of the alleged injury as well as the direct effects.

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[8] *See,e.g.*, **[*15]** *Colo. Rev. Stat. § 24-34-508* (providing for actual damages, civil penalties, cease and desist orders, and affirmative action requiring compliance for violations of Colorado's Unfair Housing Practices laws).

When a state seeks only compensatory and/or punitive damages, courts **[*17]** have held that there is no quasi-sovereign interest. *See, e.g., Hood v. F. Hoffman-La Roche, Ltd., 639 F. Supp. 2d 25, 33 (D. D.C. 2009)*; *Levi-Strauss, 471 F.Supp. at 371*. However, if the state requests relief in the form of injunctions or civil penalties, even in conjunction with compensatory damages, courts have held that a quasi-sovereign interest is at stake. *See, e.g., SDS West Corp., 640 F. Supp.2d at 1052*; *Abbott Labs., 341 F. Supp. 2d at 1062-63*; *New York ex rel Abrams v. Gen. Motors Corp., 547 F. Supp. 703, 705-06 (S.D. N.Y. 1982)*.

This case presents the latter scenario. The Complaint asserts three violations of Colorado's Unfair Housing Practices laws, for which injunctive remedies, civil penalties and compensatory damages for Ms. Moores are sought. CCRC seeks prospective injunctive relief regarding Wells Fargo's practices as they may apply to future customers—that Wells Fargo be ordered to cease and desist in their practice of discriminating against persons because of marital status, that Wells Fargo be permanently enjoined from unlawfully discriminating on the basis of marital status, that Wells Fargo be ordered to take affirmative actions to ensure that there is no future **[*18]** unlawful discrimination. In addition, CCRC requests that Wells Fargo be required to pay civil penalties pursuant to Colorado statute. CCRC argues that these remedies will benefit the populace of Colorado as a whole by helping to eradicate discrimination on the basis of marital status. Because this action is brought to benefit the State's population as a whole and not simply Ms. Moores, a quasi-sovereign interest is at stake.

The Court therefore finds that the State of Colorado is a real party in interest and that it brings this action in its *parens patriae* role. Because Colorado is not a citizen of any state, Wells Fargo has not demonstrated the complete diversity required by *28 U.S.C. §1332(a)* and *§ 1441(b)*. *Lincoln Prop. Co., 546 U.S. at 89*. [9]

IT IS THEREFORE ORDERED that

(1) **[*19]** Plaintiff Colorado Civil Rights Commission's ("CCRC") Motion to Remand **(#6)** is **GRANTED.**

(2) Pursuant to *28 U.S.C. § 1447(c)*, this case is **REMANDED** to the Colorado District Court for Jefferson County. The Clerk of the Court shall transmit the entire case file of this action to the Clerk for the District Court in Jefferson County.
(3) The Clerk of Court shall thereafter close this case.

Dated this 1st day of July, 2011

BY THE COURT:

/s/ Marcia S. Krieger

Marcia S. Krieger

United States District Judge

End of Document

[9] It is of no significance to this analysis that Ms. Moores may benefit from this action or might also be considered a real party in interest. The absence of citizenship status for Colorado precludes a finding of complete diversity among the parties. *See, e.g., Hood v. AstraZeneca Pharms. LP, 744 F.Supp.2d 590, 596 (N.D. Miss. 2010)*; *Hoffman-La Roche, 639 F.Supp.2d at 33-34*; *Microsoft Corp., 428 F.Supp.2d at 546*.

WorldHomeCenter.Com v. PLC Lighting, Inc.

United States District Court for the Southern District of New York

July 5, 2011, Decided; July 5, 2011, Filed

No. 10 Civ. 4092 (RJS)

Reporter
851 F. Supp. 2d 494 *; 2011 U.S. Dist. LEXIS 136731 **; 2011 WL 7416334

WORLDHOMECENTER.COM, INC., Plaintiff, -v- PLC LIGHTING, INC., Defendant.

Core Terms

warranty, Donnelly Act, allegations, rule of reason, consumers, disclaimer, antitrust, consumer-oriented, injunction, misleading, motion to dismiss, policies, products, commerce, argues, deceptive trade practices, private right of action, manufacturer, preemption, deceptive, practices, retailers, vertical, courts, declaratory, customers, parties, void

LexisNexis® Headnotes

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

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

In reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. To survive a *Rule 12(b)(6)* motion to dismiss, a complaint must allege enough facts to state a claim to relief that is plausible on its face. Thus, a pleading that only offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. If the plaintiff has not nudged his claims across the line from conceivable to plausible, his complaint must be dismissed.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN2[] **Deceptive & Unfair Trade Practices, State Regulation**

See *N.Y. Gen. Bus. Law § 349(a)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN3[] **Deceptive & Unfair Trade Practices, State Regulation**

To state a claim under N.Y. Gen. Bus. Law § 349, a plaintiff must allege that (1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN4[] Deceptive & Unfair Trade Practices, State Regulation

As a threshold matter, a party must plead consumer-oriented conduct in order to claim the benefit of N.Y. Gen. Bus. Law § 349. The consumer-oriented requirement may be satisfied by showing that the conduct at issue potentially affects similarly situated consumers. Although consumer-oriented conduct does not require a repetition or pattern of deceptive conduct, a plaintiff must demonstrate that the acts or practices have a broader impact on consumers at large. New York courts recognize that private contract disputes between the parties do not fall within the ambit of § 349.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN5[] Deceptive & Unfair Trade Practices, State Regulation

Deceptive practices within the meaning of N.Y. Gen. Bus. Law § 349 are acts which are dishonest or misleading in a material respect. The New York Court of Appeals has adopted an objective definition of "misleading," under which the alleged act must be likely to mislead a reasonable consumer acting reasonably under the circumstances.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] Deceptive & Unfair Trade Practices, State Regulation

Under New York law, the general rule is that there can be no claim for deceptive acts or practices when the alleged deceptive practice was fully disclosed.

Torts > Products Liability > Theories of Liability > Breach of Warranty

HN7[] Theories of Liability, Breach of Warranty

N. Y. Gen Bus. Law § 369-b clearly states that a warranty may not be limited by a manufacturer doing business in the state solely for the reason that such merchandise is sold by a particular dealer or dealers, and that any attempt to limit the manufacturer's warranty or guarantee for the aforesaid reason is void.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN8[] Deceptive & Unfair Trade Practices, State Regulation

Federal ***antitrust law*** preempts Donnelly Act, N.Y. Gen. Bus, Law § 340. claims only where the conduct complained of principally affects interstate commerce, with little or no impact on local or intrastate commerce.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN9[] Deceptive & Unfair Trade Practices, State Regulation

To plead an antitrust violation under the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, a plaintiff must demonstrate that defendants' conduct constituted anticompetitive activity either per se or under the rule of reason. Under a rule of reason analysis, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The per se rule treats categories of restraints as necessarily illegal, thus eliminating the need to study the reasonableness of an individual restraint in light of the real market forces at work.

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

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

The rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. To plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market. A plaintiff also bears the initial burden to show that the challenged behavior had an actual adverse effect on competition as a whole in the relevant market. Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice.

Torts > Products Liability > Theories of Liability > Breach of Warranty

HN11[] Theories of Liability, Breach of Warranty

Neither *N.Y. Gen. Bus. Law §§ 369-a* nor *369-b* provides for a private right of action on their face. In the absence of a statutory private right of action. A court will only imply a private right of action where (1) a plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose; and (3) the creation of such a right would be consistent with the legislative scheme.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN12[] Injunctions, Preliminary & Temporary Injunctions

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. A preliminary injunction is an extraordinary remedy that should not be routinely granted. The party seeking the injunction carries the burden of persuasion to demonstrate, by a clear showing, that the necessary elements are satisfied.

Counsel: [1]** For WorldHomeCenter.Com, Inc., Plaintiff: Lawrence Richard Lonergan, Woods & Lonergan LLP, New York, NY.

For PLC Lighting, Inc., Defendant: Harry H. Rimm, John Henry Doyle, III, LEAD ATTORNEYS, Reed Smith (NYC), New York, NY.

Judges: RICHARD J. SULLIVAN, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD J. SULLIVAN

Opinion

[*497] ORDER

RICHARD J. SULLIVAN, District Judge;

Plaintiff WorldHomeCenterxom, Inc. ("WorldHomeCenter") is an online retailer of home improvement products incorporated in New York. (Am. Compl, ¶¶ 4, 6.) Defendant PLC Lighting, Inc. ("PLC") is a manufacturer and seller of lighting fixtures and accessories incorporated in Delaware. *(Id*. ¶¶ 5, 7.) Plaintiff commenced this action by filing a Complaint in New York Supreme Court, New York County, on April 12, 2010, alleging violations of the New York Deceptive Trade Practices Act and Donnelly Act and seeking declaratory and injunctive relief. Specifically, Plaintiff challenges (1) Defendant's Unilateral Minimum Advertised Pricing ("UMAP") policy, whereby Defendant required Plaintiff to advertise PLC products at a mark-up of not less than 80% (*id*., Ex. A); and (2) Defendant's warranty disclaimer policy, whereby Defendant allegedly indicated to consumers that **[**2]** it would not honor warranties on PLC products sold by Plaintiff (*id*. ¶ 23). Defendant removed the action to this Court on May 18, 2010 and moved to dismiss the Complaint on February 11, 2011. The motion was fully submitted as of March 25, 2011. Now before the Court is Defendant's motion to dismiss the Complaint pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. As stated on the record during the July 1, 2011 conference, that motion is granted in part and denied in part,

[*498] I. Legal Standard

HN1[] In reviewing a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *ATSI Commc'ns v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)*. To survive a *Rule 12(b)(6)* motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, a pleading that only offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id*. If the plaintiff "ha[s] not nudged [his] claims across the line from conceivable to plausible, **[**3]** [his] complaint must be dismissed." *Id*.

II. Deceptive Trade Practices (N.Y. GBL § 349)

Plaintiffs first cause of action alleges that Defendant's policies constitute unfair or deceptive trade practices in violation of *New York General Business Law § 349*. *Section 349* prohibits ***HN2***[] "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *N.Y. Gen. Bus. Law § 349(a)*. ***HN3***[] To state a *Section 349* claim, a plaintiff must allege that "(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." *Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009)*. The parties dispute the first two elements of the *Section 349* claim — whether the policies at issue are "consumer-oriented" and whether they are materially misleading.

The Amended Complaint alleges that both the UMAP policy and the warranty disclaimer policy constitute false and deceptive trade practices that "unfairly discourage and dissuade consumers from purchasing merchandise from Plaintiff," and "unlawfully penalize" Plaintiffs customers who purchase Defendant's products. (Am. Compl, **[**4]** ¶ 38.) According to Plaintiff, "[i]t is inherently misleading for PLC to publish a warranty disclaimer policy and conceal the fact that the policy plainly contradicts New York State Law," because "[a] reasonable consumer would presume that the UMAP policies and warranty disclaimers are legitimate, and would avoid purchasing discounted products from Homecenter.com to the consumer's own detriment (Pl.'s Opp'n 9.)

A. "Consumer-Oriented" Conduct

HN4[] As a threshold matter, a party must plead "consumer-oriented" conduct in order to claim the benefit of *Section 349*. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank N.A., 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)*. "The 'consumer-oriented' requirement may be satisfied by showing that the conduct at issue potentially affects similarly situated consumers." *Wilson v. Northwestern Mutual Ins. Co., 625 F.3d 54, 64 (2d Cir. 2010)*. "Although consumer-oriented conduct does not require a repetition or pattern of deceptive conduct, a plaintiff must demonstrate that the acts or practices have a broader impact on consumers at large." *Id*. For that reason, New York courts have recognized that "private contract disputes" between the parties do not "fall within the ambit **[**5]** of the statute." *Oswego Laborers' Local 214 Pension Fund, 85 N.Y.2d at 25*.

In this case, the Court finds that the allegations regarding the UMAP policy clearly indicate a private contract dispute rather than "consumer-oriented" conduct. The Amended Complaint alleges that Defendant initiated the UMAP policy (Am. **[*499]** Compl, ¶ 13), that Defendant "refused to ship and fill orders submitted by Plaintiff. . . unless Plaintiff complied with [the] policy" (((*id*. ¶ 14), and that Plaintiff has sustained "lasting damages" as a result of the policy, including the loss of substantial profits and damage to its good will and market share (*id*. ¶¶ 18-19). By contrast, the Amended Complaint offers purely conclusory assertions that the UMAP policy is "directed at" consumers, and is therefore "consumer-oriented and likely to mislead a reasonable consumer." *(Id*. ¶ 30.) Such conclusory allegations fail to demonstrate the necessary impact on consumers at large. Rather, the overwhelming focus of the UMAP allegations is a private contractual dispute, which is unique to the parties in this case and therefore beyond the scope of *Section 349*. *See* *Harary v. Allstate Ins. Co., 983 F. Supp. 95, 98 (E.D.N.Y. 1997)*. Accordingly, **[**6]** the motion to dismiss the *Section 349* claim is granted with respect to the UMAP policy.

The warranty disclaimer policy is a closer question. The Amended Complaint alleges "upon information and belief* that Defendant "has indicated *to consumers* that it will not honor warranties on Defendant's policies sold by Homecenter.com." (Am. Compl. ¶ 23 (emphasis added).) The Amended Complaint further alleges that the warranty disclaimer policy "has been communicated to other retailers and Plaintiffs prospective customers," (*Id*.) These allegations are admittedly sparse. However, because the "consumer-oriented" requirement is to be liberally construed, *see* *New York v. Feldman, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002)*, the Court finds that the alleged communication directly to consumers is enough to establish "consumer-oriented" conduct at this stage of the litigation. Whether such misinformation was actually funneled to consumers is an issue to be developed in discovery and taken up on summary judgment.

B. "Deceptive" Acts or Practices

The next element of a *Section 349* claim is the requisite "misleading" act, which the Court regards as the core of the parties' dispute with respect to this cause of **[**7]** action. ***HN5***[] "Deceptive practices" within the meaning of *Section 349* are "acts which are dishonest or misleading in a material respect." *Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 258 (S.D.N.Y. 1995)*. The New York Court of Appeals has adopted an objective definition of "misleading," under which the alleged act must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund, 85 N.Y.2d at 26*. Defendant argues that there is no deceptive conduct here, because the warranty policy was "communicated to other retailers and Plaintiffs prospective customers." (Am. Compl. *%* 23.) New York law does offer some support for this position, since ***HN6***[] the general rule is that "[t]here can be no claim for deceptive acts or practices . . . when the alleged deceptive practice was fully disclosed." *Watts v. Jackson Hewitt Tax Serv, Inc., 579 F. Supp. 2d 334, 346 (E.D.N.Y. 2008)*,

However, none of the cases that stand for this general rule had occasion to address policies prohibited by other substantive laws. *See* *Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126 (2d Cir. 2007)* ("In none of these cases ... did the courts have occasion to consider **[**8]** fees prohibited by other substantive laws."). New York courts have held that "collecting fees in violation of other federal or state laws may satisfy the misleading element of *§ 349*" — even where those fees were fully disclosed. *Id*. Although illegal fees are not at issue in this case, Plaintiff argues that the warranty disclaimer policy is void and unenforceable pursuant to *New York General Business Law § 369-b*. **[*500]** Thus, Plaintiff argues that although the content of the warranty disclaimer policy was disclosed, consumers were nonetheless deceived regarding the legitimacy and lawfulness of that policy. (Pl.'s Opp'n 9.)

This is a close question, but the Court is ultimately persuaded that Plaintiff has the better argument here. ***HN7***[] *Section 369-b* clearly states that a warranty "may not be limited by a manufacturer doing business in this state solely for the reason that such merchandise is sold by a particular dealer or dealers," and that "[a]ny attempt to limit the manufacturer's warranty or guarantee for the aforesaid reason is void," *N. Y. Gen Bus. Law § 369-b*. According to the Amended Complaint, that is precisely what the alleged warranty disclaimer policy attempted to do — disclaim warranties **[**9]** of products sold by Plaintiff. (Am. Compl, ¶¶ 23-24.) Of course, the Court expresses no opinion as to whether Plaintiff will ultimately prove that allegation, especially since the alleged warranty policy has not been made part of the record. But the Court cannot conclude from the *fact* of disclosure that, as a matter of law, the warranty disclaimer policy is not a deceptive trade practice in violation of *Section 349*. *See Cohen, 498 F.3d at 127*. *But see WorldHomeCenter.com, Inc., v. Franke Consumer Prods., Inc., 10 Civ. 3205 (BSJ), Doc. No. 31, 2011 U.S. Dist. LEXIS 67798 (S.D.N.Y. June 22, 2011)*. For that reason, the Court finds that Plaintiff has sufficiently pled the "misleading" act prong of the deceptive trade practices claim.

C. **Actual Injury**

Finally, Plaintiff clearly alleges that Defendant's policies "unfairly discourage and dissuade consumers from purchasing merchandise from Plaintiff and "unlawfully penalize" customers who do purchase Defendant's products from Plaintiff. (Am. Compl. ¶ 38.) Defendant does not appear to contest the sufficiency of these allegations for purposes of the third element of a *Section 349* claim, actual injury. Because Plaintiff has sufficiently alleged all three elements, the motion **[**10]** to dismiss the *Section 349* claim is denied with respect to the warranty disclaimer policy.

III. Donnelly Act (N.Y. GBL § 340)

Plaintiffs second cause of action alleges that Defendant's policies constitute vertical price fixing in violation of the New York antitrust statute, known as the Donnelly Act, *N.Y, Gen. Bus, Law § 340*.

A. **Preemption**

In response, Defendant argues that the Donnelly Act is preempted by the Sherman Act because the conduct at issue relates to interstate commerce. In order to prevail on the preemption argument, Defendant must overcome the presumption against finding preemption of state law in areas — such as antitrust — traditionally regulated by the states. *See California v. Arc Am. Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. ***HN8***[] Federal ***antitrust law*** preempts Donnelly Act claims only where "the conduct complained of principally affects interstate commerce, with little or no impact on local or intrastate commerce." *H-Quotient, Inc. v. Knight Trading Grp., No 03 Civ. 5889 (DAB), 2005 U.S. Dist. LEXIS 1924, 2005 WL 323750, at *4 (S.D.N.Y. Feb. 9, 2005)*. In support of its preemption argument, Defendant leans heavily on Judge Scheindlin's recent decision in *Conergy AG v. MEMC Elec. Materials, Inc*., in which a defendant's **[**11]** motion to dismiss was granted because "the alleged conduct predominantly affects interstate commerce rather than New York commerce." *651 F. Supp. 2d 51, 60-62 (S.D.N.Y. 2009)*. Defendant urges the same result here.

[*501] The Court is not prepared to find preemption on a motion to dismiss in this case. Although the allegations relating to intrastate commerce are admittedly sparse, Plaintiff does allege that Defendant regularly transacts or solicits business in New York (Am. Compl, ¶¶ 2-3), that Plaintiff is a New York corporation (*id*. ¶ 4), and that a substantial part of the events at issue occurred in New York (*id*. ¶ 3). In *Conergy*, by contrast, neither party was a New York corporation, and the complaint alleged no specific impact on New York, no competition with New York producers, and no service to New York customers. *Conergy AG, 651 F. Supp.2d at 61-62*. Here, the mere fact that Plaintiff is an online retailer does not support the conclusion as a matter of law that Defendant's policies had "little or no impact on local or intrastate commerce." *H-Quotient, Inc., 2005 U.S. Dist. LEXIS 1924, 2005 WL 323750, at *4*.

Because discovery is required to resolve the issue of intrastate commercial impact, the Court rejects the **[**12]** preemption argument as a basis for a motion to dismiss the Donnelly Act claim.

B. Rule of Reason

Defendant argues in the alternative that Plaintiff fails to allege facts that would support a Donnelly Act claim under the rule of reason standard. ***HN9***[] To plead an antitrust violation under the Donnelly Act, Plaintiff must demonstrate that Defendants' conduct constituted anti-competitive activity either *per se* or under the rule of reason. Under a rule of reason analysis, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. The *per se* rule treats categories of restraints as necessarily illegal, thus "eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Id. at 886*. Thus, the threshold question in evaluating Plaintiffs Donnelly Act claim is whether the rule of reason or the *per se* rule applies.

1. The *Leegin* Decision

Defendant urges the application of the rule of reason based on the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. **[**13]** In *Leegin*, a retail apparel store brought suit under the Sherman Act against a manufacturer, claiming that the manufacturer had entered into an illegal pricing plan whereby it refused to sell products to retailers that discounted goods below a certain price (so-called "vertical" price-fixing). *See id. at 883-84*. In ruling for the manufacturer, the Supreme Court held that the rule of reason, not *a per se* rule of unlawfulness, was the appropriate standard to judge vertical price restraints. *Id. at 899*. Because the Donnelly Act is modeled on the Sherman Act and generally construed in light of federal precedent, *see Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275, 298 (S.D.N.Y. 1998)*, Defendant argues that the *Leegin* decision should control and that the rule of reason should apply.

Plaintiff counters that vertical price fixing constitutes a *per se* antitrust violation regardless of *Leegin*, because New York courts interpret the Donnelly Act differently than the Sherman Act "where State policy, differences in the statutory language[,] or the legislative history justify such a result." *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518, 634 N.E.2d 158, 611 N.Y.S.2d 786 (1994)*. To justify a divergent **[**14]** result under state law, Plaintiff leans heavily on *Section 369-a*, **[*502]** which renders void "[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer . . . ." *N.Y. Gen. Bus. Law § 369-a*. Plaintiff argues that "in view of *[Section] 369-a*, courts applying New York law should treat vertical price fixing as *a per se* Donnelly Act violation, regardless of the change in federal ***antitrust law*** occasioned by the Supreme Court's decision in *Leegin* (Pl.'s Opp'n 13-14.) But Plaintiff supplies no authority for the proposition that *Section 369-a* justifies such a divergence from federal antitrust precedent. Indeed, the handful of cases in this District that have considered parallel state and federal antitrust claims following the *Leegin* decision appear to assume that *Leegin* applies equally to both. *See Arista Records LLC v. Lime Group LLC, 532 F.Supp.2d 556, 569, 581 (S.D.N.Y. 2007)* (Lynch, J.) (citing *Leegin* for the proposition that vertical price restraints "should be evaluated under the traditional rule of reason" standard and subsequently finding that the Donnelly Act claim "overlapped] completely" **[**15]** with the federal antitrust claim). In the absence of any authority construing *Section 369-a* as relevant, much less controlling, with respect to New York ***antitrust law***, the Court declines to adopt such a view. In light of the *Leegin* decision, the Court finds that the rule of reason and not the *per se* rule applies to Plaintiffs Donnelly Act claim.[1]

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[1] The Court notes that Defendant also urges the application of the rule of reason on the grounds that the UMAP policy governs the *advertised* price rather than the resale price of Defendant's products. (Def.'s Mem. 11-12.) Whether an internet storefront ultimately collapses that distinction is certainly an interesting question. But because the Court finds that the rule of reason applies even to resale price restraints under *Leegin*, the issue of advertised versus resale pricing is beyond the scope of this ruling.

2. Applying the Rule of Reason

Having determined that the rule of reason applies to Plaintiffs Donnelly Act claim, the Court now proceeds to the implications of that choice. As previously noted, ***HN10***[] the rule of reason "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable **[**16]** restraint on competition." *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 316 (2d Cir. 2008)* (internal citation omitted). "In order to plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market." *Integrated Sys. & Power, Inc. v. Honeywell Intl., Inc., 713 F. Supp. 2d 286, 298 (S.D.N.Y. 2010)*. Plaintiff also bears the initial burden to show that the challenged behavior "had an *actual* adverse effect on competition as a whole in the relevant market." *Major League Baseball, 542 F.3d at 317* (internal citation omitted). "Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice." *Id*. (internal citation omitted).

Plaintiff has made no real attempt to plead a Donnelly Act violation under the rule of reason analysis. The Amended Complaint contains no allegations regarding the types of lighting products at issue, the geographic boundaries of the market, or the general impact of Defendant's policies in the relevant product or geographic markets. Plaintiff appears to acknowledge as much in its opposition **[**17]** papers, arguing only that "a rule of reason analysis is unnecessary" and not that Plaintiff should prevail under that standard. (Pl.'s Opp'n 13.) Because Plaintiff fails to properly plead a Donnelly Act claim under the rule **[*503]** of reason analysis, the motion to dismiss the Donnelly Act claim is granted.

IV. Declaratory Relief

Plaintiffs third cause of action seeks declaratory relief pursuant to *Section 369-a*, *Section 369-b*, and the Declaratory Judgment Act, *28 U.S.C. § 2201*. Plaintiff urges the Court to declare the UMAP policy void and unenforceable based on *Section 369-a* and the warranty disclaimer policy void and unenforceable based on *Section 369-b*. (Am. Compl, ¶¶ 48-49.) ***HN11***[] But neither of these statutes provides for a private right of action on their face, and Plaintiff has not identified any express provision authorizing a private right of action for violation of either statute. In the absence of a statutory private right of action, the Court will only imply a private right of action where (1) Plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose; and (3) the creation of such **[**18]** a right would be consistent with the legislative scheme. *See* *Carrier v. Salvation Army, 88 N.Y.2d 298, 302, 667 N.E.2d 328, 644 N.Y.S.2d 678 (1996)*. The third factor, which is generally the "most critical," is determinative here. *Id*. Since the only references to enforcement in Article 24-A of the General Business Law, which contains both *Section 369-a* and *369-b*, are to enforcement by the attorney general and not by private parties, the Court finds that implying a private right of action here would be inconsistent with the enforcement means chosen by the New York legislature. *See* *N.Y. Exec. Law § 63(12)* (authorizing the Attorney General to apply to the courts for an order enjoining any person from engaging in "repeated fraudulent or illegal acts" or otherwise demonstrating "persistent fraud or illegality" in transacting business). Accordingly, the Court grants the motion to dismiss with respect to declaratory relief.

V. Injunctive Relief

Finally, Plaintiff also seeks a preliminary injunction "enjoining and restraining Defendant from implementing and enforcing its UMAP policy." (Am. Compl, ¶ 52.) ***HN12***[] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to **[**19]** suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res, Def. Council, 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)*. A preliminary injunction is an "extraordinary remedy" that should not be routinely granted. *JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79-80 (2d Cir. 1990)*. The party seeking the injunction carries the burden of persuasion to demonstrate, "by a clear showing," that the necessary elements are satisfied. *See* *Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)*.

For the reasons stated above, Plaintiff has clearly failed to establish likelihood of success on the merits for its UMAP claims. Moreover, Plaintiff has also failed to demonstrate irreparable harm, the "single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 234 (2d Cir. 1999)*. The Amended Complaint alleges only that Plaintiff "has lost substantial profits" and experienced a "loss of established business dealings and prospective business opportunities." (Am. Compl. ¶¶ 18, 38, 42.) Because the harm alleged appears to be purely **[**20]** financial and therefore reparable through monetary damages, Plaintiff has failed to allege irreparable injury. Accordingly, the motion to dismiss with respect to injunctive relief is also granted.

[*504] VI. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED THAT Defendant's motion to dismiss is DENIED with respect to the *Section 349* claim as it pertains to Defendant's alleged warranty disclaimer policy, but GRANTED with respect to (1) the *Section 349* claim as it pertains to the UMAP policy, (2) the Donnelly Act claim, and (3) the declaratory and injunctive relief claims. IT IS FURTHER ORDERED THAT the parties shall submit a joint status letter no later than July 22, 2011, updating the Court with respect to the status of settlement discussions and the need, if any, for additional discovery. To the extent that either party wishes to file a motion for summary judgment, that party shall also submit a pre-motion letter pursuant to Rule 2.A of my Individual Practices. The Clerk of the Court is respectfully directed to terminate the motion located at Doc. No. 29.

SO ORDERED.

Dated: July 5, 2011

New York, New York

/s/ Richard J. Sullivan

RICHARD J. SULLIVAN

UNITED STATES DISTRICT JUDGE

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Adobe Sys. v. Norwood

United States District Court for the Northern District of California

July 6, 2011, Decided; July 6, 2011, Filed

No. C 10-03564 SI

Reporter
2011 U.S. Dist. LEXIS 72293 *; 99 U.S.P.Q.2D (BNA) 1954 **; 2011 WL 2650945

ADOBE SYSTEMS INCORPORATED, Plaintiff, v. RENEE NORWOOD, Defendant. AND RELATED COUNTER- AND THIRD-PARTY CLAIMS.

Prior History: Adobe Sys. v. Norwood, 2011 U.S. Dist. LEXIS 24865 (N.D. Cal., Mar. 8, 2011)

Core Terms

Adobe, counterclaims, software, misuse, products, motion to dismiss, false light, disparagement, defamation, first sale doctrine, resellers, user, leave to amend, Counter-Defendants, allegations, copies, unfair competition, license agreement, anticompetitive, antitrust, dismissal with prejudice, restraint of trade, computer software, secondary market, conspiracy, pleadings, licensed

Counsel: **[*1]** For Adobe Systems Incorporated, Plaintiff, Counter-defendant: Annie S. Wang, LEAD ATTORNEY, Nicole Lynn Drey, J. Andrew Coombs, A.P.C., Glendale, CA; J. Andrew Coombs, J. Andrew Coombs, A Professional Corporation, Glendale, CA.

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For Renee Norwood, also known as Liza Renee Norwood, also known as Liza Bynum, also known as Renee Bynum, Defendant: Michael Lawrence Rodenbaugh, Rodenbaugh Law, San Francisco, CA.

For Renee Norwood, Counter-claimant: Michael Lawrence Rodenbaugh, Rodenbaugh Law, San Francisco, CA.

For Software Publishers Association, dba Software and Information Industry Association, Counter-defendant: J. Andrew Coombs, LEAD ATTORNEY, J. Andrew Coombs, A Professional Corporation, Glendale, CA; Nicole Lynn Drey, LEAD ATTORNEY, J. Andrew Coombs, A.P.C., Glendale, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

[1954] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COPYRIGHT MISUSE COUNTERCLAIM AND DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S UCL CLAIM**

Plaintiff/counter-defendant Adobe Systems Incorporated (Adobe) and third-party **[*2]** defendant **[**1955]** Software & Information Industry Association's (SIIA) motion for partial dismissal of the amended counterclaims of defendant/counterclaimant Renee Norwood, now appearing pro se, is currently scheduled for hearing on July 8,

2011. Pursuant to *Civil Local Rule 7-1(b)*, the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court GRANTS Adobe's motion to dismiss Count One of the amended counterclaims, with prejudice. The Court DENIES the motion to dismiss Count Five of the amended counterclaims to the extent it is supported by Norwood's defamation, false light, and/or business disparagement claims. Count Five of the amended counterclaims is dismissed with prejudice to the extent it is based on an alleged violation of the federal Copyright Act or alleged anticompetitive acts.

BACKGROUND

Adobe filed this copyright and trademark infringement case on August 13, 2010, alleging that Renee Norwood engaged in "systematic, unauthorized copying and distribution of Adobe's software products through sales on the eBay online auction site." Compl. at ¶ 1. Norwood filed an **[*3]** answer on November 17, 2010 and on that same date filed ten counterclaims against Adobe and third-party defendant SIIA, a non-profit trade association, alleging three antitrust and unfair competition violations, misuse of copyright, defamation, placing defendant before the public in a false light, business disparagement, aiding and abetting, civil conspiracy, and that SIIA was an alter ego and/or instrumentality of Adobe. Adobe responded on January 7, 2011 and moved to dismiss all of the counterclaims except for the defamation, false light, and business disparagement claims.

On March 8, 2011, the Court dismissed Count One (conspiracy in restraint of trade in violation of federal ***antitrust law***) and Count Two (violation of California ***antitrust law***) with prejudice. Order Granting Motion to Dismiss Counterclaims, p. 5. The Court granted Adobe's motion to dismiss Counts Three (violation of the California Unfair Competition Law by restraint of trade), Eight (aiding and abetting), Nine (civil conspiracy), and Ten (alter ego/instrumentality), but gave Norwood leave to amend. Order, p. 1. The Court dismissed with prejudice Count Four (misuse of copyright) as to any claim for judgment against **[*4]** SIIA or for damages generally, but gave Norwood leave to amend to support a declaratory judgment against Adobe. Order, pp. 1, 8.

On March 18, 2011, Norwood filed amended counterclaims. Norwood claims that Adobe and SIIA "made a concerted effort to stop resale distribution altogether by instituting a coordinated campaign of federal litigation against small individual resellers who sell computer software on the secondary market — computer software lawfully purchased by these small computer software resellers and their upstream suppliers," which Norwood argues violates the first sale doctrine. Amended Counterclaims at ¶ 38. Norwood claims that Adobe and SIIA "have joined together to embark on a scheme to cartelize [the secondary market for computer software] and its financial promise for themselves. Their goal is simple: to destroy the secondary market for their computer software, since they no longer owned or controlled those copies of their software products." *Id.* at ¶ 39. To accomplish this goal, Norwood claims that Adobe and SIIA are "specifically targeting small, independent re-sellers of Adobe products" by filing lawsuits and Digital Millennium Copyright Act ("DMCA") take-down notices **[*5]** in order to "intimidate, harass and ultimately eliminate from competition these small resellers . . . ." *Id.* at ¶¶ 40-41. Norwood claims that Adobe and SIIA intentionally focus on small resellers with limited financial means in order to avoid having to litigate. They "know that their claims of infringement are not valid given the critical limitation on copyright, embodied in the First Sale Doctrine . . . . " *Id.* at ¶ 42.

Norwood claims that "Counter-Defendants aided and assisted one another in perpetrating the wrongful acts" alleged above. *Id.* at ¶ 48. "Specifically, Counter-Defendants conspired and agreed to unreasonably restrain trade in and to control and dominate the market for Adobe software products" and "took acts in furtherance of their combination and conspiracy, as alleged herein, that were intended to destroy the secondary market for Adobe software products and were intended to and did injure Norwood by bringing the instant lawsuit against her." *Id.*

Norwood further claims that SIIA issued a press release on October 6, 2010, which contained **[**1956]** defamatory statements accusing Norwood of piracy. Norwood alleges that the statements were made without any evidence to support them and **[*6]** have caused her to suffer "severe emotional, psychological, and medical distress and damages . . . as she experienced the destruction of her reputation, identity, sense of self-worth, and lost business and customers." *Id.* at ¶¶ 49-61.

Norwood claims that the counter-defendants "have acted in conspiracy with one another, each tacitly and/or expressly participating in a common plan to destroy the legal, secondary market for Adobe software, and in the common plan to destroy [her] business reputation." *Id.* at ¶ 62.

On May 2, 2011 Norwood's attorney, Michael L. Rodenbaugh, moved to withdraw as counsel. The Court granted Rodenbaugh's motion to withdraw as counsel on June 3, 2011, and extended the mediation deadline by 60 days. The Court also ordered Mr. Rodenbaugh to inform Norwood of the Court's ruling by mail and e-mail, and inform Norwood of the pending motion to dismiss and associated deadlines.

Norwood has not asked the Court for a continuance nor submitted a response to Adobe's partial motion to dismiss the amended counterclaims.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be **[*7]** granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. *See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*, *overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)*.

In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. *See United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981)*.

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. *Federal Rule of Civil Procedure 15* governs amendment of the pleadings. It states that if a responsive pleading has already been filed, the party seeking amendment may amend the party's pleading only by leave of court or by written consent of the adverse party and that leave shall be freely given when justice so requires. *Fed. R. Civ. P. 15(a)*. **[*8]** This rule reflects an underlying policy that disputes should be determined on their merits, and not on the technicalities of pleading rules. *See Foman v. Davis, 371 U.S. 178, 181-82, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (citation and internal quotation marks omitted). Accordingly, the Court must be generous in granting leave to amend.

Generally, courts cannot consider material outside the complaint when ruling on a motion to dismiss for failure to state a claim. *Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001)*. However, material properly submitted as part of the complaint may be considered on a motion to dismiss. *Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994)* (citing *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990))*, *rev'd on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*. A document is not outside the complaint if **[*9]** the complaint specifically refers to the document and if its authenticity is not questioned. *Id.* (citing *Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982))*. The court may consider the full text of the document, even if the complaint quotes it only in part. *In re Stac Electronics Securities Litig., 89 F.3d 1399, 1405 n. 4 (9th Cir. 1996)*.

Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*. Where a plaintiff is proceeding pro se, the Court has an obligation to construe the pleadings liberally and to afford the plaintiff the benefit of any doubt. *Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)* (en banc). However, pro se pleadings must still allege facts sufficient to allow a reviewing court to determine whether a claim has been stated. **[**1957]** *Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)*.

DISCUSSION

I. Count One: Misuse of Copyright

Norwood's first amended counterclaim is for misuse of copyright. It is based primarily on the allegation that Adobe's actions are in violation of the first sale doctrine.

A. Copyright Misuse

Copyright misuse, which is nearly **[*10]** always regarded as a defense, "forbids a copyright holder from securing an exclusive right or limited monopoly not granted by the Copyright Office" by preventing "copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly." *A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026 (9th Cir. 2001)* (internal quotation marks and alteration marks omitted). Here, Norwood alleges that Adobe and SIIA have attempted to control the resale of Adobe's software products beyond their first sale in contravention of the first sale doctrine. Amended Counterclaims at ¶ 35.

B. First Sale Doctrine

The first sale doctrine "permits one who has acquired ownership of a copy to dispose of that copy without the permission of the copyright owner." *UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1177 (9th Cir. 2011)* (citing *17 U.S.C. § 109(a)*). However, the doctrine "does not apply to a person who possesses a copy of the copyrighted work without owning it, such as a licensee." *Vernor v. Autodesk, Inc., 621 F.3d 1102, 1107 (9th Cir. 2010)* (citing *17 U.S.C. § 109(d)*). "[A] software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies **[*11]** that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions." *Id. at 1111*.

C. Norwood's Amended Counterclaim

Many district courts have held that copyright misuse does not support a claim for damages. *Adobe Systems, Inc. v. Kornrumpf, 780 F. Supp. 2d988 , 2011 U.S. Dist. LEXIS 4956, 2011 WL 181375, *2 (N.D. Cal. 2011)*; *Ticketmaster L.L.C. v. RMG Techs., Inc., 536 F. Supp. 2d 1191, 1198 (C.D. Cal. 2008)*; *Online Policy Group v. Diebold Inc., 337 F. Supp. 2d 1195, 1198 n.4 (N.D. Cal. 2004)*. As Norwood identified no legal authority suggesting otherwise, the Court dismissed with prejudice her request for damages for copyright misuse. Order p. 6. Norwood did identify a case suggesting that copyright misuse may be asserted as a counterclaim for declaratory judgment. *See Apple Inc. v. Psystar Corp., No. C 08-03251 WHA, 2009 U.S. Dist. LEXIS 14370, 2009 WL 303046, *2 (N.D. Cal. 2009)*. The Court gave Norwood leave to amend her copyright misuse claim for declaratory relief against Adobe, but made clear that the claim could only survive if Norwood alleged facts showing the applicability of the first sale doctrine. Order p. 7 (citing *Adobe Systems v. Kornrumpf, 2011 U.S. Dist. LEXIS 4956, 2011 WL 181375 at *2)*.

Norwood **[*12]** bears the burden of alleging facts sufficient to support her cause of action. *See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. To show the applicability of the first sale doctrine, the Court said that Norwood must plead facts that distinguish her case from *Vernor* in her amended complaint. Order p. 7. In *Vernor*, the court said that the first sale doctrine does not apply to one who possesses a copy of a copyrighted work without owning it, such as a licensee. *Vernor, 621 F.3d at 1107*. The Court noted that Norwood had made only conclusory allegations that her purchase of the software from "other third party distributors" was "legitimate" and that she "failed to plead facts to suggest that title was transferred to her" or "provide information regarding the terms under which the third party distributors obtained the software." Order pp. 7-

8. The court said that to sustain a copyright misuse claim against Adobe in her amended pleading, "Norwood must plead facts showing that title of the software in question was properly transferred to her." Order p. 8.

In her amended counterclaims, Norwood attempts to demonstrate that Adobe's software distribution method constitutes a first sale under **[*13]** the first sale doctrine. Norwood argues that sales of Adobe software to computer and other component hardware manufacturers who sell the software as a "'package deal'" with hardware products constitutes a first sale because **[**1958]** ownership in the copies of the software is transferred to the hardware manufacturers. Amended Counterclaims at ¶ 13. Norwood claims that Adobe sells its software products to resellers under the terms of "*sales contracts*" that exclude provisions typical of end user license agreements and include provisions indicating transfer of ownership. *Id.* at ¶ 14 (emphasis in original). As examples of these provisions, Norwood provides that Adobe allows for no refunds or exchanges of the copies of the software and that the contracts do not place restrictions on the reseller's ability to resell the copies of the software, indicating that "Adobe relinquishes its control of the software copies." *Id.*

Norwood also claims that copies of Adobe's CS4 software, which Norwood allegedly sold on eBay, contain no licensing restrictions on the face of the packaging or on the CDs containing the software. Norwood acknowledges in her amended counterclaims, however, that print inside the CD case **[*14]** states: "'Notice to Users: This product is offered subject to your acceptance of the license agreement included with the media and to limited warranty terms. See www.adobe.com/products/eulas for details.'" *Id.* at ¶ 26. When the user goes to that website, a licensing agreement is downloaded to the user's computer. *Id.* at ¶ 27. The agreement includes these terms:

> Adobe products are not sold; rather, copies of Adobe products . . . are licensed all the way through the distribution channel to the end user. UNLESS YOU HAVE ANOTHER AGREEMENT DIRECTLY WITH ADOBE THAT CONTROLS AND ALTERS YOUR USE OR DISTRIBUTION OF THE ADOBE PRODUCTS, THE TERMS AND CONDITIONS OF THE APPLICABLE LICENSE AGREEMENTS BELOW APPLY TO YOU.

Amended Counterclaims Exh. B (capital letters in original).

Norwood argues that this agreement "only purports to apply to the end-user of the software, rather than any of the prior purchasers from Adobe and its customers." Amended Counterclaims at ¶ 27. The language on Adobe's website, however, which Norwood attaches to her amended counterclaims, explicitly indicates that Adobe products are "licensed all the way through the distribution channel . . . ." Amended Counterclaims Exh. B. **[*15]** This contradicts Norwood's allegation that the license agreements only apply to end users and not to her or her supplier. Norwood does not plead facts indicating that either she or her supplier, Bea's Hive, have another agreement directly with Adobe that would make the license agreement quoted above inapplicable to them. The amended counterclaims and the exhibits attached by Norwood make clear that her Adobe products were licensed, not sold.

Norwood does not plead facts that distinguish her case from *Vernor*. The Court GRANTS Adobe's motion to dismiss Count One of the amended counterclaims, with prejudice.

II. Count Five: Violation of California's Unfair Competition Law

The Court granted Norwood leave to amend her third original counterclaim, which alleged violation of the California Unfair Competition Law (UCL) by restraint of trade. The original counterclaim related her UCL claim to her antitrust claim (that "Counter-Defendants conspired to and did restrain trade in ways that violated federal and state antitrust laws, and/or that violated the policy and spirit of such laws and threatened their incipient violation") and it was dismissed. *See* Counterclaims at ¶ 47. But Norwood argued that **[*16]** her defamation, false light, and/or disparagement claims could support the UCL claim. *See* Order p. 4. The Court granted Norwood leave to amend her UCL claim to plead causes of action other than antitrust, including defamation, false light, and/or business disparagement.

Norwood's amended counterclaims incorporate paragraphs 1 through 100 — including her copyright misuse, defamation, false light, and business disparagement claims — into her UCL claim. Norwood alleges that the "concerted and anticompetitive acts of Counter-Defendants. . . constitute unlawful and unfair business acts and practice and unfair competition." Amended Counterclaims at ¶ 102. She alleges that counter-defendants "conspired to and did commit unlawful, unfair and fraudulent actions, generally targeted at all eBay and Amazon resellers of Adobe software, including specifically Ms. Norwood." *Id.* In so doing, Norwood says, "Counter-defendants have also violated the U.S. Copyright Act . . . [and] have also violated specific California and/or other statutes, including statutes which prohibit defamation, false light and/or business **[**1959]** disparagement — each of which are unlawful, unfair, or fraudulent torts." *Id.* **[*17]** at ¶¶ 103-04.

California's Unfair Competition Law prohibits any "unlawful, unfair or fraudulent business act or practice." *Cel-Tech Communic'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 539 (Cal. 1999)*; *Cal. Bus. & Prof. Code § 17200 et seq*. "By proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Id. at 539-40* (internal quotation marks and citations omitted). The law was "'intentionally framed in its broad, sweeping language.'" *Id. at 540* (citation omitted).

"Violation of almost any federal, state or local law may serve as the basis for a UCL claim." *Kornrumpf, 2011 U.S. Dist. LEXIS 4956, 2011 WL 181375 at *5* (citation omitted). The "unlawful" practices prohibited by *section 17200* are "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)* (citing *People v. McKale, 25 Cal. 3d 626, 159 Cal. Rptr. 811, 602 P.2d 731 (Cal. 1979))*. Norwood attempts to ground her UCL claim in (1) her allegations that defendants committed certain anticompetitive acts; (2) her allegations **[*18]** of copyright misuse; and (3) her defamation, false light, and business disparagement claims. In the Court's previous Order, it dismissed alleged anticompetitive acts as a basis for Norwood's UCL claim. To the extent that her UCL claim is still based on alleged anticompetitive acts, it is dismissed. Because the Court has now dismissed Norwood's copyright misuse claim, Norwood's UCL claim is dismissed with prejudice to the extent that it is based on a violation of the federal Copyright Act. However, Norwood's UCL claim can be supported by her defamation, false light, and business disparagement claims. The Court DENIES Adobe's motion to dismiss Norwood's UCL claim to the extent that the claim is based on Norwood's defamation, false light, and business disparagement claims.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS Adobe's motion to dismiss Count One of the amended counterclaims, with prejudice. The Court DENIES Adobe's motion to dismiss Count Five of the amended counterclaims to the extent it is supported by Norwood's defamation, false light, and/or business disparagement claims. Count Five of the amended counterclaims is DISMISSED with prejudice **[*19]** to the extent it is based on an alleged violation of the federal Copyright Act or alleged anticompetitive acts.

IT IS SO ORDERED.

Dated: July 6, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

End of Document

Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.

United States District Court for the Eastern District of Wisconsin

July 6, 2011, Decided

Case No. 09C0852; Case No. 10C0224; Case No. 11C0162

Reporter

795 F. Supp. 2d 847 *; 2011 U.S. Dist. LEXIS 72198 **; 2011-1 Trade Cas. (CCH) P77,521

FOND DU LAC BUMPER EXCHANGE, INC., on behalf of itself and others similarly situated, Plaintiffs, v. JUI LI ENTERPRISE COMPANY, LTD., et al., Defendants.VEHIMAX INTERNATIONAL, LLC, on behalf of itself and others similarly situated, Plaintiffs, v. JUI LI ENTERPRISE COMPANY, LTD., et al., Defendants.ARKANSAS TRANSIT, ARKANSAS TRANSIT HOMES, INC., OLIVIA LEE, PATRICK TORREY, MARY FOWLER, et al., Plaintiffs, v. JUI LI ENTERPRISE COMPANY LTD., et al., Defendants

Subsequent History: Motion denied by *Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., 2012 U.S. Dist. LEXIS 125677 (E.D. Wis., Sept. 5, 2012)*

Prior History: *Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., 753 F. Supp. 2d 792, 2010 U.S. Dist. LEXIS 125978 (E.D. Wis., Nov. 30, 2010)*

Core Terms

commerce, import, defendants', Sherman Act, antitrust, anti-competitive, conspiracy, domestic, interlocutory appeal, price fixing, export, prices, foreign nation, plaintiffs', consumers

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN1[] **Relief From Judgments, Altering & Amending Judgments**

Courts have the inherent power to revisit prior decisions. *Fed. R. Civ. P. 54(b)* states that courts may revise interlocutory decisions at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Because a motion for reconsideration serves the limited purpose of correcting manifest errors of law or fact or of presenting newly discovered evidence, movants generally face an uphill battle.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN3[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act (FTAIA), *15 U.S.C.S. § 6(a)*, removes from the jurisdiction of the Sherman Act the following conduct: conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless – (1) such conduct has a direct, substantial, and reasonably forseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of the FTAIA, other than *§ 6a*. *15 U.S.C.S. § 6a*.

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN4[] **International Commerce & Trade, Exports & Imports**

Import trade or commerce consists of transactions in which the seller is located abroad, the buyer is domestic, and the goods flow into the United States. In determining whether defendants' conduct involved import trade or commerce, a court focuses on the nature of the transactions in which they allegedly engaged, not on their nationalities.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

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

HN5[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act, *15 U.S.C.S. § 6(a)*, affirms that the purpose of the Sherman Act is to protect consumers and businesses in the American marketplace from injuries arising from anticompetitive activity.

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

HN6[] **Sherman Act, Scope**

A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

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

HN7[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act, *15 U.S.C.S. § 6(a)*, provides that activities carried out abroad such as limiting imports or fixing the price of imported products are subject to the Sherman Act.

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

HN8[] Per Se Rule & Rule of Reason, Per Se Violations

Where defendants' price fixing conspiracy targets American commerce, defendants' conduct has a direct, substantial and foreseeable effect on domestic commerce.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN9[] Appellate Jurisdiction, Interlocutory Orders

A court may certify a question for interlocutory appeal under *28 U.S.C.S. § 1292(b)* if it presents a controlling question of law as to which there is a substantial ground for difference of opinion and an intermediate appeal may materially advance the progress of the case. For a court to grant a *§ 1292(b)* petition, there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation. The party seeking interlocutory review has the burden of persuading the court that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

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

HN10[] Appellate Jurisdiction, Interlocutory Orders

The question of whether a plaintiff's complaint satisfies the pleading standard involves the routine application of a settled legal standard to facts alleged in a complaint and does not present the type of exceptional circumstance justifying an interlocutory appeal.

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For Olivia Lee, Patrick Torrey (2:09-cv-00852-LA), Consolidated Plaintiffs: Brad Yamaguchi, Derek G Howard, Minami Tamaki LLP, San Francisco, CA; Corey Mather, David J Syrios, Ademi & O'Reilly LLP, Cudahy, WI; Daniel R Karon, Goldman Scarlato & Karon PC, Cleveland, OH; Daniel J Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; Donna F Solen, Mason LLP, Washington, DC; Garrett D Blanchfield, Reinhardt Wendorf & Blanchfield, St Paul, MN; Ilan Chorowsky, Progressive Law Group LLC, Chicago, IL; Isaac L Diel, Sharp McQueen PA, Bonner Springs, KS; Jeffrey A Leon, Freed & Weiss LLC, Chicago, IL; John Gressette Felder, Jr, McGowan Hood Felder and Johnson, Columbia, SC; Krishna B Narine, The Law Office of Krishna B Narine, Huntingdon Valley, PA; Mary Gilmore Kirkpatrick, Kirkpatrick & Goldsborough PLLC, South Burlington, **[**4]** VT; Richard Lee Quintus, Roberts Law Firm PA, Little Rock, AR.

For Jui Li Enterprise Company Ltd (2:09-cv-00852-LA), Defendant: Joseph W Voiland, Mark A Cameli, Rebecca Frihart Kennedy, Reinhart Boerner Van Deuren SC, Milwaukee, WI; Robert M Kalec, Dean & Fulkerson PC, Troy, MI.

For Taiwan Kai Yih Industrial Co Ltd (2:09-cv-00852-LA), Defendant: Joseph W Voiland, Mark A Cameli, Reinhart Boerner Van Deuren SC, Milwaukee, WI; Robert M Kalec, Dean & Fulkerson PC, Troy, MI.

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For Auto Parts Industrial Ltd (2:09-cv-00852-LA), Defendant: Dante A Stella, Dykema Gossett PLLC, Detroit, MI; Howard B Iwrey, Dykema Gossett PLLC, Bloomfield Hills, MI; J Kevin Snyder, Dykema Gossett PLLC, Los Angeles, CA.

For Cornerstone Auto Parts LLC (2:09-cv-00852-LA), Consolidated Defendant: Dante A Stella, Dykema **[**5]** Gossett PLLC, Detroit, MI; Howard B Iwrey, Dykema Gossett PLLC, Bloomfield Hills, MI.

For TYG Products LP (2:09-cv-00852-LA), Consolidated Defendant: Joseph W Voiland, Mark A Cameli, Reinhart Boerner Van Deuren SC, Milwaukee, WI; Robert M Kalec, Dean & Fulkerson PC, Troy, MI.

For Roberts Wholesale Body Parts Inc (2:09-cv-00852-LA), Movant: Jason M Lindner, Jason S Hartley, Stueve Siegel Hanson LLP, San Diego, CA; Jessica N Servais, Vincent J Esades, Heins Mills & Olson PLC, Minneapolis, MN; K Scott Wagner, Hale & Wagner SC, Milwaukee, WI.

For Vehimax International LLC, on behalf of itself and all others similarly situated (2:10-cv-00224-LA), Plaintiff: Eric L Dirks, Patrick J Stueve, LEAD ATTORNEYS, PRO HAC VICE, Stueve Siegel Hanson LLP, Kansas City, MO; Jason M Lindner, Jason S Hartley, LEAD ATTORNEYS, Stueve Siegel Hanson LLP, San Diego, CA.

For Taiwan Kai Yih Industrial Co Ltd (2:10-cv-00224-LA), Defendant: Mark D Campbell, LEAD ATTORNEY, Loeb & Loeb LLP, Los Angeles, CA; Robert M Kalec, PRO HAC VICE, Dean & Fulkerson PC, Troy, MI.

For Gordon Auto Body Parts, Gordon Auto Parts USA Corp (2:10-cv-00224-LA), Defendants: Michael B Brennan, Gass Weber Mullins LLC, Milwaukee, WI.

For Auto **[**6]** Parts Industrial Ltd (2:10-cv-00224-LA), Defendant: Dante A Stella, LEAD ATTORNEY, Dykema Gossett PLLC, Detroit, MI; Howard B Iwrey, LEAD ATTORNEY, PRO HAC VICE, Dykema Gossett PLLC, Bloomfield Hills, MI; J Kevin Snyder, LEAD ATTORNEY, Dykema Gossett PLLC, Los Angeles, CA.

For Arkansas Transit Homes Inc (2:11-cv-00162-LA), Plaintiff: Ben Barnow, Blake A Strautins, Barnow and Associates PC, Chicago, IL; Corey Mather, David J Syrios, Guri Ademi, John D Blythin, Shpetim Ademi, Ademi & O'Reilly LLP, Cudahy, WI; Howard M Bushman, Lance A Harke, Harke Clasby & Bushmann LLP, Miami Shores, FL; John C Cabaniss, Cabaniss Law, Milwaukee, WI; Michael L Roberts, Richard Lee Quintus, Roberts Law Firm PA, Little Rock, AR.

For Mary Louise Fowler, Patrick Torrey, Olivia Lee (2:11-cv-00162-LA), Plaintiffs: Brad Yamaguchi, Derek G Howard, Minami Tamaki LLP, San Franciso, CA; Daniel R Karon, Goldman Scarlato & Karon PC, Cleveland, OH; Daniel J Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; Donna F Solen, Mason LLP, Washington, DC; Garrett D Blanchfield, Reinhardt Wendorf & Blanchfield, St Paul, MN; Ilan Chorowsky, Progressive Law Group LLC, Chicago, IL; Isaac L Diel, Sharp McQueen PA, Bonner **[**7]** Springs, KS; Jeffrey A Leon, Freed & Weiss LLC, Chicago, IL; John Gressette Felder, Jr, McGowan Hood Felder and Johnson, Columbia, SC; Krishna B Narine, The Law Office of Krishna B Narine, Huntingdon Valley, PA; Mary Gilmore Kirkpatrick, Kirkpatrick & Goldsborough PLLC, South Burlington, VT; David J Syrios, Ademi & O'Reilly LLP, Cudahy, WI.

Judges: LYNN ADELMAN, District Judge.

Opinion by: LYNN ADELMAN

Opinion

[*849] **DECISION AND ORDER**

Plaintiffs, Fond du Lac Bumper Exchange, Inc. and Vehimax International, LLC, American purchasers of sheet metal aftermarket auto parts ("AM Parts"), bring these, now consolidated, putative class actions alleging that defendants, Taiwanese manufacturers of such parts and their American subsidiaries, violated *Section 1* of the Sherman Anti-Trust Act by conspiring to fix the prices of many AM Parts sold in the United States and to engage in other anti-competitive conduct such as reducing the availability of AM Parts and sharing the tools used to produce such parts. Plaintiffs further allege that they were injured as a result of defendants' conspiracy by being forced to pay higher prices for AM Parts and having diminished choice in the market. Pursuant to *Fed. R. Civ. P. 12(b)(1)*, defendants' **[**8]** moved to dismiss for lack of subject matter jurisdiction, and pursuant to *Fed. R. Civ. P. 12(b)(6)*, for failure to state a claim. I denied both motions. Before me now are defendants motions to reconsider my decision on the *Rule 12(b)(1)* motion. Alternatively, defendants ask me to certify both the *Rule 12(b)(1)* and *12(b)(6)* issues for interlocutory appeal.

HN1[] Courts have the inherent power to revisit prior decisions. *In re Text Messaging Antitrust Litig., 630 F.3d 622, 627 (7th Cir. 2010)*; see also *Fed. R. Civ. P. 54(b)* (stating that courts may revise interlocutory decisions "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"). Because a motion for reconsideration serves the limited purpose of correcting manifest errors of law or fact or of presenting newly discovered evidence, *Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987)*, movants generally face an uphill battle.

HN2[] The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. Defendants argue that, based **[**9]** on the Foreign Trade Antitrust Improvements Act ("FTAIA"), *15 U.S.C.A. § 6(a)*, I lack jurisdiction under the Sherman Act. ***HN3***[] The FTAIA removes from the jurisdiction of the Sherman Act the following conduct: conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably forseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

[*850] (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

15 U.S.C. § 6a. Defendants assert that their alleged anti-competitive conduct took place in Taiwan because they sold the parts in question to plaintiffs in Taiwan. Thus, they contend that their conduct involved purely foreign commerce, not import or domestic commerce and therefore is not within the Sherman Act. Defendants also contend that their conduct did not have the necessary effect on domestic commerce to fall within the Sherman Act **[**10]** and that any effect it may have had did not give rise to plaintiffs' claim.

In order to resolve defendants' motions, I must first consider whether defendants' alleged activities involved import trade or commerce within the FTAIA. ***HN4***[] Import trade or commerce consists of transactions in which the seller is located abroad, the buyer is domestic, and the goods flow into the United States. Phillip E. Areeda and Herbert Hovenkamp, ***Antitrust Law***, An Analysis of Antitrust Principles and Their Application, Vol. 1B, 3rd ed. § 272i, at 290 (2006). In determining whether defendants' conduct involved import trade or commerce, I focus on the nature of the transactions in which they allegedly engaged, not on their nationalities. Id. I note also that Congress enacted the FTAIA because, as the scope of antitrust liability expanded under the broad jurisdictional language of the Sherman Act, it became concerned that the Sherman Act was excessively hospitable to suits alleging foreign injuries rather than injuries to American consumers. Id. at 287. Another Congressional concern was that ***antitrust law*** could impair the ability of American businesses to export their products efficiently as, for example, through **[**11]** joint ventures. Id. Thus, ***HN5***[] the FTAIA affirms that the purpose of the Sherman Act is to protect consumers and businesses in the American marketplace from injuries arising from anticompetitive activity.

In my previous decision, I found that the transactions in which defendants allegedly engaged involved import commerce and, having reviewed the parties' recent submissions, I conclude that that conclusion was correct. The evidence strongly supports the conclusion that the activities that defendants engaged in were not the type of activities that Congress intended to exclude from Sherman Act jurisdiction. The evidence suggests that defendants' alleged conspiracy focused on setting the prices of parts that were manufactured for the purpose of being sold in the United States and that such parts were in fact sold in the United States at prices established by the anti-competitive agreement. The complaint and the evidence indicate that there is a large American market for the parts in question (far larger than any market that might exist in Taiwan). The complaint and the evidence further indicate that defendants negotiated the sales of parts to importers at prices and in amounts established by **[**12]** the conspiracy and delivered the parts to their ships for transport to the United States. In addition, defendants traveled to the United States to market the parts and established affiliates in the United States to import, distribute and service them. Further, at least one defendant, an American affiliate, itself brought AM parts into the United States.

The foregoing conduct clearly involves import commerce. Defendants' contention that because they may have sold the parts in Taiwan they were not involved in import commerce is based on an unduly narrow **[*851]** understanding of import commerce. Even if defendants transferred title to the parts to plaintiffs in Taiwan and did not themselves ship the parts into the United States, by allegedly agreeing to fix the prices of parts to be sold in the United States and taking the additional steps described above, defendants' conduct involved import commerce. As discussed, the purpose of American ***antitrust law*** is to protect the American marketplace from anti-competitive injury, and the FTAIA reaffirms that purpose. The FTAIA does not immunize foreign export cartels such as that allegedly established by defendants from liability for anti-competitive activity **[**13]** in the American marketplace. Defendants' proposed narrow reading of import commerce would have the perverse effect of encouraging companies to engage in off-shore anti-competitive activity designed to harm American consumers and importers.

A number of cases as well as the legislative history of the FTAIA make this point. See, e.g., *Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 704-05, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (stating that ***HN6***[] "a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"); see also *McBee v. Delica Co., 417 F.3d 107, 119 (1st Cir. 2005)* (stating that "absent a certain degree of extraterritorial enforcement, violators will either take advantage of international coordination problems or hide in countries without efficacious antitrust or trademark laws, thereby avoiding legal authority"); *Pub. Law 97-290*, Export Trading Company Act of 1982, H.R. Rep. 97-686, as reprinted in 1982 U.S.C.C.A.N. 2487, 2494-95 (stating that "it is important that there be no misunderstanding that import restraints which can be damaging to American consumers remain **[**14]** covered by the law" and noting that foreign ***antitrust law*** applies to the activities of American exporters); *Restatement (Third) of the Foreign Relations Law of the United States, Part IV § 415 cmt. b* (1987) (stating that ***HN7***[] the FTAIA provides that activities carried out abroad such as "limiting imports or fixing the price of imported products" are subject to the Sherman Act).

Thus, because defendants' activities involved import trade or commerce, the FTAIA does not bar jurisdiction under the Sherman Act. Even assuming, arguendo, that the FTAIA does apply, the domestic effects exception in the statute would also apply and would bring defendants' activities within the Sherman Act. The evidence indicates that defendants control 95% of the American AM parts market and that by using their combined market power to raise prices and limit the range of products imported into the United States, their alleged conduct had a direct, substantial and foreseeable effect upon import and domestic commerce. See, e.g., *Riverdell Forest Products, Ltd. v. Canadian Forest Products, Ltd., 810 F. Supp. 1116 (D. Colo. 1993)* (finding direct effect on import commerce where foreign price fixing conspiracy targeted **[**15]** American importers); see also *In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal. Dec. 31, 2010)* (stating that ***HN8***[] where defendants' price fixing conspiracy targeted American commerce, defendants' conduct had a direct, substantial and foreseeable effect on domestic commerce). In short, defendants' activities "were intended to affect imports and did affect them." *United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945)*.

Finally, the evidence indicates that plaintiffs' alleged injuries arose directly from the effect of defendants' alleged anti-competitive conduct. After all, fixing the **[*852]** prices that American buyers like plaintiffs had to pay for AM parts was the whole point of the alleged conspiracy.

As an alternative form of relief, pursuant to *28 U.S.C. § 1292(b)*, defendants request that I certify for interlocutory appeal the issues of subject matter jurisdiction and the sufficiency of the complaint. ***HN9***[] I may certify a question for interlocutory appeal under *§ 1292(b)* if it presents "a controlling question of law as to which there is a substantial ground for difference of opinion and . . . an intermediate appeal **[**16]** . . . may materially advance" the progress of the case. For a court to grant a *§ 1292(b)* petition, "there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation." *Ahrenholz v. Bd. of Trs. of Univ. of Ill., 219 F.3d 674, 675 (7th Cir.2000)*. The party seeking interlocutory review has the burden of persuading the court that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Fisons Ltd. v. United States, 458 F.2d 1241, 1248 (7th Cir.1972)*.

I decline to certify for intermediate appeal either of the issues defendants raise. The subject matter jurisdiction issue presents a controlling question of law because a determination of no subject matter jurisdiction would end the case. However, if the facts are as plaintiffs allege, defendants' activities clearly involved import commerce and/or had a direct, substantial and foreseeable effect on American consumers and as a result the issue is only marginally contestable. Moreover, an interlocutory appeal is unlikely to speed up resolution of the issue. This is so not only because **[**17]** an appeal would take considerable time but also because I can revisit the issue if discovery indicates that defendants' activities were less oriented toward the American market than it appears.

The question of whether plaintiffs' amended complaint states a claim likely presents a controlling question of law. See *In re Text Messaging, 630 F.3d at 626*. However, the question is not contestable. This is so because in In re Text Messaging, the Seventh Circuit considered the pleading standard and stated that direct evidence of an agreement to raise prices would be a "smoking gun" sufficient to state a plausible antitrust claim. *Id. at 628-29*. In the present case, plaintiffs' complaint identifies an admission that defendants no longer compete on price and have achieved very high profit margins by working together to jointly develop the American market. Thus, ***HN10***[] the question of whether plaintiffs' complaint satisfies the pleading standard involves the routine application of a settled legal standard to facts alleged in a complaint and does not present the type of exceptional circumstance justifying an interlocutory appeal. See *id. at 626-27*.

Therefore, for the reasons stated, defendants' motions **[**18]** for reconsideration or in the alternative for a certificate of an interlocutory appeal are **DENIED.**

Dated at Milwaukee, Wisconsin this 6th day of July 2011.

/s/

LYNN ADELMAN

District Judge

End of Document

Nokia Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.)

United States District Court for the Northern District of California

July 6, 2011, Decided; July 6, 2011, Filed

No. M 07-1827 SI, MDL No. 1827; No. C 09-05609 SI

Reporter

2011 U.S. Dist. LEXIS 72389 *; 2011-1 Trade Cas. (CCH) P77,533; 2011 WL 2650689

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION This Order Relates To: NOKIA CORPORATION, et al., Plaintiffs, v. AU OPTRONICS CORPORATION, et al., Defendants.

Subsequent History: Motion denied by *Oregon v. AU Optronics Corp. (In re TFT-LCD (Fatal Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 76562 (N.D. Cal., July 11, 2011)*

Prior History: *AT&T Mobility LLC v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2010 U.S. Dist. LEXIS 72426 (N.D. Cal., July 19, 2010)*

Core Terms

arbitration, parties, arbitration agreement, compel arbitration, arbitration clause, contractual relationship, antitrust, discovery, disputes, waive, motion to compel arbitration, matters, argues, touch, motion to dismiss, conspiracy, purchases

Counsel: **[*1]** Martin Quinn (3:07-md-01827-SI), Special Master, Pro se, San Francisco, CA.

For Martin Quinn, Special Master: Martin Quinn, JAMS, San Francisco, CA.

Mr. Daniel Weinstein, Special Master, Pro se, San Francisco, CA.

For Giles Patricia, 07-3078, Plaintiff: Samuel W. Lanham, Jr., LEAD ATTORNEY, Lanham & Blackwell, Bangor, ME.

For Gina Cerda 07-1339, Linda Klare, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA.

For ATS Claim, LLC, Plaintiff: David Paul Germaine, LEAD ATTORNEY, David Paul Germaine, LEAD ATTORNEY, PRO HAC VICE, Chicago, IL; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA.

For Direct Purchaser Plaintiffs, Plaintiff: Daniel L. Warshaw, LEAD ATTORNEY, Pearson, Simon, Warshaw & Penny LLP, Sherman Oaks, CA; Eric B. Fastiff, LEAD ATTORNEY, Lieff, Brendan Patrick Glackin, Cabraser, Heimann & Bernstein,LLP, San Francisco, CA; Hilary Kathleen Ratway, LEAD ATTORNEY, Hausfeld, LLP, Washington, DC; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For BellSouth Telecommunications, Inc. 09-4997, Pacific Bell Telephone Company 09-4997, **[*2]** Southwestern Bell Telephone Company 09-4997, Plaintiff: Christopher T. Leonardo, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC; Jeffrey H. Howard, PRO HAC VICE, Jeffrey H. Howard, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Joshua C. Stokes, Crowell & Moring LLP.

For Nokia Corporation 09-5609, Nokia Inc. 09-5609, Plaintiff: Brian Parker Miller, Donald MacKaye Houser, Joann Elizabeth Johnston, Kacy Christine McCaffrey, Valarie Cecile Williams, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Lisa Kathleen Bojko, Alston & Bird, Atlanta, GA; Matthew Scott Orrell, Atlanta, GA; Matthew D. Richardson, Peter Konito, ALSTON BIRD LLP, Atlanta, GA; Randall Lee Allen, Alston and Bird, Menlo Park, CA; Richard W. Stimson, Alston & Bird LLP, Dallas, TX.

For AT & T Corp. 09-4997, AT & T Datacomm, Inc. 09-4997, AT & T Mobility LLC 09-4997, AT & T Operations, Inc. 09-4997, AT & T Services, Inc. 09-4997, Target Corp. 10-4945, Kmart Corp 10-4945, Sears, Roebuck and Co. 10-4945, Good Guys, Inc. 10-4945, Newegg Inc. 10-4945, Old Comp **[*3]** Inc. 10-4945, Radioshack Corp. 10-4945, Plaintiff: Christopher H. Wood, Christopher T. Leonardo, Adams Holcomb LLP, Washington, DC; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC.

For Electrograph Systems, Inc. 10-117, Electrograph Technologies, Corp., 10-117, Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Philip J Iovieno, Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Dell Inc. 10-1064, Dell Products, L.P. 10-1064, Plaintiff: Andrew Jacob Tuck, Debra Dawn Bernstein, Elizabeth Helmer Jordan, Alston and Bird LLP, Atlanta, GA; Matthew David Kent, Alston + Bird LLP, Atlanta, GA; Michael P. Kenny, Rodney J Ganske, ALSTON & BIRD LLP, Atlanta, GA; Steven Daniel Hemminger, Alston & Bird LLP, Menlo Park, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, **[*4]** Alioto Law Firm, San Francisco, CA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN;Derek G. Howard, Minami Tamaki LLP, San Francisco, CA;Michael Morteza Kowsari, Attorney at Law, Los Angeles, CA; Stephen Gerard Larson, Girardi & Keese, Los Angeles, CA; Steven J Foley, Hellmuth and Johnson PLLC, Edina, MN, Unites Sta; Gregory W. Landry, LaMarca & Landry, P.C.; Marvin A. Miller, Miller Law LLC.

For State of Oregon, 10-4346, ex rel. John Kroger, Attorney General, Plaintiff: Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Michael K. Kelley, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Tim David Nord, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

For Direct Purchaser Plaintiffs, Plaintiff: Joseph Richard Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Brendan Patrick Glackin, Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, **[*5]** Warshaw & Penny, LLP, San Francisco, CA.

For Tracfone Wireless, Inc., 10-3205, Plaintiff: David Bedford Esau, James Blaker Baldinger, Carlton Fields, P.A., West Palm Beach, FL; Robert L. Ciotti, Carlton Fields, Tampa, FL.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General, Plaintiff: Anne E. Schneider, LEAD ATTORNEY, Attorney General of Missouri, Liaison Counsel for the State Actions, Jefferson City, MO.

For State of Arkansas, 10-3619, ex rel. Dustin McDaniel, Attorney General, Plaintiff: David A. Curran, Assistant Attorney General, Little Rock, AR.

For State of Michigan, 10-3619, ex rel. Michael A. Cox, Attorney General, Plaintiff: Mary Elizabeth Lippitt, Michigan Attorney General, Assistant Attorney General, Lansing, MI.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General, Plaintiff: Andrew McNally Hartnett, Office of the Missouri Attorney General, Jefferson City, MO; Anne E. Schneider, Attorney General of Missouri Consumer Protection, Jefferson City, MO.

For State of West Virginia, 10-3619, ex rel Darrell McGraw, Attorney General, Plaintiff: Douglas Lee Davis, Attorney General, Consumer Protection and Antitrust, Charleston, WV; Jill L. Miles, Assistant **[*6]** Attorney General, Charleston, WV.

For State of Wisconsin, 10-3619, ex rel J.B. Van Hollen, Attorney General, Plaintiff: Gwendolyn J. Cooley, Wisconsin Attorney General, Madison, WI.

For State of Florida, Office of the Attorney General, Department of Legal Affairs, 10-3517, Plaintiff: Eli Friedman, Office of the Attorney General, State of Florida, Tallahassee, FL; Lizabeth Ann Leeds Brady, Robert Scott Palmer, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Liaison Counsel for the State Actions, Tallahassee, FL.

For Best Buy Co., Inc. 10-4572, Best Buy Enterprise Services, Inc. 10-4572, Best Buy Purchasing LLC 10-4572, Best Buy Stores, L.P. 10-4572, Magnolia Hi-Fi, Inc. 10-4572, Plaintiff: David Martinez, LEAD ATTORNEY, Michael A. Geibelson, Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Robins Kaplan Miller and Ciresi LLP, Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi, Minneapolis, MN; K. Craig Wildfang, Attorney at Law, Minneapolis, MN.

For The People of the State of California, 10-5212 - ex **[*7]** rel. Edmund G. Brown, Jr., Attorney General of the State of California, as parens patriae on behalf of natural persons residing in the state, Plaintiff: Adam Miller, CA Dept of Justice, ***Antitrust Law*** Section, San Francisco, CA.

For Eastman Kodak Company, 10-5452, Plaintiff: John R. Foote, Karl David Belgum, Nixon Peabody LLP, San Francisco, CA.

For SB Liquidation Trust, 10-5458, Plaintiff: Allan Diamond, Jason Paul Fulton, Jim McCarthy, Diamond McCarthy LLP, Dallas, TX; Erica W. Harris, Susan Godfrey LLP, Houston, TX; Marc M. Seltzer, Ryan Christopher Kirkpatrick, Steven Gerald Sklaver, Susman Godfrey LLP, Los Angeles, CA.

For Costco Wholesale Corp., 11-0058, Plaintiff: Cori G. Moore, Noah G. Purcell, Perkins Coil LLP, Seattle, WA; David J. Burman, Perkins Coie LLP, Seattle, WA; Troy Philip Sauro, Perkins Coie LLP, San Francisco, Ca.

For Sony Computer Entertainment America, LLC 10-5616, 10-5620, Sony Electronics, Inc. 10-5616, 10-5620, Plaintiff: David Mark Goldstein, Esq., Orrick, Herrington & Sutcliffe LLP, San Francisco, CA; Richard James Mooney, Robert L. Stolebarger, Holme Roberts & Owen LLP, San Francisco, CA; Stephen V. Bomse, Orrick Herrington & Sutcliffe, San Francisco, CA.

For **[*8]** Alfred H. Siegel, 10-5625, as Trustee of the Circuit City Stores, Inc. Liquidating Trust, Plaintiff: H. Lee Godfrey, Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Jordan Connors, Parker C. Folse, III, Susman Godfrey LLP, Seattle, WA; Marc M. Seltzer, Susman Godfrey LLP, Los Angeles, CA.

For State of New York, 11-0711, Plaintiff: Jeremy R. Kasha, New York State Office of the Attorney General (NYC), New York, NY.

For LG Display Co., Ltd., (D, I, 09-1115) formerly known as LG Philips LCD Co., LTD., Defendant: Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC; Jeremy James Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I, 09-1115), Samsung Electronics America, Inc., (D, I, 09-1115), Defendants: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, Jeffrey Michael Davidson, Timothy C. Hester, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Steven D Sassaman, Timothy C. Hester, Covington and Burling, San Francisco, CA.

For Sharp Corporation, (D, I, 09-1115), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, John **[*9]** M. Grenfell, Ryan Takemoto, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Anne Benton Kaldor, Bingham McCutchen, San Francisco, CA; Colin C. West, McCutchen, Doyle, Brown & Enersen, LLP, San Francisco, CA; Erin Alysa Smart, Bingham McCutchen LLP, San Francisco, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New York, NY; Lindsay A. Lutz, Pillsbury Winthrop Shaw Pittman, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY, Jon R. Roellke, Bingham McCutchen.

For Sharp Electronics Corporation, (D, I, 09-1115), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, John M. Grenfell, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Anne Benton Kaldor, Bingham McCutchen, San Francisco, CA; Colin C. West, McCutchen, Doyle, Brown & Enersen, LLP, San Francisco, CA; Erin Alysa Smart, Bingham McCutchen LLP, San Francisco, CA; Fusae Nara, Pillsbury Winthrop LLP, San Francisco, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New York, NY; Lindsay A. Lutz, Pillsbury Winthrop Shaw Pittman, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY; Jon R. Roellke, Bingham McCutchen.

For Toshiba Corporation, (D, I, 09-1115), Toshiba America Electronics Components, **[*10]** Inc. (D, I, 09-1115), Toshiba America Information Systems, Inc. (D, I, 09-1115), Toshiba Mobile Display Co., Ltd., Defendants: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; Kristen Jentsch McAhren, LEAD ATTORNEY, White and Case LLP, Washington, DC.

For Toshiba Matsushita Display Technology Co., Ltd., (D, I, 09-1115), Defendant: John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY.

For Hitachi Ltd., (D, I, 09-1115), Hitachi Displays, Ltd., (D, I, 09-1115), Defendants: Kent Michael Roger, Michelle Minju Kim-Szrom, Morgan Lewis & Bockius LLP, San Francisco, CA; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP.

For Hitachi America Ltd., (I), Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Electronic Devices (USA), Inc., (D, I, 09-1115), Defendant: Kent Michael Roger, LEAD ATTORNEY, Michelle Minju Kim-Szrom, Courtney Lynn Landis, Morgan Lewis & Bockius LLP, San Francisco, CA; John Clayton Everett, Jr., Morgan, Lewis & Bockius LLP.

For NEC LCD Technologies, Ltd., (D, I), Defendant: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For **[*11]** NEC Electronics America, Inc., (D, I), Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA; Edward G. Biester, III, Duane Morris LLP, Philadelphia, PA.

For AU Optronics Corporation, (D, I, 09-1115), Defendant: Christopher Alan Nedeau, LEAD ATTORNEY, Allison Marie Dibley, Esq., Bryan B. Barnhart, Carl Lawrence Blumenstein, Nossaman LLP, San Francisco, CA; Jessica Rae Madrigal, Nossaman Guthner Knox Elliott, San Francisco, CA; Kirk Christopher Jenkins, Sedgwick Detert Moran Arnold, Chicago, IL; Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

For AU Optronics Corporation America, (D, I, 09-1115), Defendant: John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Michael F. Healy, Esq., Sedgwick Detert Moran & Arnold, LLP, San Francisco, CA; Christopher Alan Nedeau, LEAD ATTORNEY, Allison Marie Dibley, Esq., Bryan B. Barnhart, Carl Lawrence Blumenstein, Nossaman LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Jessica Rae Madrigal, Nossaman Guthner Knox Elliott, San Francisco, CA; Kirk Christopher Jenkins, Sedgwick Detert **[*12]** Moran Arnold, Chicago, IL.

For Chi Mei Optoelectronics USA, Inc., (D, I, 09-1115), Defendant: John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Nathan Loy Walker, LEAD ATTORNEY, WilmerHale, Palo Alto, CA; Brent J. Gurney, PRO HAC VICE, Adam Michael Raviv, Therese Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP, Co-Liaison Counsel for defendants, Washington, DC, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., (D, I, 09-1115), Defendant: Joel Steven Sanders, Rachel S. Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Rebecca Justice Lazarus, Gibson, Dunn & Crutcher, San Francisco, CA; William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA; Robert W. Tarun, Roxane C. Busey, Baker & McKenzie LLP.

For Hannstar Display Corporation, (D, I, 09-1115), Defendant: Christoher M. Wyant, LEAD ATTORNEY, Hugh F. Bangasser, K&L Gates LLP, Seattle, WA; Hugh Frederick Bangasser, Julie Anne Halter, Ramona M. Emerson, K&L Gates, Seattle, WA; Jeffrey L. Bornstein, K&L Gates LLP, San Francisco, CA.

For Samsung Semiconductor, Inc., (D, I, **[*13]** 09-1115), Defendant: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Steven D Sassaman, Covington and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA; Tyler Mark Cunningham, Sheppard

Mullin Richter & Hampton, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Epson Imaging Devices Corporation, (D), Defendant: Jeffrey E. Faucette, LEAD ATTORNEY, Kimberly Linnell Taylor, Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA; Stephen P. Freccero, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA.

For CMO Japan Co., Ltd., (D, I, 09-1115), Chi Mei Corporation, (D, I, 09-1115), Defendants: John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Adam Michael Raviv, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP.

For NEC Electronic America, Inc., Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

For Nexgen **[*14]** Mediatech USA Inc, (D, 09-1115), Defendant: Caren K. Khoo, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr, New York, NY; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Adam Michael Raviv, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Brent J. Gurney, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP, Co-Liaison Counsel for defendants, Washington, DC, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For LG Electronics Inc., (D), Defendant: Samuel R. Miller, LEAD ATTORNEY, Robert Brooks Martin, III, Ryan M. Sandrock, Sidley Austin LLP, San Francisco, CA.

For Royal Phillips Electronics NV, Defendant: Garrard R. Beeney, LEAD ATTORNEY, Sullivan & Cromwell, New York, NY; Bradley P. Smith, Theodore Edelman, New York, NY.

For NEC Display Solutions of America, Inc., Defendant: Stephen Holbrook Sutro, George Dominic Niespolo, Duane Morris LLP, San Francisco, CA.

For Phillips Consumer Electronics North America, Defendant: R. Dale Grimes, LEAD ATTORNEY, Joshua Ray Denton, Bass Berry & Sims PLC, Nashville, TN; Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, **[*15]** CA.

For LG Electronics U.S.A.,Inc., (D), Defendant: A. Scott Ross, LEAD ATTORNEY, Neal & Harwell, Nashville, TN; Samuel R. Miller, LEAD ATTORNEY, Sidley Austin LLP, San Francisco, CA; Robert Brooks Martin, III, Ryan M. Sandrock, Sidley Austin LLP, San Francisco, CA.

For Chi Mei Optoelectronics Corporation, (D, I, 09-1115), Defendant: John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Steven F. Cherry, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC, DC.

For Chungwa Picture Tubes Ltd. ("CPT"), Defendant: Joel Steven Sanders, Gibson, Dunn & Crutcher LLP, San Francisco, CA.

For Mitsubishi Electric Corporation, Defendant: Terrence Joseph Truax, Jenner & Block LLC, Chicago, IL.

For Mitsubishi Electric & Electronics USA, Inc., Defendant: Michael T. Brody, PRO HAC VICE, Donald R. Harris, Robert J. Blazejowski, Terrence Joseph Truax, Jenner & Block LLC, Chicago, IL; Kenneth E. Keller, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA; Michael David Lisi, Krieg Keller Sloan Reilley & Roman, San Francisco, CA.

For IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendant: Kent Michael Roger, Morgan Lewis **[*16]** & Bockius LLP, San Francisco, CA.

For Samsung Electronics Company, Ltd., Defendant: Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Seiko Epson Corporation, Defendant: Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA.

For Epson Electronics America, Inc., (D), Dismissed as a indirect purchaser defendant on 4/1/08, Defendant: Jeffrey E. Faucette, LEAD ATTORNEY, Kimberly Linnell Taylor, Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA; Kevin C. McCann, LEAD ATTORNEY, Sean David Unger, Paul Hastings Janofsky &

Walker LLP, San Francisco, CA; Derek Francis Foran, Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA; Melvin R. Goldman, Morrison & Foerster, San Francisco, CA; David Lawrence Meyer, Morrison & Foerster, Washington, DC, United Sta.

For Syntax-Brillian Corp., Defendant: Herman Samuel Palarz, LEAD ATTORNEY, Tyre Kamins Katz & Granof, Los Angeles, CA.

For Nexgen Mediatech, Inc. ("Nexgen"), (D, 09-1115), Defendant: John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Adam Michael Raviv, Wilmer Cutler Pickering Hale **[*17]** and Dorr LLP, Washington, DC; Steven F. Cherry, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC, DC.

For Tatung Company of America, Inc. ("Tatung America"), (D, 09-1115), Defendant: Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Karen Sewell, PRO HAC VICE, Robert Walter Tarun, PRO HAC VICE, Baker & McKenzie LLP, Chicago, Il; Nancy Chung Allred, Robert Walter Tarun, Baker & McKenzie LLP, San Francisco, CA; Patrick J. Ahern, PRO HAC VICE, Baker & McKenzie, Chicago, IL.

For Koninklijke Philips Electronics N.V. ("Philips"), (D), Defendant: Bradley P. Smith, Garrard R. Beeney, Theodore Edelman, LEAD ATTORNEYS, Sullivan & Cromwell LLP, New York, NY; Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For LG Display America, Inc., (D, I, 09-1115) formerly known as LG Philips LCD America, Inc., Defendant: Michael Robert Lazerwitz, LEAD ATTORNEY, Katerina S Colitti, PRO HAC VICE, Jeremy James Calsyn, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For Au Optronics Corporation America, Inc, 09-4997, Defendant: Allison Marie Dibley, Esq., Nossaman LLP, San Francisco, CA.

For Mitsui & Co. (Taiwan), Limited, (D), Defendant: Lisa Cox Ghannoum, Baker **[*18]** Hostetler, Cleveland, OH; Peter Wethrell James, Baker Hostetler, Los Angeles, CA; Ernest E. Vargo, Tracy Lynn Cole, Baker & Hostetler LLC.

For Sanyo Consumer Electronics Co., Ltd., (D), Defendant: Allison Ann Davis, LEAD ATTORNEY, Sam N. Dawood, Davis Wright Tremaine LLP, San Francisco, CA; Nick Steven Verwolf, Davis Wright Tremaine LLP, Bellevue, WA.

For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Defendant: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Chimei Innolux Corp., Defendant: Adam Michael Raviv, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP, Co-Liaison Counsel for defendants, Washington, DC, DC.

For Philips Electronics North America Corporation, Defendant: Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For Tatung Company, Defendant: Patrick J. Ahern, LEAD ATTORNEY, Baker & McKenzie, Chicago, IL.

For Apple Inc., Interested Party: Caroline Nason Mitchell, Robert Allan Mittelstaedt, LEAD ATTORNEYS, Jones Day, San Francisco, CA.

For State of California, Amicus: Adam Miller, LEAD ATTORNEY, CA Dept of Justice, San Francisco, CA; Emilio Eugene Varanini, IV, State **[*19]** Attorney General's Office, San Francisco, CA.

For United States Antitrust Division,Department of Justice, Intervenor: Peter K. Huston, LEAD ATTORNEY, Department of Justice, Antitrust Division, San Francisco, CA; Alexandra Jill Shepard, David J. Ward, Niall Edmund Lynch, U.S. Department of Justice, Antitrust Division, San Francisco, CA; Heather S. Tewksbury, United States Department of Justice, Antitrust Division, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA.

For State of Illinois, Intervenor: Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP.

For State of Washington, 10-5711 (plaintiff), Intervenor: Brady R. Johnson, Jonathan A Mark, Attorney General of Washington, Seattle, WA; Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP; Tina E. Kondo, Senior Assistant **[*20]** Attorney General, Seattle, WA.

For NEC LCD Technologies, Ltd., Intervenor: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

For Chi Mei Corporation (3:09-cv-05609-SI), In Re: Carl Lawrence Blumenstein, Nossaman LLP, San Francisco, CA.

For Nokia Corporation, Plaintiff: Randall Lee Allen, LEAD ATTORNEY, Alston and Bird, Menlo Park, CA; Brian Parker Miller, PRO HAC VICE, Peter Kontio, PRO HAC VICE, Richard W. Stimson, PRO HAC VICE, Valarie Cecile Williams, PRO HAC VICE, Donald MacKaye Houser, Kacy Christine McCaffrey, Matthew D. Richardson, Alston & Bird LLP, Atlanta, GA; Kevin Michael Pitre, Alston and Bird, Atlanta, GA; Matthew Scott Orrell, Atlanta, GA.

For Nokia Inc., Plaintiff: Randall Lee Allen, LEAD ATTORNEY, Alston and Bird, Menlo Park, CA; Brian Parker Miller, PRO HAC VICE, Peter Kontio, PRO HAC VICE, Richard W. Stimson, PRO HAC VICE, Valarie Cecile Williams, PRO HAC VICE, Donald MacKaye Houser, Kacy Christine McCaffrey, Matthew D. Richardson, Edward Paul Bonapfel, Alston & Bird LLP, Atlanta, GA; Kevin Michael Pitre, Alston and Bird, Atlanta, GA; Matthew Scott Orrell, Atlanta, GA; Matthew Scott Orrell, Atlanta, GA.

For AU Optronics Corporation, AU Optronics **[*21]** Corporation America, Inc., Defendants: Allison Marie Dibley, Esq., Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA.

For Chunghwa Picture Tubes, LTD., Defendant: Joel Steven Sanders, LEAD ATTORNEY, Rachel S. Brass, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Rebecca Justice Lazarus, Gibson, Dunn & Crutcher, San Francisco, CA.

For Tatung Company, Tatung Company of America, Inc., Defendants: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA.

For Hitachi, Ltd., Hitachi Displays, Ltd., Hitachi Electronics Devices (USA), Inc., Defendants: Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Defendants: Derek Ludwin, Washington, DC; Jeffrey Michael Davidson, Simon J. Frankel, Covington & Burling LLP, San Francisco, CA; Robert D. Wick, Covington & Burling LLP, Washington, DC; Timothy C. Hester, Covington & Burling, San Francisco, CA; Daniel M Suleiman, Covington & Burling LLP.

For Samsung SDI Co., Ltd., Defendant: Michael W. Scarborough, Samsung SDI America, Inc., Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For **[*22]** Sharp Corporation, Sharp Electronics Corporation, Defendants: Jacob R. Sorensen, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA.

For Toshiba Corporaton, Toshiba America Electronics Components, Inc., Toshiba Mobile Display Co., Ltd., Toshiba America Information Systems, Inc., Defendants: John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING AU OPTRONICS CORPORATION'S MOTION TO COMPEL ARBITRATION

On February 18, 2011, the Court heard argument on AU Optronics Corporation's ("AUO") Motion to Compel Arbitration. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS AUO's Motion.

BACKGROUND

Plaintiff Nokia Corporation, a Finnish company, is a "global leader in the design, manufacture, and supply of mobile wireless handsets." First Amended Complaint ("FAC"), ¶30. Plaintiff Nokia, Inc. is an American subsidiary of Nokia Corporation. FAC, ¶31. On November 25, 2009, Nokia Corporation and Nokia Inc. (collectively, "Nokia") filed suit in this Court against numerous domestic and foreign defendants, **[*23]** including AUO, for violations of state and federal antitrust laws.

Nokia's First Amended Complaint alleges a global price-fixing conspiracy by suppliers of liquid crystal display ("LCD") panels. It alleges that during the conspiracy period (1996-2006), "LCDs used in mobile wireless handsets included at least five different types of active and passive matrix technologies: TFT-LCD, thin film diode ('TFD'), color super-twist nematic ('CSTN'), film super-twist nematic ('FSTN'), and monochrome super-twist nematic ('MSTN'). Defendants' and their co-conspirators' price-fixing conspiracy alleged herein had the effect of raising, fixing, maintaining, and/or stabilizing the prices of TFT-LCDs as well as non-TFT LCDs, including TFD, CSTN, FSTN, and MSTN LCDs." FAC, ¶24.

Plaintiffs' first claim for relief seeks treble damages and injunctive relief under *Section 1* of the Sherman Act, and *Sections 4* and *16* of the Clayton Act. The second claim for relief seeks treble damages and injunctive relief under California's Cartwright Act and Unfair Competition Laws, as well as the antitrust, consumer protection, unfair trade and deceptive practices laws of Florida and Nevada. *Id.* **[*24]** Prayer for Relief, ¶A (I-ii).

Defendant AUO filed an answer to Nokia's amended complaint on August 27, 2010. Doc. 68.[1] In its answer, AUO asserted a number of affirmative defenses, the fifty-second of which reads, in its entirety, as follows: "To the extent Nokia has agreed to arbitration or chosen a different forum for the resolution of its claims against AUO, its claims are barred and should be dismissed." *Id.* at 37. On January 7, 2011, AUO filed a motion to compel arbitration and stay the court proceedings. Doc. 76.

LEGAL STANDARD

Section 4 of the Federal Arbitration Act ("FAA") permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court . . . for an order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." **[*25]** *9 U.S.C. § 4*. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. *Id.*

International commercial arbitration agreements involving a United States corporation are governed by Chapter 2 of the FAA, which codifies the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

[1] AUO initially filed its answer in the consolidated MDL case, No. 07-1827 but failed to file it in the individual case, No. 09-5609. AUO then filed a stipulation that allowed AUO to file the answer in the individual case *nunc pro tunc* to August 27, 2010. Doc. 68. The Court signed an order accordingly. Doc. 73.

Awards (the "New York Convention" or "Convention"). *9 U.S.C. § 206*. A district court may compel arbitration not only in its own district but also in a foreign location if the proposed arbitration is governed by the Convention. *Id.* Arbitration agreements governed by the New York Convention are also governed by Chapter 1 of the FAA to the extent that the FAA and the Convention are not in conflict. *9 U.S.C. § 208*.

The Supreme Court has stated that the FAA espouses a general policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*; *see also* *Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)*. Federal courts are required to rigorously enforce an agreement to arbitrate. *See* *Hall Street Assocs., 552 U.S. at 582*. Courts are also directed **[*26]** to resolve any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)*. The federal policy favoring enforcement of arbitration agreements "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*.

The Ninth Circuit has held that, in determining whether to issue an order compelling arbitration under the New York Convention, the Court may not review the merits of the dispute but must limit its inquiry to determining whether:

> (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Balen v. Holland America Line Inc., 583 F.3d 647, 654-55 (9th Cir. 2009) (citation omitted). "If these **[*27]** questions are answered in the affirmative, a court is required to order arbitration unless the court finds the agreement to be null and void, inoperative, or incapable of being performed." *Prograph Intern. Inc. v. Barhydt, 928 F. Supp. 983, 988 (N.D. Cal. 1996)* (citation omitted); *see also* *9 U.S.C. § 4*.

The FAA provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2*. However, the strong presumption in favor of arbitration "does not confer a right to compel arbitration of any dispute at any time." *Volt, 489 U.S. at 474*. This is because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)*; *see also* *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 831 (2d Cir. 1988)* (stating that the purpose of the FAA is to "make arbitration agreements as enforceable as other contracts, but not more so") (citation omitted). Additional grounds for declining to enforce **[*28]** an arbitration agreement include unconscionability and party waiver. *See* *Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010)* (unconscionability); *Moses, 460 U.S. at 24-25* (waiver).

DISCUSSION

AUO and Nokia entered into a Product Purchase Agreement ("PPA") in 2005. That PPA included an arbitration clause that reads, in full:

> Any disputes related to this Agreement or its enforcement shall be resolved and settled by arbitration in the English language in London, England, in accordance with the Arbitration Rules of the ICC. The decision of the arbitrators shall be final, binding, and executable. The arbitration shall be the exclusive remedy of the Parties to the dispute.

Blumenstein Decl. Ex. A at 16, ¶27.2. The parties agreed that the PPA would apply "retroactively to previous deliveries." *Id.* at 15, ¶25.1. The parties also agreed to a provision stating that "[n]o waiver is effective unless in writing in each separate case and signed by both Parties." *Id.* at 16, ¶26.2. At the bottom of each page of the PPA, there is a copyright notice that reserves all rights in the document to Nokia, indicating that Nokia was likely the drafter of the contract.

The parties dispute whether the **[*29]** PPA should be interpreted to govern Nokia's claims and whether AUO has waived any right to demand arbitration. This Court must consider these issues in light of the specific circumstances of this dispute as well as the federal judiciary's "strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes[.]" *Mitsubishi, 473 U.S. at 631*; *see also* *Moses, 460 U.S. at 24-25*. As "the party resisting arbitration[, Nokia] bears the burden of proving that the claims at issue are unsuitable for arbitration." *See* *Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*.

I. The Arbitration Agreement Governs the Current Dispute

In order to determine whether Nokia's claims are subject to the parties' arbitration agreement, this Court must first evaluate whether the agreement was valid under the Ninth Circuit's four-factor *Balen* test. If the agreement is found to be valid under the *Balen* test, the Court must then determine whether any other reason exists to find the agreement to be unenforceable.

A. The *Balen* Test

A finding of validity under the *Balen* test requires that four factors be established: (1) a written agreement that (2) includes a provision **[*30]** that requires arbitration in the territory of a signatory of the Convention, (3) arises out of a commercial legal relationship, whether contractual or not, and (4) has an international element, such as a party to the agreement who is not an American citizen, or a commercial relationship with one or more foreign states. *Balen, 583 F.3d at 654-55*.

The parties in this matter do not dispute that the PPA, which is a written and signed agreement, includes an arbitration agreement. Neither do they dispute that the PPA arose out of their commercial and contractual relationship. Both parties have international headquarters and American divisions. Therefore, all of the factors are present and the agreement is valid under the *Balen* test.

B. Grounds for Non-Enforcement

Nokia has not asserted any of the more commonly proffered reasons for seeking non-enforcement of an arbitration agreement, such as fraud, duress, or unconscionability. Instead, Nokia argues that its current claims, which relate to an alleged price-fixing conspiracy, exist wholly apart from the parties' contractual relationship and are thus not governed by the PPA and its arbitration agreement.

The reasoning that Nokia offers to support **[*31]** this argument falls short of the "forceful evidence" required, because the broad language of the arbitration clause allows for an interpretation that would cover all claims related, though not integral, to the contractual relationship. In its complaint, Nokia specifically alleged that "Nokia Corporation contracted with various Defendants regarding the prices and volumes of LCDs that Nokia Corporation and Nokia Inc. purchased in the United States and elsewhere." FAC, ¶32. This indicates that the claims in this case, which involve allegations of price-fixing, are in fact related to the parties' contractual relationship.

Nokia is correct that "a party can only be compelled to arbitrate those claims that it agreed to arbitrate." Opp. Brief at 15. The argument that Nokia did not agree to arbitrate the claims currently before the Court, however, is unpersuasive. The Supreme Court has held in several cases that arbitration clauses are to be read broadly and that any ambiguity must be read in favor of arbitration. *See e.g.* *Volt, 489 U.S. at 476*; *see also* *AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)* ("Finally, it has been established that where the contract contains **[*32]** an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . [i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'") (internal citations omitted).

The language of the PPA states that "**any** disputes **related to** this Agreement" must be arbitrated. Blumenstein Decl. Ex. A, 16, ¶27.2 (emphasis added). This is similar to the language analyzed by the Ninth Circuit in *Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999)*. In *Simula*, the two parties entered into a contractual relationship in which Simula was to provide Autoliv with certain car parts that Autoliv would then deliver to BMW. *Id. at 718*. The contract included an arbitration clause that stated that it would apply to "[a]ll disputes arising in connection with this Agreement[.]" *Id. at 720*. Autoliv **[*33]** then began producing similar car parts that it marketed in direct competition with Simula's products. *Id. at 718*. Simula brought suit, alleging violations of antitrust, trade secret, trademark, and defamation laws. *Id. at 719*. Autoliv moved to compel arbitration under the parties' contract, and Simula objected, arguing that its claims were outside the scope of the agreement. *Id.* The Ninth Circuit determined that

> the language "arising in connection with" reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract . . . To require arbitration, [a party's] factual allegations need only "touch matters" covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability.

Id. at 721. The Ninth Circuit therefore ordered the parties to arbitration. *Id. at 726*. *See also* *Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1131 (9th Cir. 2000)* ("The record here leaves little doubt that the dispute is subject to arbitration . . . The parties' arbitration clause is broad and far reaching: 'Any dispute, controversy or claim arising out of or **relating [*34] to** the validity, construction, enforceability or performance of this Agreement . . . .'") (emphasis added).

Under the Ninth Circuit's reasoning, the language "related to" must be read broadly, to encompass any matter that touches the contractual relationship between the parties. This must include matters that, while not arising directly under the contractual relationship, are nevertheless related to it. Nokia's antitrust claims, while existing outside of the parties' contractual relationship, nevertheless relate to the parties' relationship. *See, e.g.*, FAC, ¶7 ("Defendants'[sic] . . . raised the prices of LCDs and LCD Products above the price that would have prevailed in a competitive market. During the Conspiracy Period, Nokia . . . purchased [LCD-related] Products . . . Nokia suffered damages as a result . . . ."). All of the purchases at issue in this case were made under the PPA. Nokia's current unfair competition and antitrust claims therefore "touch matters" addressed by the agreement and are sufficiently related to be covered under the agreement's broad language. *See JLM Indus. v. Stolt-Nielsen SA, 387 F.3d 163, 172-75 (2d Cir. 2004)* (holding that an arbitration clause that read **[*35]** "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration . . . ." was broad enough to encompass plaintiff's collateral antitrust claims).

Nokia offers an alternative interpretation of the holding in *Simula*, namely that in order to find that a dispute "touches matters" addressed by the agreement, it is also necessary to find that some reference to the contract is essential to determining the outcome of the dispute. The Ninth Circuit did note that "resolution here of [the plaintiff's] antitrust claims will necessitate interpreting the 1995 Agreement to determine its meaning and whether the contracts between [the parties] actually do suppress competition as alleged." *175 F.3d at 722*. However, the Ninth Circuit mentioned this as one reason supporting the decision to compel arbitration, not as a condition precedent to doing so. The holding in *Simula* does not incorporate this as a necessary component of the "touch matters" test, nor have subsequent courts applying this test required this contractual-interpretation element. *See, e.g.* *In re Currency Conversion Fee Litigation, 265 F. Supp. 2d 385, 410 (S.D.N.Y. 2003)*.[2] Moreover, the **[*36]** "touch matters" test

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[2] During oral argument, the parties discussed two cases extensively: *In re Currency Conversion Fee Litigation, 265 F. Supp. 2d 385 (S.D.N.Y. 2003)* and *Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097 (C.D. Cal. 2002)*, both of which were cited in AUO's reply. While it is true that the precise factual allegations of these cases differ from those currently before the Court, their holdings are consistent with this decision. *Currency Conversion* addressed credit cardholder allegations that credit card networks and banks had conspired to artificially raise the fees for foreign currency conversions performed by credit card companies. *265 F.*

was first endorsed by the Supreme Court in *Mitsubishi. 473 U.S. at 624 n.13*. Nothing in *Mitsubishi*, however, discusses the relevance of contractual interpretation to the determination of arbitrability. Therefore, Nokia's current claims are subject to the arbitration clause contained in the PPA.

Nokia also argues that its claims should be treated as exempt from the arbitration agreement, or in the alternative that pre-2005 and post-2005 claims should be separated, because at least some portion of the actions on which Nokia bases its claim for damages took place before Nokia signed the PPA. AUO, however, contends that the agreement was intended to cover all dealings between the companies, including those that took place prior to 2005. Neither party has provided persuasive authority in support of its position outside of the contract itself. However, it is true that the PPA includes a term specifically stating that the agreement as a whole applies retroactively. Blumenstein Decl. Ex. A, 15, ¶25.1. Additionally, the PPA included an integration **[*39]** clause stating that the PPA "supersedes all previous arrangements, communication and agreements between the Parties in relation to the subject matter of this Agreement." *Id.* at ¶28.1.

The ultimate question for this Court is whether the parties knowingly entered into an agreement to submit a dispute such as the one presently before the Court to arbitration. Based on the language of the PPA, the answer to that question must be yes. The broad language of the arbitration agreement, combined with the explicit statement that the PPA must be read retroactively, as the final, integrated contract between the parties, indicates that the intent of the parties, at the time of the contract's conclusion, was to submit all disputes relating to the contractual relationship, regardless of whether the actions giving rise to the dispute occurred before or after the signing of the contract, to binding arbitration. This Court is bound to give meaning to the parties' intent as specified in the PPA, regardless of Nokia's present desire to alter the terms of that contract. The fact that Nokia drafted the PPA, as acknowledged by counsel at the hearing and indicated by the copyright notice, further weighs against **[*40]** Nokia's current request for the Court to derogate from the written contents of the contract.

Accordingly, this Court finds that the PPA and its arbitration agreement govern Nokia's present claims against AUO insofar as those claims relate to Nokia's purchases from AUO. Nokia remains free to proceed with its claims against AUO's alleged co-conspirators that are based upon purchases from AUO. It also may proceed with its claims that are based upon purchases from defendants other than AUO.

II. AUO Has Not Waived Its Right To Request Arbitration

Nokia also contends that, even if the PPA applies to Nokia's present claims, AUO implicitly waived its right to compel arbitration by engaging in aggressive litigation tactics over a fourteen month period. AUO responds that its actions have not been inconsistent with its intent to arbitrate, that Nokia has failed to demonstrate that it would suffer any prejudice if the parties were sent to arbitration, and that the PPA requires any waiver to be in writing.

Supp. 2d at 396-96. *Bischoff* addressed customer allegations that DirecTV had conspired with other companies to create a monopoly over the "distribution and sale of high-power direct satellite service and equipment." *180 F. Supp. 2d at 1102*. Both **[*37]** cases dealt with the arbitrability of antitrust claims based on the wording of an arbitration clause; both held that, where the parties signed a broadly worded arbitration agreement, the presumption in favor of arbitration compelled a finding that the antitrust claims were arbitrable. *See, e.g. Currency Conversion, 265 F. Supp. 2d at 410* ("In contrast, the arbitration clauses at issue here are quite broad in that they apply to any claim 'arising from or relating in any way to . . . your Account' and 'arising out of or relating to . . . your Account.' . . . [A]fter applying the strong policy in favor of arbitration . . . it is clear that plaintiffs' antitrust claims 'touch matters' covered by [the agreements].") (contrasting the arbitration clause before the court with the clause at issue in *Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511 (10th Cir. 1995)* in which the Tenth Circuit held that language referring specifically to "the implementation, interpretation, and enforcement of the contract" was not broad enough to cover the parties' antitrust dispute); *see also Bischoff, 180 F. Supp. 2d at 1106* ("Plaintiffs contend that their claims in this case do not relate to non-performance **[*38]** by DirecTV under the parties' contract, but rather, relate to DirecTV's illegal conspiracies with other parties in an effort to violate anti-trust laws. . . Plaintiffs allege that they have paid higher prices for services and equipment than they otherwise would have but for DirecTV's alleged anti-competitive acts. These allegations center around DirecTV's services, disputes which clearly fall within the scope of the arbitration clause.").

The Ninth Circuit has established a three part test, called the *Fisher* test, for determining whether a party has waived its right to compel arbitration: "A party seeking to prove waiver of a right **[*41]** to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir.1986)*. "However, waiver of the right to arbitration is disfavored because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof." *Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758 (9th Cir. 1989)* (citation omitted).

A. Awareness of the Existence of the Arbitration Clause

Nokia argues that AUO must have been aware of the existence of the arbitration clause. AUO has not challenged this assertion, and therefore, the Court finds that the first prong of the test is satisfied.

B. Actions Inconsistent With an Intent to Arbitrate

Nokia argues that AUO has delayed moving to compel arbitration and chosen instead to participate in the litigation process. Nokia contends that this decision was inconsistent with AUO's right to arbitrate and thereby qualifies as an implicit waiver of that right. Additionally, Nokia argues that AUO's decisions to join the **[*42]** other defendants' motion to dismiss, file an answer to Nokia's complaint, participate in discovery, and take part in the meet-and-confer process were inconsistent with AUO's right to compel arbitration.

The Ninth Circuit has held that a significant delay may indicate an intent to waive arbitration rights. *Van Ness, 862 F.2d at 758*. In *Van Ness*, the party seeking to compel arbitration delayed over two years before moving to compel arbitration. *Id.* Its motion to compel arbitration was filed after the trial had initially been scheduled to begin, and only three months prior to the continued start date. *Id. at 755*. The court held that this delay constituted an implicit waiver of the right to compel arbitration. *Id.*

The case presently before the Court is distinguishable on several levels. First, the delay between Nokia's initial filing and AUO's motion to compel is just over one year, as opposed to the two years found unacceptable in *Van Ness.* Second, the trial is currently scheduled to begin on November 5, 2012. *See* No. 07-1827 (MDL Docket), Doc. 2165. This start date was almost two years away when AUO filed its motion to compel, and is still well over a year away as of this decision. Third, **[*43]** while AUO has participated in various aspects of the litigation, this involvement cannot reasonably be compared to the involvement in *Van Ness.* The defendant in Van Ness, one of a small group of defendants, apparently chose of its own accord to move forward with litigation. *Van Ness, 862 F.2d at 755-56*. In the present case, by contrast, AUO is one of numerous defendants, and Nokia is one of numerous plaintiffs, in a complex multidistrict litigation. The motion to dismiss was not filed by AUO itself; while AUO chose to join the motion, it can hardly be considered the equivalent to filing such a motion independently. Moreover, the Ninth Circuit has held that even where a party files a motion to dismiss, this alone will not be sufficient to constitute a waiver of the right to compel arbitration. *See Sovak v. Chugai Pharmaceutical Co., 280 F.3d 1266, 1270 (9th Cir. 2002)*. The same is true of each of AUO's actions; while they might not be wholly consistent with an intent to arbitrate, neither are they inherently inconsistent with that right, without an additional showing of prejudice to Nokia.

One of the few actions that can clearly be treated as representing AUO's intent is AUO's answer **[*44]** to Nokia's amended complaint. Doc. 68. While AUO did not affirmatively demand arbitration in its answer, it did assert that "[t]o the extent Nokia has agreed to arbitration or chosen a different forum for the resolution of its claims against AUO, its claims are barred and should be dismissed." Answer, Doc. 68 at 37. Moreover, the existence of a written waiver requirement in the PPA weighs against a finding of implicit waiver. AUO did not at any point explicitly waive its right to compel arbitration, whereas the reference to arbitration in its answer could be interpreted as an intent to preserve its right. Ultimately, the fact that this is one of a very complex set of cases further cautions the Court against reading too much into AUO's actions, especially in light of the policy disfavoring waiver. Therefore, while the second prong of the *Fisher* test is less clear, it appears to weigh against a finding of waiver.

C. Prejudice to the Non-Moving Party

Nokia claims that it has been prejudiced by AUO's actions in at least three specific ways. First, Nokia claims that it has been forced to respond to multiple legal challenges from AUO, including the aforementioned motion to dismiss and several **[*45]** discovery-based motions. Second, Nokia claims that it has been forced to invest significant time and money in pursuing discovery with regard to AUO and that this investment will be for nothing if Nokia is forced to arbitrate, due to different standards relating to discovery in arbitrations. And third, Nokia argues that it has also incurred significant expenses responding to AUO's discovery requests, and that Nokia's prejudice here is amplified because AUO likely would not have been able to insist on such expansive discovery in an arbitration setting.

The Ninth Circuit has strongly indicated that where there is no showing of prejudice, there will likely be no waiver of arbitration rights. *See* *Sovak, 280 F.3d at 1270* ("We conclude that Sovak has not met his burden because he has not shown how he was prejudiced by Cook's delay in moving to compel arbitration."). In the present case, two facts weigh heavily against a finding of prejudice. First, AUO is only one of numerous defendants against which Nokia has brought suit in this proceeding. Therefore, even had AUO moved to compel arbitration immediately after Nokia filed its complaint, Nokia would likely still have been required to answer **[*46]** the motion to dismiss, comply with discovery requests, and otherwise engage in this litigation. The discovery between Nokia and AUO, it is true, might not have taken place or would have been less extensive had an arbitral proceeding been initiated sooner. However, Nokia may be able to use some of the information is has obtained in the arbitration as well as in its ongoing lawsuits with other defendants on this same issue. Transfer to an arbitral forum will not preclude Nokia from pursuing its claims and Nokia is free to raise these equitable concerns before the arbitrator, who will be in a better position to discern the factual outlines of the discovery dispute.

The parties to this matter are both sophisticated corporations. The arbitration agreement is part of a complex business contract that appears to have been drafted by Nokia. The evidence before the Court does not clearly indicate an intent to waive the right to arbitrate on AUO's part, or significant prejudice on Nokia's; neither does it convey a clear intent to exclude anti-trust or unfair business practice from the scope of the arbitration clause. As the party challenging the motion to compel arbitration, Nokia carries the **[*47]** heavy burden of proving to the Court that an otherwise enforceable arbitration agreement should not apply to the case at hand, and it must do so in light of the strong federal policy in favor of enforcing arbitration agreements, particularly in the field of international commercial disputes. Nokia has failed to carry that burden.

III. The Litigation Between Nokia and AUO Is Stayed Pending Arbitration

It is within the Court's discretion to stay all or part of the litigation associated with the dispute between Nokia and AUO. *United States v. Neumann Caribbean Int'l, Ltd., 750 F.2d 1422, 1427 (9th Cir. 1985)*; *see also* *Bischoff, 180 F. Supp. 2d at 1114*. Alternately, the Court may allow the litigation to run concurrently with arbitral proceedings. *Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)*. In light of the many parties associated with this multidistrict litigation, as well as the significant amount of time between now and the scheduled trial date, the Court stays all litigation between Nokia and AUO that involves purchases made by Nokia from AUO. Nokia remains free to pursue litigation with the other alleged co-conspirators.

IV. Modification of the Protective Order

At the **[*48]** February 18, 2011 hearing on this matter, the parties discussed the possibility of amending the protective order that currently prevents the parties from revealing the details of this multidistrict litigation, in order to allow them to present certain evidence obtained in this litigation to the arbitrator. The Court is amenable to this possibility and requests that the parties meet and confer and present the Court with a proposed order.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant AUO's Motion to Compel Arbitration. Doc. 76, 78 in 09-5609; Doc. 2283 in 07-1827.

IT IS SO ORDERED.

Dated: July 6, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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[Walters v. McMahen](#)

United States District Court for the District of Maryland

July 6, 2011, Decided

Civil Action No.: RDB-11-0751

Reporter
795 F. Supp. 2d 350 *; 2011 U.S. Dist. LEXIS 72332 **

BIZZIE WALTERS, et al., Plaintiffs, v. TODD MCMAHEN, et al., Defendants.

Subsequent History: Related proceeding at *Simpson v. Sanderson Farms, Inc., 2012 U.S. Dist. LEXIS 89026 (M.D. Ga., June 27, 2012)*

Affirmed by *Walters v. McMahen, 2012 U.S. App. LEXIS 13682 (4th Cir. Md., July 5, 2012)*

Prior History: *Walters v. McMahen, 2011 U.S. Dist. LEXIS 28506 (M.D. Ala., Mar. 18, 2011)*

Core Terms

conspiracy, hiring, intracorporate conspiracy doctrine, employees, predicate, conspire, documents, racketeering, allegations, violations, cases, wages, dismissal with prejudice, motion to dismiss, facilities, attest, fail to state a claim, illegal immigrant, hiring practices, cause of action, fraudulent, aliens, courts, amend, staff

LexisNexis® Headnotes

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

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

In ruling on a motion to dismiss, the factual allegations in a plaintiff's complaint must be accepted as true and those facts must be construed in the light most favorable to the plaintiff.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 8(a)(2)*, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 12(b)(6)* authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted; therefore, a *Rule 12(b)(6)* motion tests the legal sufficiency of a complaint. When ruling on such a motion, the court must accept the well-pled allegations of the complaint as true, and construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

A complaint must be dismissed if it does not allege enough facts to state a claim to relief that is plausible on its face. Under the plausibility standard, a complaint must contain more than labels and conclusions or a formulaic recitation of the elements of a cause of action. Well-pleaded factual allegations contained in the complaint are assumed to be true even if they are doubtful in fact, but legal conclusions are not entitled to judicial deference. Thus, even though *Fed. R. Civ. P. 8(a)(2)* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

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

HN4[] Motions to Dismiss, Failure to State Claim

To survive a *Fed. R. Civ. P. 12(b)(6)* motion, the legal framework of the complaint must be supported by factual allegations that raise a right to relief above the speculative level. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to plead a claim. The plausibility standard requires that the pleader show more than a sheer possibility of success, although it does not impose a probability requirement. Instead, a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Thus, a court must draw on its judicial experience and common sense to determine whether the pleader has stated a plausible claim for relief.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Immigration Law > Enforcement of Immigration Laws > Criminal Offenses > Fraudulent Activity

HN5[] Claims, Fraud

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, , it is unlawful for any person employed by or associated with any enterprise to conduct such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *18 U.S.C.S. § 1962(c)*. *18 U.S.C.S. § 1961* of RICO spells out specific acts which are predicate violations. *Section 1961(1)(F)* defines a violation of *8 U.S.C.S. § 1324(a)(3)(A)* as a RICO predicate act. Under *§ 1961(1)(B)* violations of *18 U.S.C. §§ 1546(b)(1)*, *(2)* and *(3)* are likewise predicate offenses.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN6[] Claims, Fraud

See *18 U.S.C.S. § 1961(1)(F)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN7[] Claims, Fraud

See 18 U.S.C.S. § 1961(1)(B).

Immigration Law > Enforcement of Immigration Laws > Criminal Offenses > Fraudulent Activity

HN8[] Criminal Offenses, Fraudulent Activity

See 18 U.S.C.S. § 1546(b).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN9[] Private Actions, Racketeer Influenced & Corrupt Organizations

Under 18 U.S.C.S.§ 1962(d), it is unlawful to conspire to violate any provision of § 1962(a), (b) or (c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq. To plead a violation of § 1962(d), a plaintiff must allege that each defendant agreed that another coconspirator would commit two or more acts of racketeering.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

HN10[] Racketeer Influenced & Corrupt Organizations, Remedies

See 18 U.S.C.S. § 1964(c).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

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

Immigration Law > Enforcement of Immigration Laws > Criminal Offenses > Fraudulent Activity

HN11[] Claims, Fraud

It appears that Fed. R. Civ. P. 9(b) does apply to the allegations of false attestation which are part of the claims under 18 U.S.C.S. §§ 1546(b)(1), (2) and (3). The pleading standard of Rule 9(b) applies to all averments of fraud. When the alleged racketeering sounds in fraud, plaintiffs asserting claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., must meet the pleading standard of Rule 9(b).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN12[] Private Actions, Racketeer Influenced & Corrupt Organizations

The standard of pleading under *18 U.S.C.S. § 1962(d)* requires that plaintiffs must describe in detail the conspiracy, including the identity of the co-conspirators, the object of the conspiracy and the date and substance of the conspiratorial agreement.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN13[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Injury caused by an overt act that is not an act of racketeering or otherwise wrongful under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, is not sufficient to give rise to a cause of action under *18 U.S.C.S. § 1964(c)* for a violation of §*18 U.S.C.S. § 1962(d)*.

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN14[] **Enforcement of Immigration Laws, Employer Liabilities & Obligations**

A violation *8 U.S.C.S. § 1324(a)(3)(A)* occurs when an individual knowingly hires at least 10 individuals who are aliens, with knowledge that these individuals were brought into the United States in violation of the subsection.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN15[] **Claims, Fraud**

Under *18 U.S.C.S. § 1964(c)*, a plaintiff must plead injury to business or property by reason of the violation of the violation of *18 U.S.C.S. § 1962(d)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN16[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Unlawful employment of aliens is not a predicate act under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, only the hiring of illegal aliens who are known to have been smuggled (brought' into the United States qualifies as a RICO predicate offense.

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN17[] **Civil Conspiracy, Defenses**

The intracorporate conspiracy doctrine, developed in the antitrust context, holds that because the acts of corporate agents are attributable to the corporation itself, a corporation lacks the multiplicity of actors required to form a conspiracy. A corporation cannot conspire with its employees, and employees, when acting within the scope of their employment, cannot conspire amongst themselves. The United States Court of Appeals for the Fourth Circuit has identified two exceptions to the intracorporate conspiracy doctrine: (1) when a corporate officer has an independent personal stake in achieving the illegal objectives of the corporation; and (2) when the agent's acts are unauthorized.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

HN18[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The U.S. Court of Appeals for the Fourth Circuit has consistently found that the intracorporate conspiracy doctrine can be broadly applied to conspiracy cases, including civil claims under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.* The Fourth Circuit has long held that a single entity cannot conspire amongst itself. This principle has consistently been applied outside of the antitrust context.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN19[] **Dismissal, Involuntary Dismissals**

Dismissal with prejudice is warranted where amendment would be futile in light of the complaint's fundamental deficiencies.

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For Todd McMahen, Tol Dozier, Nancy Hollis, Alberto Asyn, Richard Jamison, Jim Hungate, Amparo Herrera, Jeff Beckman, Jerry Layne, Angie Wood, Elana Fernandez, Jim Booth, Terry Ashby, Leslie Cox, Randy Brown, Efrem Andrews, Gilberto Fernando Rivera, Bennie Gray, Charlie Carpenter, Bel Holden, Defendants: Brooks R Amiot, LEAD ATTORNEY, Linda Marie Boyd, Jackson Lewis LLP, Baltimore, MD; Allan Stephen Rubin, Christina A Daskas, Lawrence Bryant Shulman, Jackson Lewis LLP, Southfield, MI.

For Maria Salizar Gonzalez, David Castro, Julio Unzueta, Defendants: David Daneman, Bishop Daneman and Simpson LLC, Baltimore, MD; William John Hughes , Jr, PRO HAC VICE, Cooper Levenson April Niedelman **[**2]** and Wagenheim, Atlantic City, NJ.

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For Perdue Farms Incorporated, Movant: Brooks R Amiot, LEAD ATTORNEY, Linda Marie Boyd, Jackson Lewis LLP, Baltimore, MD; Maurice Baskin, Venable LLP, Washington, DC; Allan Stephen Rubin, Christina A Daskas, Lawrence Bryant Shulman, Jackson Lewis LLP, Southfield, MI.

Judges: Richard D. Bennett, United States District Judge.

Opinion by: Richard D. Bennett

Opinion

[*351] MEMORANDUM OPINION

On March 22, 2010, Plaintiffs Bizzie Walters, Annie Hodge, Annette Baldwin, Katrena Cooper and Barbara Allen filed a Class Action Complaint in the United States District Court for the Middle District of Alabama and initiated this class action lawsuit. Plaintiffs name **[**3]** as Defendants twenty-nine current and former Perdue Farms, Inc. ("Perdue") employees. [1] In a one count conspiracy claim, Plaintiffs allege that Defendants conspired to depress the wages of the legal, hourly-paid employees of Perdue in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.* through a scheme of hiring and falsely attesting to the work authorization of large numbers of illegal immigrants.

On May 28, 2010, Defendants filed a motion for joinder of Perdue, transfer of venue and / or dismissal and for stay of discovery. (ECF No. 61). Concurrently, Perdue filed a motion to intervene in the suit. (ECF No. 63). Subsequently, Plaintiffs filed a First Amended Class **[**4]** Action Complaint (ECF No. 80) on June, 18, 2010. Plaintiffs filed this action on behalf of themselves and on behalf of a class consisting of all other persons legally authorized to be employed in the U.S., who have been employed at any of the Perdue facilities identified in this action as hourly wage earners in the four years prior to the filing of this case and up through trial. Am. Compl. ¶ 185. On March 18, 2011, this case was transferred from the Middle District of Alabama to this Court, (ECF No. 147) and on April 5, 2011, Perdue withdrew its motion to intervene. (ECF No. 163).

Presently pending before this Court is Defendants' Motion for Dismissal (ECF No. 61). [2] The Defendants move to dismiss **[*352]** on the ground that Plaintiffs fail to state a claim for relief under *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Plaintiffs have filed a response in opposition to Defendants' motion (ECF No. 179). The parties' submissions have been reviewed and this Court held a hearing on June 9, 2011, pursuant to *Local Rule 105.6 (D. Md. 2010)* [3]

The Plaintiffs' one count civil RICO claim in this case relies on an expansive legal theory previously rejected by other United States District Courts. Essentially, the claim is that mid-level human resources employees have engaged in a conspiracy to indirectly enrich themselves by causing Perdue to violate United States immigration laws, thereby increasing its net profit, thereby increasing the potentiality of higher salaries for its employees. *See infra* n.13. This claim is simply not plausible. The logical extent of that legal theory would be to create civil RICO causes of action as to any allegedly illegal human resources decisions made by mid-level corporate employees. Furthermore, even if this theory were plausible, a corporation cannot conspire with its employees and, with rare exception, employees of a corporation, when acting within the scope of their employment, cannot conspire among themselves. No exceptions to this intracorporate conspiracy **[**6]** doctrine, well recognized by the United States Court of Appeals for the Fourth Circuit, apply in this case. As the Plaintiffs simply have no discernible independent personal stake in this matter, any effort to further amend their complaint would be futile. Accordingly, for the reasons that follow, Defendants' Motion to Dismiss (ECF No. 61) is GRANTED, and this case is DISMISSED WITH PREJUDICE.

I. Background

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[1] Todd McMahen, Tol Dozier, Nancy Hollis, Alberto Asyn, Elana Asyn, Richard Jamison, Jim Hungate, Amparo Herrera, Maria Salizar Gonzalez, Jeff Beckman, Jerry Layne, David Castro, Angie Wood, Julio Unzueta, Emperatriz "Paola" Beatty, Jim Booth, Terry Ashby, Jeanette Cox, Sandra Herrera, Leslie Cox, Gustavo "Gus" Paez, Randy Brown, Efrem Andrews, Gilberto "Fernando" Rivera, Bennie Gray, Charlie Carpenter, Bel Holden, Rob Helfin, and Gary Miller (collectively, "Defendants").

[2] Defendants' motion to dismiss was filed as part of the joint motion for joinder of Perdue, transfer of venue **[**5]** and stay of discovery, (ECF No. 61) filed in advance of the First Amended Complaint, but still deemed to be applicable to that amended complaint.

[3] The parties agreed that the pending Motion to Dismiss is applicable to the amended complaint.

HN1[] In ruling on a motion to dismiss, "[t]he factual allegations in the Plaintiff's complaint must be accepted as true and those facts must be construed in the light most favorable to the plaintiff." *Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)*.

Defendants are employees of Perdue, the alleged third largest poultry processing company in the United States. Am. Compl. ¶ 6. Perdue is headquartered in Salisbury, Maryland and owns and operates poultry processing facilities in Dothan, Alabama; Perry, Georgia; Monterey, Tennessee; Cromwell, Kentucky; Dillon, South Carolina; Accomac, Virginia; Bridgewater, Virginia; Concord, North Carolina; Georgetown, Delaware; Lewiston, North Carolina; Milford, Delaware; Rockingham, North Carolina; Salisbury, Maryland; and Washington, Indiana. **[**7]** *Id.* ¶ 3, 4. Plaintiffs allege that "Corporate Co-Conspirators," including defendants Helfin and Miller, conspired with unnamed "Facility Co-Conspirators" and the other named Defendants, employees in Perdue's Human Resources ("HR") departments, to implement a scheme of hiring illegal immigrants. *Id.* ¶ 43. Plaintiffs allege that these hiring practices save Perdue millions of dollars in labor costs because illegal immigrants will work longer hours for lower wages than American citizens. *Id.* ¶ 43. Plaintiffs allege that these practices depress the wages of Perdue's legally authorized workers. *Id.* ¶ 184.

Plaintiffs state that corporate management directs HR managers and their staff members to accept false documents from **[*353]** illegal immigrants and to falsely attest to the authenticity of such documents in the hiring process. *Id.* ¶ 45. Plaintiffs allege that Defendants therefore engage in a host of illegal practices, including but not limited to: hiring workers who were previously employed at Perdue using different identifications, hiring workers known to be present in the United States illegally or using facially false documents, and hiring workers who use multiple sets of documents in order **[**8]** to work extra shifts. *Id.* ¶ 46.

Plaintiffs allege that these practices are pervasive and that a scheme of illegal hiring is in place at each of Perdue's processing facilities. *Id.* ¶ 184. At the Dothan plant, for example, Plaintiffs allege that Defendants Dozier, Hollis, Alberto Asyn, Elana Fernandez and other unnamed parties in the HR department use "some or all" of the hiring practices alleged in ¶¶ 45-46. *Id.* ¶ 68. Plaintiffs lay out the corporate hierarchy at the plant, stating that Dozier is responsible for assisting McMahen and other corporate officers in setting the class's wages below market rates. Plaintiffs further assert that McMahen knows and approves of an immigration law conspiracy at the Dothan facility. *Id.* ¶ 74. Plaintiffs repeat functionally the same argument as to the named Defendants at the Perry facility, *Id.* ¶¶ 80-90; the Monterey facility, *Id.* ¶¶ 91- 105; the Cromwell facility, *Id.* ¶¶ 106-21; the Dillon facility, *Id.* ¶¶ 122-35; and the Accomac facility, *Id.* ¶¶ 136-48. Plaintiffs further allege, on information and belief, that the same illegal hiring conspiracy is in place at Perdue's eight other facilities: Bridgewater, *Id.* ¶¶ 149-52; Concord, *Id.* ¶¶ 153-56; Georgetown, **[**9]** *Id.* ¶¶ 157-60; Lewiston, *Id.* ¶¶ 161-64; Milford, *Id.* ¶¶ 165-68; Rockingham, *Id.* ¶¶ 169-72; Salisbury, *Id.* ¶¶ 173-76 Washington, *Id.* ¶¶ 177-80.

Plaintiffs allege that Perdue's hiring practices are RICO predicate acts. [4] First, Plaintiffs allege that certain Defendants violated *8 U.S.C. § 1324(a)(3)(A)*, [5] a predicate offense under *18 U.S.C. § 1961(1)(F)*, by knowingly hiring hundreds of unauthorized and fraudulently documented workers, who had been brought into the United States from Mexico with assistance. *Id.* ¶ 53, 54. Second, Plaintiffs allege that certain Defendants violated *18 U.S.C. §§ 1546(b)(1)*, *(2)* and *(3)*, racketeering acts under *18 U.S.C. § 1961(1)(B)*, by accepting fake or fraudulent documents from newly hired workers and making false attestations as to their legal status on I-9 forms. [6] *Id.* ¶ 56,

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[4] *Section 1961 of RICO* defines the operative terms of *§ 1962* - *§ 1968*. "Racketeering activity" **[**10]** is defined in *§ 1961* through a set of predicate violations — violations of other enumerated statutes.

[5] "Any person, who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens as described in subparagraph (B) shall be fined under title 18 or imprisoned for not more than 5 years, or both. (B) An alien described in this subparagraph is an alien who — (i) is an unauthorized alien (as defined in *section 1324a(h)(3)* of this title), and (ii) has been brought into the United States in violation of this subsection." *8 U.S.C. § 1324(a)(3)*.

[6] All United States employers must complete and retain a Form I-9 for each individual they hire for employment in the United States verifying employment eligibility.

57. Conducting the affairs of an enterprise through a pattern of racketeering activity is illegal under *18 U.S.C. § 1962(c)*, and Plaintiffs therefore allege that Defendants, though their scheme of illegal hiring violated *§ 1962(d)*, which finds unlawful any conspiracy to violate *§ 1962(a)-(c)*.

II. Standard of Review

HN2[] Under *Federal Rule of Civil Procedure 8(a)(2)*, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Rule 12(b)(6) of the Federal Rules of Civil Procedure* **[*354]** authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted; therefore, a *Rule 12(b)(6)* motion tests the legal sufficiency of a complaint. **[**11]** *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. When ruling on such a motion, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997)*.

HN3[] A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *see also Simmons v. United Mort. and Loan Inv., LLC, 634 F.3d 754, 768 (4th Cir. Jan. 21, 2011)*; *Andrew v. Clark, 561 F.3d 261, 266 (4th Cir. 2009)*. Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555*. Well-pleaded factual allegations contained in the complaint are assumed to be true "even if [they are] doubtful in fact," but legal conclusions are not entitled to judicial deference. *See id.* (noting that "courts are not bound to accept as true a legal conclusion couched as a factual allegation") (internal quotation marks omitted). Thus, even **[**12]** though *Rule 8(a)(2)* "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. at 1937, 1950 (2009)*.

HN4[] To survive a *Rule 12(b)(6)* motion, the legal framework of the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. The Supreme Court has explained recently that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. *Iqbal, 129 S. Ct. at 1949*. The plausibility standard requires that the pleader show more than a sheer possibility of success, although it does not impose a "probability requirement." *Twombly, 550 U.S. at 556*. Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1937*. Thus, a court must "draw on its judicial experience and common sense" to determine whether **[**13]** the pleader has stated a plausible claim for relief. *Id.*

III. Analysis

A. Failure to State a Claim

HN5[] Under the Racketeer Influenced and Corrupt Organizations Act, it is unlawful for "any person employed by or associated with any enterprise" to conduct "such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *18 U.S.C. § 1962(c)*. *Section 1961 of RICO* spells out specific acts which are predicate violations. *Section 1961(1)(F)* [7] defines a violation of *8 U.S.C. § 1324(a)(3)(A)* as a RICO predicate act. Under *§ 1961(1)(B)* [8] violations of *18 U.S.C. §§ 1546(b)(1)*, **[*355]** *(2)* and *(3)* [9] are likewise predicate offenses.

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[7] **HN6**[] "Any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 274 (relating to aiding or assisting certain aliens to enter the United States), or section 278

HN9[] Under § 1962(d) it is unlawful to conspire to violate any provision of § 1962 (a), (b) or (c) of RICO. To plead a violation of § 1962(d), a plaintiff must allege that "each defendant agreed that another coconspirator would commit two or more acts of racketeering." Proctor v. Metro. Money Store Corp., et al., 645 F. Supp. 2d 464, 477 (D. Md. 2009) (quoting United States v. Pryba, 900 F.2d 748, 760 (4th Cir. 1990)).

Plaintiffs bring a one count conspiracy claim under § 1964(c) [10] or a violation of § 1962(d), alleging predicate violations under § 1324(a)(3)(A) and 18 U.S.C. §§ 1546(b)(1) - (3). Amend Comp. ¶ 181. Plaintiffs assert **[**15]** that Federal Rule of Civil Procedure 8, not Federal Rule of Civil Procedure 9(b) should govern the pleading of these claims. Pls.' Opp'n at 14. [11] owever, this Court need not reach a decision on the appropriate pleading standard; Plaintiffs fail to state a claim under the lower threshold of Rule 8, and would necessarily fail under the more rigorous Rule 9(b). [12]

Regardless of the pleading standard applied, Plaintiffs fail to state a claim. Plaintiffs present no more than conclusory allegations to suggest that the Defendants formed a conspiracy under 18 U.S.C. § 1962(d). Plaintiffs allege a scheme of illegal hiring in which supervisors direct HR staff members to violate immigration laws. Amend Comp. ¶ 45. In a similar civil RICO case alleging predicate violations of §1324(a) and §1546 brought in the Northern District of Alabama, the Court explained HN12[] the standard of pleading under § 1962(d), stating that plaintiffs must "describe in detail the conspiracy, including the identity of the co-conspirators, the object of the conspiracy and the date and substance of the conspiratorial **[**17]** agreement." Cruz v. Cinram Intl. Inc., 574 F. Supp. 2d 1227, 1236 (N.D. Ala. 2008). Here, Plaintiffs fail to provide any facts indicative of such an agreement, including when or where the agreement took place, or the specific substance of any communications between management and HR staff **[*356]** regarding hiring policy. Plaintiffs do not state facts sufficient to present a "plausible" claim under Twombly.

Plaintiffs also fail to adequately plead agreement to the conspiracy on the part of each defendant, as required by the United States Court of Appeals for the Fourth Circuit in United States v. Pryba, 900 F.2d 748, 760 (4th Cir. 1990). In *Pryba*, the court found that to support a conspiracy conviction under § 1962(d), each defendant must agree that he or another would violate § 1962(c). Id. at 760. Plaintiffs repeat that at each facility Defendants use

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(relating to import of aliens for immoral purpose) if the act indictable under such section of Act was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).

[8] HN7[] "(B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1546 (relating **[**14]** to fraud and misuse of visa, permits and other documents)." 18 U.S.C § 1961(1)(B).

[9] HN8[] "Whoever uses — (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, (2) an identification document knowing (or having reason to know) that the document is false, or (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned for not more than 5 years or both." 18 U.S.C. § 1546(b)(1)-(3).

[10] HN10[] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale or securities to establish a violation of section 1962." 18 U.S.C. § 1964(c).

[11] The Defendants have alternatively argued that the complaint does not satisfy the pleading requirement of either Rule 8 or Rule 9(b).

[12] Parenthetically, this Court will note, however, that HN11[] it appears that Rule 9(b) does apply to the allegations of false attestation which are part of the claims under §§ 1546(b)(1), (2) and (3). The pleading standard of Rule 9(b) **[**16]** applies to "all averments of fraud." Hershey v. MNC Fin., Inc., 774 F. Supp. 367, 376 (D. Md. 1991). This Court recently found that when the alleged racketeering sounds in fraud, plaintiffs asserting RICO claims must meet the pleading standard of Rule 9(b). Kun Lee v. PMG 1001, LLC, No. RDB-09-1514, 2010 U.S. Dist. LEXIS 2103, 2010 WL 14823 at *3 (D. Md. January 11, 2010). Plaintiffs' claims of "false attestation" under §1546 sound in fraud and therefore should meet the Rule 9(b) pleading standard.

"some or all" of the illicit hiring practices alleged, Am. Compl. ¶ 71, but Plaintiffs fail to detail the personal agreement or involvement of each defendant. Moreover, as to eight of the Perdue facilities, Plaintiffs offer no facts supporting their allegations of predicate violations and conspiracy. They have pled on information and belief alone. **[**18]** Plaintiffs' claims rest heavily on conjecture; they have not advanced their allegations beyond a "speculative level" as *Twombly* requires. *Twombly, 550 U.S. at 555*.

Plaintiffs' claims as to the predicate RICO violations are similarly insufficient. In *Beck v. Prupis*, the Supreme Court held that ***HN13***[] "injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under *§ 1964(c)* for a violation of *§ 1962(d)*." *529 U.S. 494, 505, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000)*. Thus Plaintiffs must plead facts sufficient to support a plausible inference that the alleged conspiracy actually gave rise to acts of racketeering which were the proximate cause of the Plaintiffs' injury.

HN14[] A violation *§ 1324(a)(3)(A)* occurs when an individual knowingly hires at least 10 individuals who are aliens, with knowledge that these individuals were brought into the United States in violation of the subsection. Plaintiffs' pleading of this predicate violation is simply a recitation of the statute:

> "They have personally hired hundreds of workers (and more than ten per year, each) with actual knowledge that the workers were unauthorized for employment, used fraudulent identity **[**19]** documents that did not pertain / relate to them, and had been brought into the country with the assistance of others on their illicit journey across the U.S.-Mexico border. . . ."

Am. Compl. ¶ 54. Plaintiffs do not identify a single worker specifically known to be an illegal alien. Rather, Plaintiffs only allege in a conclusory fashion that Defendants at various facilities "observe[] the largely illegal workforce and know[] that most of these people are not U.S. citizens." Am. Compl. ¶ 83. Additionally, Plaintiffs allegations as to the means by which the illegal workers were brought into the country are unfounded. Plaintiffs state only: "on information and belief, Defendant Paez is also responsible for directly working with 'coyotes' and 'runners' to obtain employment at Perdue for the illegal immigrants when they arrive in the local community." *Id.* ¶ 108. This conclusion is not supported by any facts and is not entitled to judicial deference.

Plaintiffs likewise fail to state a claim under the predicate violation of *18 U.S.C. §§ 1546(b)(1)-(3)*. Plaintiffs explain that Defendants attest, under penalty of perjury, to the veracity of workers' identification documents when filling out I-9 **[**20]** forms. *Id.* ¶ 58. Plaintiffs' complaint states: "this is a false attestation because the HR staff members know the documents presented are fake / fraudulent." *Id.* ¶ 58. The HR staff's alleged knowledge stems from being "directed by their superiors to accept . . . false documents and make these false attestations," and from the alleged hiring **[*357]** practices themselves, which include "hiring workers who are known to have previously been employed at Perdue under different identities" or "hiring workers whose background information . . . is plainly invalid and / or inconsistent on its face." *Id.* ¶ 46. Plaintiffs again fail to give any specific examples of known illegal employees, workers whose papers were found to be facially fraudulent or workers hired for multiple shifts using dual identities. Plaintiffs do not provide any underlying facts supporting the statement that these practices are taking place.

Additionally, ***HN15***[] under *§ 1964(c)* a Plaintiff must plead injury to "business or property by reason of" the violation of the violation of *§ 1962(d)*. Plaintiffs allege that the "hourly wages for the Class . . . are depressed below market levels (the going rate for unskilled labor in the area by employers **[**21]** which do not employ illegal workers)." Am. Compl. ¶ 73. Plaintiffs state no underlying data or figures to support assertion. The complaint states no facts addressing: (1) the wages of any class members (2) the market wage of area employers who do not employ illegal workers (3) how the Plaintiffs can purport to determine which area employers do and do not "employ illegal workers" for purposes of calculating market wages. Plaintiffs, therefore, cannot sustain a claim because they fail to "raise a right to relief above a speculative level." *Twombly, 550 U.S. at 555*.

This Court's decision to dismiss this case is bolstered by the recent failure of substantially similar civil RICO claims relying on identical legal theories brought in district courts throughout the country. *See Nichols v. Mahoney, 608 F. Supp. 2d 526 (S.D.N.Y. 2009)*; *Trollinger v. Tyson Foods, 543 F. Supp. 2d 842 (E.D. Tenn. 2008)*; *Hall v. Thomas,* 753 F. Supp. 2d 1113 (N.D. Ala. 2010). [13] n *Nichols*, for example, the Southern District of New York dismissed a civil RICO claim alleging the same predicate violations of immigration statutes as in the instant case. As in this case, the *Nichols* court found that the plaintiffs failed **[**22]** to provide adequate factual information to sustain a claim, and noted that ***HN16***[] unlawful employment of aliens is *not* a RICO predicate act — only the hiring of "illegal aliens who are known to have been smuggled ('brought') into the United States" qualifies as a RICO predicate offense. Nichols, 608 F. Supp. 2d at 534.

Moreover, while Plaintiffs rely heavily in their analysis on the Williams v. Mohawk Indus., Inc., 465 F.3d 1277 (11th Cir. 2006) **[**23]** line of cases, [14] *Mohawk* is readily distinguishable from the instant case. In *Mohawk*, the conspiracy outlined involved named third party recruiters who conspired with Mohawk employees to bring undocumented aliens across the border for employment purposes. Id. at 1281-2. In this case, by contrast, the conspiracy alleged involves no third party efforts and the complaint contains almost no facts regarding **[*358]** the arrival of the allegedly illegal workers in the United States. Moreover, *Mohawk* was decided *pre-Iqbal*, limiting its precedential value. Nichols, 608 F. Supp. 2d at 538. Substantial reliance on *Mohawk* does little to advance Plaintiffs' claims.

B. The Intracorporate Conspiracy Doctrine

Even if Plaintiffs' claims were sufficiently plausible, they are nevertheless barred by the intracorporate conspiracy doctrine. ***HN17***[] The intracorporate conspiracy doctrine, developed in the antitrust context, holds that because the acts of corporate agents are attributable to the corporation itself, a corporation lacks the multiplicity of actors required to **[**24]** form a conspiracy. Marmott v. Maryland Lumber Co., 807 F.2d 1180, 1184 (4th Cir. 1986). As this Court has previously noted, a corporation cannot conspire with its employees — and employees, when acting within the scope of their employment, cannot conspire amongst themselves. AGV Sports Group, Inc. v. Protus IP Solutions, Inc., No. RDB 08-3388, 2009 U.S. Dist. LEXIS 58264, 2009 WL 1921152, at *4-5 (D. Md. July 1, 2009). The United States Court of Appeals for the Fourth Circuit has identified two exceptions to the intracorporate conspiracy doctrine: (1) when a corporate officer has an "independent personal stake" in achieving the illegal objectives of the corporation, Greenville Publ'g Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974); Shoregood Water Co. v. United States Bottling Co., No. RDB 08-2470, 2009 U.S. Dist. LEXIS 69624, 2009 WL 2461689 at *7 (D. Md. Aug. 10, 2009); and (2) when the agent's acts are unauthorized. Buschi v. Kirven, 775 F.2d 1240, 1252-3 (4th Cir. 1985).

In United States v. Gwinn, No. 5:06-cv-00267, 2008 U.S. Dist. LEXIS 26361, 2008 WL 867927 (S.D. W. Va. Mar. 31 2008), the Southern District of West Virginia engaged in a thorough review of the Fourth Circuit's continued application of the intracorporate conspiracy doctrine in civil RICO **[**25]** cases in light of the Supreme Court's decision in Cedric Kushner Promotions Ltd. v. Don King et al., 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). In *Cedric Kushner*, the Supreme Court found that a corporation's sole proprietor could be a natural person, and also an "enterprise" for the purposes of establishing liability under § 1962(c). Id. at 163. The Court made clear, however, that its holding created no inconsistency with "***antitrust law***'s intracorporate conspiracy doctrine." Id. at 166. The court in *Gwinn* explained that while some courts have viewed *Cedric Kushner* as an indication that the intracorporate conspiracy doctrine should not be extended to RICO claims brought under § 1962(d) ***HN18***[] the Fourth Circuit has consistently found that the intracorporate conspiracy doctrine can be broadly applied to

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[13] Two legally and factually analogous cases against poultry processors, Trollinger v. Tyson Foods, 543 F. Supp. 2d 842 (E.D. Tenn. 2008) and Hall v. Thomas, 753 F. Supp. 2d 1113 (N.D. Ala. 2010), were found to be without merit and were decided for the defendants on summary judgment. While these cases did survive motions to dismiss, both cases were filed *pre-Iqbal* and therefore are of limited value in analyzing the legal sufficiency of the pleading in the instant case. Both *Trollinger* and *Hall* are nevertheless indicative of the lack of factual backing characterizing this particular strain of civil RICO cases based on alleged use of illegal immigrant labor. In both cases, defendants were subjected to a lengthy discovery process for identical allegations.

[14] Williams v. Mohawk Indus., Inc., 314 F. Supp. 2d 1333 (N.D. Ga. 2004), *aff'd in part, rev'd in part on other grounds by* 465 F.3d 1277 (11th Cir. 2006).

conspiracy cases, including civil RICO claims. Gwinn, 2008 U.S. Dist. LEXIS 26361, 2008 WL 867927 at * 22-23 (citing Detrick v. Panalpina Inc., 108 F.3d 529, 544 (4th Cir. 1997)). While the Fourth Circuit has yet to rule directly on this issue, *Cedric Kushner* should not change this Circuit's analysis of the applicability of the intracorporate conspiracy doctrine to non-antitrust cases. *See* Culver v. JBC Legal Group, P.C., No. 5:04-cv-389, 2005 U.S. Dist. LEXIS 45426, 2005 WL 5621875, at *6 (W.D.N.C. June 28, 2005) **[**26]** (unpublished) (holding that the intracorporate conspiracy doctrine is not limited to antitrust cases).

The Fourth Circuit has long held that "a single entity cannot conspire amongst itself." Gwinn, 2008 U.S. Dist. LEXIS 26361, 2008 WL 867927, at * 23 (quoting Cohn v. Bond, 953 F.2d 154, 159 (4th Cir. 1991)). This principle has consistently been applied outside of the antitrust context. *See, e.g.,* Buschi, 775 F.2d at 1253 (holding the intracorporate conspiracy doctrine applicable to cases arising under 42 U.S.C. § 1983). Addressing **[*359]** § 1962(d) specifically, district courts in the Fourth Circuit *pre-Cedric Kushner* uniformly held that the intracorporate conspiracy doctrine can act to bar civil RICO claims brought under this section. Sadighi v. Daghighfekr, 36 F. Supp. 2d, 279 (D.S.C. 1999); Huntingdon Life Sciences, Inc. v. Rokke, 986 F. Supp. 982, 991 (E.D. Va. 1997); Broussard v. Meineke Discount Muffler Shops, Inc., 945 F. Supp. 901, 911-12 (W.D.N.C. 1996) *rev'd on other grounds*, 155 F. 3d 331 (4th Cir. 1998).

Post-Cedric Kusher, the Fourth Circuit has continued to apply the intracorporate conspiracy doctrine in non-antitrust conspiracy cases. *See* ePlus Tech., Inc. v. Aboud, 313 F.3d 166 (4th Cir. 2002) (noting the **[**27]** general applicability of the intracorporate conspiracy doctrine to a non-antitrust conspiracy claim); [15] Lewin v. Cooke, 28 F.App'x 186 (4th Cir. 2002) (unpublished) (applying the intracorporate conspiracy doctrine to a state law conspiracy claim). In *ePlus*, for example, the court affirmed its *pre-Cedric Kushner* stance that "it is generally true that under the intracorporate immunity doctrine . . . corporate employees cannot conspire with each other or with the corporation." 313 F.3d at 179. Thus, claims brought under § 1962(d) likewise continue to be governed by the intracorporate conspiracy doctrine.

Applying the doctrine to the instant case, it is clear that Plaintiffs' claims are barred. The Defendants are all current or former employees **[**28]** of Perdue acting within the scope of their employment, Am. Compl. ¶ 45, and, as such, cannot conspire amongst themselves. Neither recognized exception applies. Plaintiffs specifically state that the Defendants were directed by management to pursue the particular hiring policy here alleged — there was no action outside the scope of the agents' authority. *Id.* Likewise, the independent personal stake exception has no bearing here. For that exception to apply, a conspirator must possess a personal interest independent and "wholly separable" from the interests of the corporation. Selman v. Am. Sports Underwriters, Inc., 697 F. Supp. 225, 239 (W.D. Va. 1988). *See* Greenville Publ'g Co., 496 F.2d at 399; Gwinn, 2008 U.S. Dist. LEXIS 26361, 2008 WL 867927, at *25 ("Where a corporation's success is directly dependent on the agent's success in furthering the illegal activity, the two are directly related and are not 'wholly independent' of one another."). Plaintiffs here allege no interest on the part of the Defendants independent of their relationship with the Perdue corporation; Defendants' alleged interests and the profitability of the company are, instead, completely intertwined. [16] herefore, Plaintiffs cannot sustain **[**29]** a claim under § 1962(d).

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[15] In *ePlus*, the plaintiff brought a civil conspiracy claim under state law and RICO § 1962(d). The court noted the general applicability of the intracorporate conspiracy doctrine, but found that the case fell under the independent personal stake exception. As a result, the court did not specifically note whether it considered the intracorporate conspiracy doctrine in relation to the state law claim, the RICO claim, or both. ePlus, 313 F.3d at 179.

[16] At the hearing held by this Court on June 9, 2011, Plaintiffs explained that the alleged scheme aimed to increase Perdue's overall profitability. Plaintiffs alleged that greater profits would, in turn, benefit the Defendants in the form of higher wages and bonuses for "keeping labor costs low." Plaintiffs provided no facts supporting the conclusion that Defendants would, in fact, receive greater compensation from their alleged activities. *Cf.* ePlus, 313 F.3d at 179-80 (holding that the independent personal stake exception applied when a conspirator's aim was to profit by sending her employer into bankruptcy). Defendants, therefore, have no independent personal stake in the alleged scheme.

IV. Dismissal with Prejudice

In *Cozzarelli v. Inspire Pharms., Inc., 549 F.3d 618, 630 (4th Cir. 2008)*, the **[*360]** Fourth Circuit held that ***HN19***[] dismissal with prejudice was warranted where "amendment would be futile in light of the [complaint's] fundamental deficiencies." *See also* *Ganey v. PEC Solutions, Inc., 418 F.3d 379, 391, 125 Fed. Appx. 490 (4th Cir. 2005)* (affirming a denial to leave to amend where any amendment would be futile).

Here, dismissal with prejudice is appropriate. Plaintiffs have no presently **[**30]** pending motion for leave to amend and a previous amendment did not cure fundamental deficiencies in the complaint. Plaintiffs continue to rely on conclusory allegations and boilerplate recitations of the elements of their cause of action. Moreover, even if Plaintiffs were able to meet the pleading standard of *Twombly* and *Iqbal*, the intracorporate conspiracy doctrine bars the expansive civil RICO claim proffered by the Plaintiffs. Thus, amendment of this complaint would be futile. Plaintiffs cannot plead conspiracy of these parties as allegedly configured within the corporate entity, Perdue Farms, Inc.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is GRANTED and this case is DISMISSED WITH PREJUDICE. A separate Order follows.

Dated: July 6, 2011

/s/

Richard D. Bennett

United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 6th day of July 2011, ORDERED that:

1. Defendants Todd McMahen, *et al. 's* Motion to Dismiss (ECF No. 61) is GRANTED;
2. This case is DISMISSED WITH PREJUDICE;
3. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel; and

4. The Clerk of the Court CLOSE THIS **[**31]** CASE.

/s/

Richard D. Bennett

United States District Judge

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Drake v. Cox Communs., Inc.

United States District Court for the District of Kansas

July 7, 2011, Decided

Case No. 10-2671-JTM

Reporter
2011 U.S. Dist. LEXIS 73529 *; 2012-1 Trade Cas. (CCH) P77,917; 2011 WL 2680688

LIONEL DRAKE, Plaintiff, vs. COX COMMUNICATIONS, INC., AND THE ADVERTISING COUNCIL, INC., Defendants.

Core Terms

free air, Sherman Act, allegations, antitrust, surreplies, motion to dismiss, anti trust law, charitable, cable television, relevant market

Counsel: **[*1]** Lionel Drake, Plaintiff, Pro se, Topeka, KS.

For The Advertising Council, Inc., Defendant: Jason R. Bock, Lyndon W. Vix, Ron L. Campbell, Stephen E. Robison, LEAD ATTORNEYS, Fleeson, Gooing, Coulson & Kitch, LLC - Wichita, Wichita, KS.

For Cox Communications, Inc., Defendant: James M. Armstrong, LEAD ATTORNEY, Foulston Siefkin LLP - Wichita, Wichita, KS.

Judges: J. THOMAS MARTEN, JUDGE.

Opinion by: J. THOMAS MARTEN

Opinion

MEMORANDUM AND ORDER

This is an action by *pro se* plaintiff Lionel Drake against defendants Cox Communications, Inc. and The Advertising Council, Inc., complaining that the defendants have refused to provide him with free cable access time to broadcast his political commentary. Invoking state tort law, Drake made comparable factual charges in a Kansas action, alleging that Cox and the Ad Council "wrongfully obstructed [his] requests for [free] public service announcement air time." *Lionel Drake v. Cox Communications, LLC and Cox Enterprises*, Case No. 09-C-1287 (Shawnee Dist. Ct. Aug. 16, 2010).

After the Shawnee Country District Court granted summary judgment on the claims advanced in that action, Drake commenced this federal action, arguing that the denial of free air time represents a violation of **[*2]** federal ***antitrust law***. Cox and the Ad Council have moved to dismiss Drake's claims, and the court finds that Drake's claims should be dismissed pursuant to *Fed.R.Civ.Pr. 12(b)(6)*. Further the court finds that Drake — notwithstanding his voluminous pleadings — has failed to articulate any potential grounds by which his claims might be made viable, and so denies his requests for amendment and discovery.

Defendant Cox is a cable television provider. The Ad Council prepares and distributes PSAs for various organizations, including the federal government. According to his Complaint, Drake is a "freelance writer and television producer," who would like to produce public service announcements (PSAs). (Doc. 1, ¶ 4). However, he alleges he cannot do so because Cox only donates free air time to PSAs produced by the Ad Council. In his first claim, Drake argues that the defendants have violated Section 2 of the Sherman Act by monopolizing the "national market" for PSAs. In his second claim, he argues that the defendants have entered into "exclusionary agreement" to exclude persons such as himself from receiving free air time, thus violating Section 1 of the Sherman Act. Drake also asserts claims **[*3]** for "unlawful tying" under Section 1, and for violation of Section 13a of the Clayton Act for Discrimination.

Many of the factual allegations in Drake's Complaint are prefaced by the qualification that "Plaintiff is informed and believes and based thereon alleges" the asserted fact. However, a complaint must present averments which "raise a right to relief above a speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This standard requires the plaintiff to advance "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. These allegations in the complaint must "state a claim to relief that is plausible on its face." Robbins v. Oklahoma, 519 F.3d. 1242, 1246 (10th Cir. 2008) (quoting Twombly, 550 U.S. at 570 (2007). *See also* VanZandt v. Oklahoma Dept. of Human Service, 276 Fed. Appx. 843, 2008 WL 1945344 *3 (10th Cir. 2008) (the plaintiff must allege sufficient facts to "nudge[] their claims across the line from conceivable to plausible"). "[T]he mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claim is insufficient; the complaint must give the court reason to **[*4]** believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007).

This standard is particularly relevant in antitrust actions, such as that instituted by Drake. "*Twombly* is ... an essential guide to the application of that [pleading] standard in the antitrust context." In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 320 (3d Cir. 2010). As the Third Circuit noted in that case, *Twombly* itself "turned largely on the doctrinal fact that ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case. Id. at 320, n. 18 (internal quotation omitted).

Drake's antitrust claims under the Sherman Act fail for multiple reasons. First, he has failed to demonstrate any standing to present his claims here. Standing in the context of the Sherman Act requires a showing of an antitrust injury, that is, "an injury of the type the antitrust laws were intended to prevent." Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006) (internal quotation omitted), *cert. denied*, *549 U.S. 1209, 127 S. Ct. 1334, 167 L. Ed. 2d 81 (2007)*. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). **[*5]** The plaintiff must show that the defendant's actions have harmed not just himself, but competition as well. Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango, 582 F. 3d 1216, 1225 (10th Cir. 2009).

Here, Drake merely alleges the frustration of his own desire to receive free air time. He has failed to allege or show any injury to competition or to the consumer by Cox's actions in donating free air time to the Ad Council. More fundamentally, the provision of free air time for PSAs is simply not commercial activity, and thus not the sort of activity which the Sherman Act was intended to address. It is charitable activity, the polar opposite of commerce, and hence does not fall within the scope of the Act. *See* Bronx Legal Services v. Legal Services for New York City, No. 02 CV 6199, 2003 U.S. Dist. LEXIS 695, at *11-*12 (S.D.N.Y. Jan. 17, 2003) (dismissing antitrust action arising from the contribution of free legal services since transactions were "akin to a series of charitable gifts"), *aff'd*, 78 Fed. Appx. 781 (2d Cir. 2003); Dedication & Everlasting Love to Animals v. Humane Soc'y of the United States, 50 F.3d 710 (9th Cir. 1995) (upholding dismissal of antitrust **[*6]** claim based on the supposed market for charitable stray animal shelters). *See also* In re Terrorist Attacks on September 11, 2001, 538 F.3d 71, 92 (2nd Cir. 2008) (holding in context of Foreign Sovereign Immunity Act that "[t]he alleged conduct itself—giving away money—is not a commercial activity."), *abrogated on other gds,* Samantar v. Yousuf, 130 S.Ct. 2278, 176 L. Ed. 2d 1047 (2010).

In Council for Employment and Economic Energy Use v. WHDH Corporation, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, *440 U.S. 945, 99 S. Ct. 1421, 59 L. Ed. 2d 633 (1979)*, the Third Circuit rejected an antitrust action against radio stations which donated free air time to a political opponent of the plaintiff, the court stressing:

> The original intent of Congress in enacting the Sherman Act was to suppress and penalize restraints on Commercial competition in the marketing of goods and services. *Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 495, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*. It is difficult to conceive how the present complaint fits under that general rubric. Moreover, the Supreme Court has made clear its refusal to permit parties to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have **[*7]** no basis whatever in the legislative history of that Act." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961)*. *See also* *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)*. The only exceptions to this rule countenanced by the Court were situations in which the political activity at issue was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id. 365 U.S. at 144, 81 S.Ct. at 533*. Simply stating the exception demonstrates that it has no relationship to the facts alleged in appellant's complaint. ***This case involves political opponents, not commercial competitors; and political objectives, not market place goals***.

580 F.2d at 12 (emphasis added). The present case involves charitable contributions for public service information, "not market place goals," and Drake's claim does not involve the type of injury that the antitrust laws were designed to address.

Further, Drake's Sherman Act claims are materially deficient in his failure to provide any intelligible definition of the relevant **[*8]** market. Actions under both *Section 1* and *Section 2* require careful definition of the relevant market. *See* *Jacobs v. Tempur-Pedic Internat'l, 626 F.3d 1327, 1336 (11th Cir. 2010)* (*Section 1*); *Campfield v. State Farm Mutual Automobile Ins. Co., 532 F.3d 1111, 1117 (10th Cir. 2008)* (*Section 2*). Claims under *Section 2* require proof of a relevant market showing "the interchangeability of use or the cross-elasticity of demand between the product and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*.

Drake argues that the relevant market is the "national market" for PSAs, but this allegation is fatally overbroad. His Complaint advances no credible allegation that Cox, a regional cable provider, controls the national market for PSAs, or that Cox and the Ad Council, or indeed cable television more generally, are the only vehicles for the production and dissemination of PSAs. By its very nature, cable television is local television. Further, cable television is typically comprised of hundreds of television channels, each of which may carry its own PSAs. And cable television itself must compete with a variety of other media outlets, such as broadcast television, radio, **[*9]** the internet, and newspapers. Nowhere in Drake's many pages of Complaint, Response, and (unauthorized) Surreplies is there any intelligible definition of the relevant market within which Cox and the Ad Council have supposedly acquired monopoly power. He has failed to credibly allege the existence of a "national market" for the production of PSAs.

Further, actions under *Section 2* require a showing of monopolization. "Monopoly power is the power to control prices or exclude competition." *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558, 1567 (10th Cir. 1991)*. Here, Drake has failed to show that the defendants have monopoly power as to the production or distribution of PSAs. Aside from repeated forumulaic recitiations of the statutory language, his Complaint is devoid of any real allegation or showing that the Ad Council has any power as to the decisions of cable providers as to the recipients of free air time.

A claim under *Section 1* requires proof of concerted anticompetitive action. *Abraham v. Intermountain Healthcare, Inc., 461 F. 3d 1249, 1256 (10th Cir. 2006)*. To withstand a motion to dismiss, a plaintiff **[*10]** raising a claim under *Section 1* must advance more than an inference as to an alleged illegal agreement, he must advance specific allegations as to the particular anticompetitive agreement. *Twombly, 550 U.S. at 550-51*. Here, Drake's Complaint merely alleges at the most general level that "Defendants do have an actual and or de facto agreement to exclude competition." (Dkt. 1, ¶ 74). This generality is repeated throughout Drake's lengthy complaint, but repetition is no substitute for the specificity required by *Twombly*.

Drake's third claim is that the defendants have entered into an illegal tying agreement. But this also presupposes a commercial transaction, since "[a] tying arrangement is an agreement by a party to *sell* one product but only on the condition that the *buyer* also *purchase* a different (or tied) product." *See* Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (internal quotation omitted, emphasis added). In addition to the failure of Drake to provide any specific information as to the supposed agreement itself, there is no allegation in the Complaint that the Ad Council has engaged in any exclusionary conduct. As to Cox, a tying agreement may be illegal **[*11]** under the Sherman Act where a party who has "a direct economic interest in the sale of the tied product" acts to exclude other parties. Sports Racing Services. v. Sports Car Club of America, 131 F.3d 874, 886 (10th Cir. 1997). But, again, the present case involves the production of PSAs, which are not sold by Cox. Instead, the time is charitably donated. Drake's claim is without merit.

Finally, as noted earlier, Drake advances of discriminatory pricing under "Section 13a of the Clayton Act." (Dkt. 1, at ¶ 127). There is no Section 13a of the Clayton Act. Section 3 of the Robison-Patman Act, codified at 15 U.S.C. § 13a, does prohibit some discriminatory pricing schemes, but by its terms only applies to sales of goods. *See* National Black Expo v. Clear Channel Broadcasting Inc., No. 03 C 2751, 2007 U.S. Dist. LEXIS 9783, at *38-*39 (N.D. Ill. Feb. 7, 2007) (holding that the statute had no application of alleged discriminatory pricing in radio advertising). Moreover, the statute contains no civil remedy; it is enforced solely through criminal actions brought by the Department of Justice. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 382, 78 S. Ct. 352, 2 L. Ed. 2d 340 (1958).

The court denies plaintiff's request to **[*12]** submit an amended complaint. This request takes the form of one sentence at the end of his Response: "If the court finds that the complaint is insufficient in any area, plaintiff requests the opportunity to amend the complaint to correct these issues." (Dkt. 22, at 16).

Drake's request will be denied. Not only is the request deficient under D.Kan.Rule 15.1(a)(2), which requires that request for amendment be accompanied by a copy of the proposed amended pleading, it is also futile. Drake's original Complaint extends across 40 pages and 130 numbered paragraphs. Throughout this Complaint, and in all of his subsequent filings, Drake has failed to present a colorable antitrust claim, and there is no reason to believe that any future pleading would correct the fatal deficiencies already present. The core of Drake's argument — that the Cox's *charitable* provision of PSAs to the Ad Council violates federal ***antitrust law***— is simply contrary to unanimous case law, which provides that ***antitrust law*** is intended to govern *commercial* activity.

Similarly, the court will deny Drake's request for a hearing in which he would present evidence supposedly in support of his claims. Motions to Dismiss under **[*13]** Rule 12(b)(6) address the legal sufficiency of the allegations in a plaintiff's complaint, and thus are typically resolved without evidentiary hearing, *See* Lozar v. Birds Eye Foods, 678 F. Supp. 2d 589, 597 (W.D. Mich. 2009). As with the requested amendment, there is no reason to believe that plaintiff in a hearing will be able to state a valid basis for the present action, when he has been unable to do so in the voluminous pleadings already presented to the court.

The court will grant the motions by Cox and the Ad Council seeking to strike Drake's surreplies to the Motions to Dismiss. Surreplies are permitted only by prior leave of court, which Drake did not attempt to obtain. Michaud v. Duncan, 244 F. Supp. 2d 1217, 1230-31 (D. Kan. 2003). Here, the surreplies submitted by Drake are stricken not simply because he failed to seek prior leave, and because they advance no information which could not have also been included in his original Responses to the Motions to Dismiss, but because they lack any justification. That is, even if Drake had properly applied for permission to file his surreplies, leave would have been denied because the Replies submitted by Cox and the Ad Council contained **[*14]** no facts or arguments advanced for the first time. In the absence of such new arguments or other exceptional circumstances, no surreply would have been authorized. Michaud, 244 F.Supp.2d at 1231. Accordingly, Drake should not be placed in a more favorable position by his ignoring the prior leave rule, and the surreplies are accordingly stricken.

IT IS ACCORDINGLY ORDERED this 7th day of July, 2011, that the Motions to Dismiss and to Strike of the defendants (Dkt. 13, 15, 30, 31) are hereby granted; the Motion for Evidentiary Hearing (Dkt. 29) of the plaintiff is denied.

/s/ J. Thomas Marten

J. THOMAS MARTEN, JUDGE

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Stanislaus Food Prods. Co. v. USS-POSCO Indus.

United States District Court for the Eastern District of California

July 7, 2011, Decided; July 7, 2011, Filed

CASE NO. CV F 09-0560 LJO SMS

Reporter
2011 U.S. Dist. LEXIS 72764 *; 2011 WL 2678879

STANISLAUS FOOD PRODUCTS COMPANY, Plaintiff, vs. USS-POSCO INDUSTRIES, et al., Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part Stanislaus Food Prods. Co. v. USS-POSCO Indus., 2012 U.S. Dist. LEXIS 74000 (E.D. Cal., May 29, 2012)

Prior History: Stanislaus Food Prods. Co. v. USS-POSCO Indus., 782 F. Supp. 2d 1059, 2011 U.S. Dist. LEXIS 43056 (E.D. Cal., 2011)

Core Terms

allegations, Steel, Products, Tin, conspiracy, competitors, prices, specific intent, Sherman Act, monopolize, conspiracy to monopolize, motion to dismiss, argues, anticompetitive, antitrust, restraint of trade, relevant market, Cartwright Act, meetings, alleged conspiracy, pleadings, contracts, inferred, compete, food, equalization, manufacturer, implausible, tin-plated, monopoly

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

Opinion by: Lawrence J. O'Neill

Opinion

ORDER ON JOINT MOTION TO DISMISS

(Doc. 272)

By motion filed on April 18, 2011, defendants USS-POSCO Industries ("UPI"), U.S. Steel Corp, Pitcal, Inc., POSCO-California Corp, and POSCO American Steel Corp. (collectively "defendants") filed a joint motion to dismiss the plaintiff's third amended complaint ("TAC"). The motions were filed under seal and redacted portions of the motions were subsequently filed. Plaintiff Stanislaus Food Products filed an opposition **[*3]** to the motions on May 23, 2011. The opposition also was filed under seal with a redacted version later filed. The defendants filed a joint reply brief on June 3, 2011. Pursuant to order, the motion was set without a hearing date. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.

FACTUAL BACKGROUND

Plaintiff Stanislaus Food Products ("plaintiff" or "Stanislaus") is a Modesto tomato canner. Stanislaus processes and "fresh packs" tomatoes into tin-plated cans. Since 2001, Stanislaus has purchased millions of one-gallon tin-plated cans pursuant to a Container Supply Agreement ("Container Agreement") with non-party Silgan Containers Corporation ("Silgan"). (Doc. 268, TAC ¶21.) [1] Silgan buys "Tin Mill Products" (tin-plated steel) and manufactures the Tin Mill Products into tin-plated cans which are sold to canners, such as Stanislaus. (Doc. 268, TAC ¶29 .) Defendant USS-POSCO Industries ("UPI") is the manufacturer of the Tin Mill Products. UPI produces cold-rolled sheets, galvanized sheets and tin-plated and tin-free steel from "hot rolled" steel at its plant in Pittsburgh, California. (Doc.268, TAC ¶23.) UPI then **[*4]** sells the tin-plated steel to Silgan to make tin cans which Silgan in turn sells to Stanislaus. UPI is the only Tin Mill Products producer in the Western United States.

This action alleges antitrust conspiracies by defendants to monopolize the Tin Mill Products market and to price-fix Tin Mill Products.

Alleged Co-Conspirators

The hot-rolled steel, also known as "hot-band steel," is supplied to UPI by co-defendant U.S. Steel and non-party Pohang Iron & Steel Co., Ltd. ("POSCO") of South Korea. U.S. Steel is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. (Doc. 268, TAC ¶22.) POSCO is a Korean corporation. (Doc. 268, TAC¶27.) UPI is a joint venture formed in 1986 by U.S. Steel and POSCO, through their holding companies. (Doc. 268, TAC ¶6.) The nominal general partners of UPI are Defendants Pitcal, Inc. and POSCO-California Corporation ("POSCAL"). Each of these UPI general partners is wholly owned subsidiary of either U.S. Steel or POSCO. Defendant Pitcal, Inc. is a wholly-owned subsidiary of U.S. Steel. POSCAL is a wholly-owned subsidiary of **[*5]** Defendant POSCO American Steel Corporation ("POSAM"), which is in turn a wholly-owned subsidiary of POSCO. (Doc. 268, TAC ¶23-26.) Ultimately, U.S. Steel and POSCO each own a 50% interest in UPI. (Doc. 268, TAC ¶6.)

Tin Mill Products Market

[1] The redacted version of the Third Amended Complaint is referenced in this order, unless otherwise noted.

UPI is the only Tin Mill Products manufacturer in the Western United States. (Doc. 268, TAC ¶23.) Companies outside the Western United States have higher transportation costs for their Tin Mill Products. Until 2006, U.S. Steel sold Tin Mill Products in the Western United States by competitively pricing its products compared to UPI. Both U.S. Steel and POSCO own and operate facilities separate from UPI that produce Tin Mill Products. (Doc. 268, TAC ¶38.) Plaintiff alleges that until 2006, U.S. Steel competed directly with UPI for sales of Tin Mill Products in the Western United States. (Doc. 268, TAC ¶47.) After 2006, the competition ceased pursuant of the Market Allocation Agreement.

Market Allocation Agreement

Plaintiff alleges that beginning in 2005, the CEOs of U.S. Steel and POSCO talked about steel capacity and output. "On information and belief, Mr. Surma and Mr. Lee discussed coordination between U.S. Steel and POSCO to reduce the supply of Tin **[*6]** Mill Products in the Western United States." (Doc. 268, TAC ¶59.) The CEOs are both members of the International Iron and Steel Institute ("IISI"). Plaintiff alleges that in October 2006, "On information and belief, at this meeting, Mr. Surma and Mr. Lee discussed eliminating competition in the Relevant Market, including coordinating supply restrictions of Tin Mill Products in the Western United States, in order to increase the prices of Tin Mill Products artificially." (Doc. 268, TAC ¶60.) Plaintiff alleges that on June 27, 2006, the International Trade Commission extended an antidumping order which precluded Japanese steel makers from entering the Western United States steel market. (Doc. 268, TAC ¶66-67.) Plaintiff states that after the antidumping order was extended "defendants finalized the Market Allocation Agreement."

Plaintiff alleges that "the Market Allocation Agreement itself was negotiated and finalized during the 2006 meetings of UPI's Management Committee." (Doc. 268, TAC ¶68.) Plaintiff alleges "on information and belief" who was present at the meeting, representing which of the defendants. (Doc. 268, TAC ¶69.) Plaintiff alleges that:

> "The overarching purpose of the Agreement **[*7]** was to allocate the Relevant Market fully to UPI in order to create a monopoly and control prices so that UPI (under the direction and control of U.S. Steel, through Pitcal, and POSCO, through POSAM and POSCAL) could control and increase the prices of Tin Mill Products in the Western United States to artificially high levels." (Doc. 268, TAC ¶73.)

Pursuant to the Market Allocation Agreement, U.S. Steel agreed to:

- exit the Relevant Market by no longer competing in the Western United States,
- promised to eliminate discounts U.S. Steel had offered its customers in the Western United States for quarter inch width surplus and for freight equalization pricing. (Doc. 268, TAC ¶74.)

Pursuant to the Market Allocation Agreement, POSCO (POSAM and POSCAL) agreed to:

- refrain from selling into the Western United States Tin Mill Products produced by POSCO. (Doc. 268, TAC ¶76.)

Pursuant to the Market Allocation Agreement, UPI agreed to raise Tin Mill Products prices. (Doc. 268, TAC ¶78.) Plaintiff alleges that "U.S. Steel, UPI, Pitcal, POSCAL, POSAM, and POSCO thereby agreed to eliminate the diversity of entrepreneurial interests that prevailed prior to 2006 (U.S. Steel's actual competition and POSCO's **[*8]** potential competition)." (Doc. 268, TAC ¶79.)

Plaintiff alleges that the Market Allocation Agreement was implemented and enforced by UPI, U.S. steel and POSCO through meeting held periodically. (Doc. 268, TAC ¶¶84-87.) Plaintiff alleges that "The existence and content of these meetings and communications have been kept strictly confidential by Defendants and co-conspirator POSCO." (Doc. 268, TAC ¶¶88.)

Claims in the TAC

The Third Amended Complaint alleges the following claims for relief:

(1) First Claim - California Cartwright Act, *Cal.Bus. & Prof. Code §16720*;

(2) Second Claim - Section 1 of the Sherman Act, *15 U.S.C. §1* (Restraint of Trade);

(3) Third Claim - *Section 2* of the Sherman Act, *15 U.S.C. §2* (Conspiracy to Monopolize);

(4) Fourth Claim for Relief - Unfair Competition, *Cal.Bus & Prof Code §17200*.

This motion challenges each of plaintiff's claims.

ANALYSIS AND DISCUSSION

A. *Rule 12(b)(6)* - Motion to Dismiss for Failure to State a Claim

A motion to dismiss pursuant to *Fed R. Civ. P. 12(b)(6)* is a challenge to the sufficiency of the pleadings set forth in the complaint. A *Fed. R. Civ. P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence **[*9]** of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations of the complaint in question, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*; *Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404*, *reh'g denied*, *396 U.S. 869, 90 S. Ct. 35, 24 L. Ed. 2d 123 (1969)*.

To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)* ("*Twombly*"). A claim has facial plausibility,"when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the **[*10]** plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)*.

A court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Farm Credit Servs. of Am. v. Am. State Bank, 339 F.3d 764, 767 (8th Cir. 2003)* (citation omitted). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. 554, 127 S. Ct. 1955, 1964-65* (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S.Ct. at 1969*. **[*11]** If a plaintiff fails to state a claim, a court need not permit an attempt to amend a complaint if "it determines that the pleading could not possibly be cured by allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990)*.

B. Overview of Sherman Act Claims

Plaintiff alleges the Market Allocation Agreement violates §1 and *§2* the Sherman Act. *15 U.S.C. §§ 1*, *2*. *Section 1* prohibits restraint of trade: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." To prevail on a cause of action for violation of *15 U.S.C. § 1*, a plaintiff must show, "(1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce." *American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996)*.

Plaintiff also alleges violation of *Section 2* of the Sherman Act. *Section 2* makes it illegal to "to monopolize ... any part of the trade or commerce . . ." *15 U.S.C. § 2*. Plaintiff **[*12]** alleges a conspiracy to monopolize. To prove a conspiracy to monopolize in violation of *§ 2*, Plaintiff must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. *Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)*.

C. Challenge to the TAC under *Twombly*

The defendants challenge the complaint on the procedural grounds that the pleadings are inadequate under *Twombly.* Defendants argue that the allegations of an agreement to restrain trade in violation of *Section 1* are inadequate. The basis for the conspiracy claim is the "Market Allocation Agreement." Defendants challenged the adequacy of allegations of the Market Allocation Agreement on three grounds: (1) plaintiff does not allege direct evidence of an agreement to restrain trade, and circumstantial evidence fails to support a reasonable inference of conspiratorial agreement, (2) contradictory allegations render the Market Allocation Agreement implausible, (3) plaintiff's claims are not "plausible on their face."

1. Standards of Specificity

"[A] district court **[*13]** must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558, 127 S.Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007)*. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. A claim of Sherman Act violation requires enough factual allegations to suggest an illegal agreement was made.

In *Twombly*, the Supreme Court found allegations that the defendant telephone companies "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another" insufficient because no evidentiary facts were pleaded which could prove the conspiracy. *Twombly, 550 U.S. at 565*. The Court stated, in dicta, that "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." *550 U.S. at 565 n. 10* ("the complaint here furnishes no clue as to which of the four [defendants] (much less which of their employees) supposedly **[*14]** agreed, or when and where the illicit agreement took place."). Allegations of an agreement would normally include details about the formation of that agreement. See *Twombly, 550 U.S. 565 n. 10*.

In *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*, a class of retailers failed to plead sufficient evidentiary facts to survive dismissal under *Twombly* of a price-fixing claim against Visa, MasterCard and banks belonging to the two systems. Plaintiffs alleged that the defendants had conspired to fix the bank fees charged to retailers for processing credit card sales. The court found that plaintiffs offered no evidentiary facts as to the banks individually beyond the collective legal conclusion that the "banks" knowingly participated in the alleged scheme. *Id. at 1048*. The court stated that plaintiffs allegation of an agreement that the "Banks knowingly, intentionally and actively participated in an individual capacity in the alleged scheme" to fix the fees, was factually insufficient. *Kendall, 518 F.3d at 1048*. Without more factual content the "banks," which were large institutions with hundreds of employees, entering into contracts and agreements daily, would have no idea **[*15]** how to begin to respond to the allegations of a conspiracy. *Id. at 1047*. The court held the complaint was properly dismissed because plaintiffs did not allege factual specifics that would "answer [such] basic questions [as]: who, did what, to whom (or with whom), where, and when?" *Id. at 1049*.

Twombly and *Kendall* do not require that plaintiff prove its case or include every factual detail in support of its claims in their complaints. Rather, *Twombly* and *Kendall* requires plaintiff to include sufficient facts supporting the existence of a conspiracy, beyond the conclusory allegation that a conspiracy did exist.

2. Adequacy of Pleading the "Market Allocation Agreement"

This is the third and last time this Court has or will consider the adequacy of plaintiff's pleading of the Market Allocation Agreement. In this Court's previous order, the Court found the allegations of Market Allocation Agreement were conclusory and non-specific. The Court granted the motion to dismiss on the grounds that no specific agreements among and between defendants were alleged. Plaintiff had alleged all defendants agreed to all agreements, notwithstanding their different corporate roles in and between themselves. **[*16]** The Court found that specific allegations of the terms of the Market Allocation Agreement are particularly significant in this case and dismissed for lack of specificity. The Court now turns to whether plaintiff has plead the Market Allocation Agreement adequately.

As alleged in the TAC, the Market Allocation Agreement comprises a long term, complex arrangement between former competitors, turned joint venturers. At its core, the Market Allocation Agreement was an agreement between U.S. Steel and POSCO, two competitors and also joint venturers in UPI, to no longer compete in the Tin-Mill Products market in the Western United States. (TAC ¶13.) The Agreement required U.S. Steel to no longer compete in the Western United States for its own profits, but rather for U.S. Steel to exit the market and "share" in tin mill products through profits from UPI. The TAC states the dates the Market Allocation Agreement was negotiated: January 9, 2006, June 12, 2006 and December 6, 2006. (Doc. 268, TAC ¶14.) These dates coincide with UPI Management Committee meetings. [2] The TAC alleges the persons involved in the agreement and the roles each person undertook, but on information and belief. (Doc. 268, **[*17]** TAC ¶14.) The TAC details which person were involved in which discussions. (Doc. 268, TAC ¶56-60, 69.)

The TAC alleges specific terms of the Market Allocation Agreement: [3]

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[2] Defendants argue that "other than sheer speculation, it is not clear what basis Plaintiff could possibly have to allege that these meetings had anything to do with an alleged Market Allocation Agreement." (Doc. 272, Joint Brief p.9 n.6.) Defendants further argue that "the allegations are also false in fact." *Id.* The Court is not here concerned the falsity or speculation as to what occurred at the meetings. These are issues of proof for a different stage of proceeding. Here, the Court determines whether the plaintiff has sufficiently stated an agreement. *Twombly, 550 U.S. at 556* ("it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement").

[3] Generally, an agreement among competitors to allocate territory is a per se violation of *Section 1* of the Sherman Act. *Palmer v. BRG of Georgia, 498 U.S. 46, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990)* (per curiam). For instance, in *Palmer*, plaintiffs were students who sued providers of bar review courses, BRG and HBJ. Plaintiffs contended that the price of BRG's course was enhanced by an unlawful market allocation agreement. BRG had entered into an agreement whereby HBJ agreed to turn its Georgia bar review operations over to BRG and to grant BRG an exclusive license to market bar review courses under HBJ's "BarBri" trade name. *Id. at 47, 111 S.Ct. 401*. The Supreme Court reversed denials of summary judgment by both the trial and appeals court, and found the agreement per se unlawful. The Court held that:

> Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether **[*19]** the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. Thus, the 1980 agreement between HBJ and BRG was unlawful on its face.

Id. at 49-50, 111 S.Ct. 401. In *Palmer*, plaintiff has presented evidence of an agreement called a "covenant not to compete" in Georgia and a separate reciprocal agreement for non-competition in the rest of the United States. The court said that these agreements were formed for the purpose and the effect of raising prices for bar review courses. Pursuant to *Palmer*, such an agreement to allocate the market is illegal under *Section 1*.

(1) U.S. Steel would not sell tin mill products in the Western United States;
(2) U.S. Steel eliminated discounts offered for quarter-inch width surplus and freight equalization pricing.
(3) U.S. Steel agreed to not otherwise price its tin mill produce competitively against UPI

(4) U.S. Steel agreed to reduce the supply **[*18]** of tin mill products by reducing capacity output at its Indian-based tin mills (Doc. 268 TAC ¶74.)

The TAC alleges the term of the Market Allocation Agreement with POSCO:

(1) POSCO agreed to refrain from selling into the Western United States Tin Mill Products produced in POSCO's own tin mills. (Doc. 268, TAC ¶76.)

Here, the TAC alleges the location and dates of meetings where the Market Allocation Agreement was negotiated and finalized. (Doc. 268, TAC ¶68.) The TAC alleges the terms of the Market Allocation Agreement, and the specific individuals who implemented the Market Allocation Agreement. (Doc. 268, TAC ¶73-78.) The TAC alleges how defendants monitored **[*20]** and enforced the agreement. (Doc. 268, TAC ¶82-86.)

The allegations are not generalized conclusions as to actions by defendants. In *Twombly*, the plaintiff plead conclusions parroting the language of the *Section 1*: "defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry ... and ha[d] agreed not to compete with one another." *Twombly, 127 S.Ct. at 1955*. Here, the allegations specify which defendant engaged in which activity. Specific agreements among and between defendants are alleged. Allegations of an agreement would normally include details about the formation of that agreement. See *Twombly, 550 U.S. 565 n. 10*. Accord *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008)* ("There are no facts alleged to support [the conclusion that a conspiracy existed]. Even after the depositions taken, the complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?") The TAC's allegations state the location and dates of meetings where the Market Allocation agreement was negotiated and finalized (TAC ¶ 68); the terms of the Market Allocation Agreement, and the specific individuals who implemented the Market **[*21]** Allocation Agreement (TAC ¶¶ 73-78); and how Defendants monitored and enforced each other's compliance with the Market Allocation Agreement. (TAC ¶¶ 82-86.) Thus, the allegations are not generalized conclusions.

3. Sufficient Factual Content

Defendants argue that plaintiff's direct evidence of a conspiracy is speculative. They argue plaintiff pleads no facts that the December 6, 2006 meeting was any different than any other Management Committee meeting. Defendants argue that plaintiff does not plead facts of documents evidencing an unlawful agreement, any guilty pleas or verbal admissions by a defendant. (Doc. 272, Joint Brief p. 10.)

Plaintiff argues that it "need not provide Defendants with a witness list, testimony, and documentary evidence." (Opposition p.8.) Plaintiff points out that the cases relied upon by defendants are summary judgment cases which have a different standard of proof.

The Court agrees with plaintiff. The cases relied upon by defendants are summary judgment cases where the plaintiff failed to prove the direct agreement. *See e.g.*, *In re Baby Food Antitrust Litigation, 166 F.3d 112 (3rd Cir. 1999)* (cited in Joint Brief p. 10, 12.) This case is at the pleading stage, **[*22]** and plaintiff is not required to plead what exactly was said or happened at the Management Committee meetings. It would be surprising that plaintiff had access, pre-discovery, to detailed activities. Plaintiff has plead that the agreement was formed at these meetings in sufficient detail for defendants to establish who agreed to do what activity, when it was supposed to be done and how the activity was to be accomplished. These allegations are more than bare allegations. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)* ("A bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are large institutions with hundreds of employees entering into contracts and agreements daily.") The proof of this agreement is for different stage of this case.

4. Plausibility of the Agreement

Aside from the allegations of a direct agreement, the TAC also alleges circumstantial evidence of conspiracy. Plaintiff argues that *Twombly* does not require that the alleged antitrust conspiracy be the most likely explanation and that defendants' argument that there exists "a more plausible, alternative explanation" is not the legal standard. Plaintiff **[*23]** argues that the Market Allocation Agreement is plausible. Plaintiff argues that it has alleged numerous "plus factors" which show the plausibility of the alleged conspiracy and agreement. The structure of the Relevant Market makes collusion plausible, collusion is possible because of the concentrated supply controlled by defendants, and the inelastic demand for tin mill products would force customers to purchase from defendants.

Twombly did not explicitly use the term "plus factors" in formulating its pleading standard. "Plus factors" are pleading additional circumstantial evidence, that must exist to ensure "that the inference of conspiracy is reasonable in light of the competing inferences of independent action." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)*. Here, plaintiff argues that it has alleged "plus factors" that there was a highly concentrated supply, inelastic demand, high barriers to reentry, among other things. If there are sufficient other "plus factors," an inference of conspiracy can be reasonable. *In re Citric Acid Litigation, 191 F.3d 1090, 1102 (9th Cir. 1999)* (considering parallel pricing as a "plus **[*24]** factor," for an inference of a conspiracy).

Defendants argue that plaintiff's allegation of an unlawful agreement reached at UPI's Management Committee meeting is pure speculation and conjecture. (Doc. 272, Joint Brief p. 11.) Defendants note that plaintiff admits the "information was confidential" and plaintiff has no knowledge of the contents of the meeting. Defendants analogize plaintiff's allegations with the allegations rejected in *LaFlamme v. Societe Air France, 702 F.Supp.2d 136, 147-48 (E.D.N.Y. 2010)*. Defendants argue that in *LaFlamme*, the court dismissed plaintiff's purposed "direct evidence" of agreement because it was "based on a bald, conclusion allegation" that "it appeared that defendants decided to adopt the terms" of an agreement. *LaFlamme, 702 F.Supp.2d at 147*. Defendants argue that "plaintiff has taken the date of an ordinary meeting it knows occurred, but knows nothing else about, and attempted to pass it off as the date of an illegal agreement." (Doc. 272, Joint Brief p.13.)

The Court acknowledges that it does not infer a conspiracy merely because plaintiff identified an opportunity to conspire. *In re Citric Acid Litig., 191 F.3d at 1103* (refusing to "infer participation **[*25]** in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity.").

The Court, however, will not delve into the truth of the allegations. On a motion to dismiss, the well pleaded factual allegations are assumed to be true. *Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*. None of the allegations regarding the Market Allocation Agreement (¶¶68, 73-78, 82-86) are made upon information and belief. Plaintiff alleges who was present at the meetings in which the Market Allocation Agreement was entered on information and belief. And while "these allegations cannot alone support Plaintiffs' claims, [ ] such participation demonstrates how and when Defendants had opportunities to exchange information or make agreements." *In re Static Random Access Memory (SRAM) Antitrust Litigation, 580 F.Supp.2d 896, 903 (N.D.Cal.2008)*. It is an issue of proof as to the truth of the allegations. *See* *Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 510 (9th Cir.1989)* ("[T]he Sherman Act reflects an important federal policy in preventing excessive concentration in relevant markets.")

Circumstantial **[*26]** evidence is sufficiently alleged. U.S. Steel ceased competing in the Western United States despite what plaintiff alleges are prices that tripled historic profit margins. (Doc. 268, TAC ¶96.) Plaintiff argues that U.S. Steel competed with UPI in the Western United States for the sale of Tin Mill Products. U.S. Steel was UPI's primary competitor and there were no other competitors. [4] In 2006, the International Trade Commission decided to continue an "antidumping" order against Japanese steel producers, which UPI and U.S. Steel endorsed. (Doc. 268, TAC ¶61-67.) This antidumping order restricted entry of other foreign competitors. No other competitors were in the market - only UPI and U.S. Steel - therefore no one was able to undercut UPI and U.S. Steel's prices. (Doc. 268, TAC ¶61.) With the exclusion of potential Japanese competitors, UPI and U.S. Steel could agree to allocate the market to UPI. U.S. Steel would no longer compete in the Western United States and instead, with no competition in the market, UPI could raise prices. U.S. Steel would benefit by exiting the market because it would participate in UPI's profits as UPI's joint venturer.

In these pleadings, plaintiff has at least set the stage, time frame and rationale for U.S. Steel leaving the Western United States market. [5] The Court acknowledges that some of the allegations in the complaint alleging the Market Allocation Agreement are made on "information and relief," and particularly as to which persons were involved in making the Market Allocation Agreement. However, the Court finds that the allegations of the agreement and the circumstantial evidence are sufficient factual content, reasonable inferences from that content for an alleged unlawful agreement.

5. Contradictory Allegations

Defendants argue that the TAC's contradictory allegations **[*28]** fails to allege a claim that is "plausible on its face." (Doc. 272 Joint Brief p. 14-16.) First, defendants point to contradictory allegations that there were no steel makers other than U.S. Steel which could affect the prices in the Western United States, yet the TAC contains allegations that Mittal was a "giant" in the industry. Second, plaintiff failed to state a starting date of the alleged conspiracy. Third, despite the unlawful agreement in 2006, prices were not raised until three years later in 2009.

Plaintiff argues that *Twombly* does not require that the alleged antitrust conspiracy be the most likely explanation and that defendants' argument, that there exists "a more plausible, alternative explanation," is not the legal standard. Plaintiff argues that the Market Allocation Agreement is plausible. Plaintiff argues that it has alleged numerous "plus factors" which show the plausibility of the alleged conspiracy and agreement.

The Court need not make unwarranted deductions or unreasonable inferences from the allegations. But as long as the theory "is not facially implausible, the court's skepticism is reserved for later stages of the proceedings." *In re Gilead Sciences Sec. Litigation, 536 F.3d 1049, 1057 (9th Cir. 2008)*. **[*29]** "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S.Ct. at 1949*.

(A) Allegations of Mittal as a Competitor

The Court rejects defendants argument that the TAC is not plausible because of inconsistencies relating to Mittal, a purported competitor. The TAC alleges that the only "meaningful" competition UPI faced in the Western United States was from U.S. Steel. The TAC alleges that Mittal was "never been more than a minor player in the Western United States." (TAC ¶115.) Defendants point out that this allegation is inconsistent with another allegation because else where in the TAC, Mittal is referred to as a "giant." (Doc. 268, TAC ¶104 ("the elimination of freight equalization between these two giants increased the price of tin-mill products . . .").) The Court does not find it implausible as plaintiff alleges "Mittal has never significantly affected the price of Tin Mill Products in the Relevant Market" because "Tin Mill Products were only a 'small component of Mittal's product offering.'" (Doc. 268, TAC ¶115.)

(B) Allegations of the Starting **[*30]** Date of the Agreement

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[4] Defendants argue that plaintiff's own **[*27]** allegations acknowledge other competitors because plaintiff refers to Mittal as a "giant" in steel manufacturing. Plaintiff argues that Mittal is a "giant," but not in the Western United States which is the relevant market in this case. This argument is addressed *infra* regarding contradictory allegations.

[5] It remains to be proved whether U.S. Steel actually left the Western U.S. in 2006, as currently alleged, or much earlier in 1986, as previously alleged. This fact appears to be a linchpin in the Market Allocation Agreement.

Defendants argue that plaintiff states that the alleged conspiracy began in December 2006, but alleges, inconsistently, that part of the conspiracy, elimination of freight equalization began in April 2006. Defendants note that there is inconsistency in the starting date of the conspiracy. The TAC quotes a Silgan official's testimony, Mr. Owen, who testified that freight equalization stopped in April 2006:

> "According to the TAC, Mr. Owen's testimony was given in April 2006. As a result, based on Plaintiff's own allegations, U.S. Steel could not have agreed with POSCO in December 2006 to 'eliminate discounts' because, according to the Owen testimony that Plaintiff quotes, U.S. Steel had unilaterally already stopped these discounts at least eight months earlier, in April 2006." (Doc. 272, Joint Brief p.15.)

The Court does not find the allegation, quoting Mr. Owen's testimony, fatally inconsistent with the remaining allegations. (TAC ¶74.) Plaintiff alleges the Market Allocation Agreement was negotiated over a period of several months, including prior to April 2006. Moreover, the TAC alleges that elimination of freight equalization was one of several components of the **[*31]** Market Allocation Agreement. It is not inconceivable that this component was agreed to early on and implemented immediately upon agreement. Further, the TAC quotes testimony of an executive of Silgan, Mr. Owen, without any foundational information necessary to substantiate his knowledge and meaning. The Court is reluctant to dismiss a conspiracy claim because hearsay evidence may be marginally inconsistent with other allegations. The Court, therefore, does not find the Market Allocation Agreement implausible based upon testimony of Mr. Owen.

(C) Delay in Implementing the Market Allocation Agreement

Defendants argue that the TAC contains contradictory allegations of a 3-year delay in price increases. Defendants note that plaintiff again alleges that the conspiracy was formed in 2006, but that UPI did not increase its prices until 2009. (Doc. 268, TAC ¶¶15, 93, 109.)

Plaintiff points to allegations which explain the reason for the delay in raising prices. The standard in the industry was multi-year contracts between purchasers of Tin Mill Products and suppliers of Tin Mill Products. (Doc. 268, TAC ¶102.) In 2006, UPI and U.S. Steel were in the midst of multi- year supply contracts to supply **[*32]** Tin Mill Products to their customers. Plaintiff alleges that once those contracts expired, on or about 2009, U.S. Steel did not renew its contracts, and UPI then increased prices. (Doc. 268, TAC ¶102.)

The Court does not find these allegations implausible to explain the delay in raising prices. While not likely, it is not implausible that the agreement had a delayed timing component. UPI and U.S. Steel might have agreed to delay implementation of price increases because they were indeed in long term contracts which would subject them to contractual liability if breached. It is not implausible. It will be subject to proof at a later stage of proceedings.

D. Adequacy of Plaintiff's Claims under *Section 2* of the Sherman Act - Conspiracy to Monopolize

Section 2 makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several states." *15 U.S.C. § 2*. Plaintiff alleges a conspiracy to monopolize. (See TAC ¶¶151-159; Doc. 280, Opposition p. 24.) To prove a conspiracy to monopolize in violation of *§ 2*, Plaintiff must show four elements: (1) the existence of a combination **[*33]** or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. *Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)*.

1. Arguments regarding Specific Intent

Defendants argue that plaintiff failed to allege two elements - specific intent to monopolize and the existence of a conspiracy to monopolize. (Doc. 272, Joint Brief p. 20.) Defendants argue that there is no allegation that "defendants intended and did drive out independent competitors," citing this Court's February 23, 2011 order. (Doc. 272, Joint Reply p. 20.) Defendants point out the alleged "specific intent" rests solely upon the allegation that U.S.

Steel left the relevant market. Thus, defendants argue there is no anticompetitive conduct designed to exclude other competitors. There is no allegation of a "single instance when a defendant drove out or somehow excluded an independent competitor from the market." (Doc. 272, Joint Brief p.23.)

Plaintiff argues that "the Market Allocation Agreement excluded U.S. Steel (and POSCO) from the market by agreement thus by design leaving UPI as the monopolist supplier." (Doc. **[*34]** 280, Opposition p. 25 (emphasis in original).) This exclusion by agreement, plaintiff argues, "is the essence of a conspiracy to monopolize claim." *Id.*

2. Specific Intent and AntiCompetitive Acts

To prevail on a conspiracy to monopolize, plaintiff must show "specific intent to monopolize and anticompetitive acts designed to effect that intent." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir.1980)*, *cert. denied*, *450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981)*. "[S]pecific intent to monopolize and anticompetitive acts designed to effect that intent" are required for a conspiracy to monopolize claim. *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1154 (9th Cir.)* (*section 2* claim failed for lack of evidence that the purpose of conduct was "to stifle competition"), *cert. denied*, *540 U.S. 940, 124 S. Ct. 355, 157 L. Ed. 2d 253 (2003)*.

A "specific intent to monopolize" means an intent to exclude competition or control prices. *Carpet Seaming Tape Licensing Corp. v. Best Seam. Inc., 616 F.2d 1133, 1141-42 (9th Cir. 1980)* (specific adverse impact on the market); see *American Tobacco Co. v. United States, 328 U.S. 781, 789, 66 S. Ct. 1125, 90 L. Ed. 1575 (1945)* (object of a combination or conspiracy to monopolize is "to **[*35]** exclude actual and potential competitors"). A specific intent to destroy competition or build monopoly is essential. *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 890 (1953)*. Thus, plaintiff must allege "specific intent" ultimately to seize monopoly power by destroying or excluding competition within the relevant market. Specific intent is sufficiently met by proof that a group of competitors took concerted action to drive independent competitors out of business. *TV Communications Network v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir. 1992)*, *cert. denied*, *506 U.S. 999, 113 S. Ct. 601, 121 L. Ed. 2d 537 (1992)*.

Plaintiff argues that it has satisfied the requirements to allege the existence of a conspiracy to monopolize, by alleging the Market Allocation Agreement. Plaintiff argues that excluding competition was the goal of the Market Allocation Agreement. Thus, plaintiff's allegation of a "intent to monopolize" is the existence of the Market Allocation Agreement. (Opposition p. 24.)

3. Lack of Independent Competition

The crux of this "specific intent" challenge is whether independent competitors must have been driven out, excluded or impaired in some fashion by the anticompetitive **[*36]** conduct - the Market Allocation Agreement. The issue is whether plaintiff has plead itself out of a claim because it alleges that there were no other competitors in the market which UPI and U.S. Steel agreed to allocate. The TAC alleges that only UPI and U.S. Steel were in the same market. As such, when U.S. Steel agreed to exit the Western United States, no other competitors were impacted.

Plaintiff cites to *Hunt-Wesson Foods* and to *William Inglis* for the proposition that the "Market Allocation Agreement excluded U.S. Steel (and POSCO) from the market by agreement, thus by design leaving UPI as the monopolist suppler." (Doc. 280, Opposition p. 25.)

In *Hunt-Wesson Foods, 627 F.2d 919 (9th Cir. 1980)*, *cert. denied*, *450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981)*, a food manufacturer brought a conspiracy to monopolize claim, among other claims, against a second food manufacturer. The second food manufacturer moved to dismiss the complaint for failure to allege specific intent. The Court overruled a motion to dismiss finding that specific intent had been alleged in that defendant had engaged in acts resulting in anticompetitive effects, "with the specific intent to eliminate plaintiff and others as competitors . . **[*37]** all with the intent of keeping or forcing plaintiff out of the business . . . and all with the purpose and effect of obstructing, restraining and excluding competition by the plaintiff and others." *Hunt-Wesson Foods, 627 F.2d at 926-927*. Thus, in *Hunt-Wesson Foods*, the plaintiff had alleged that the conduct excluded plaintiff and others as competitors.

In *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981)*, *cert. denied*, *459 U.S. 825, 103 S. Ct. 57, 103 S. Ct. 58, 74 L. Ed. 2d 61 (1982)*, a baking company brought suit against competing independent wholesale bakers alleging antitrust violations. *William Inglis* stated that specific intent may be inferred from "conduct that serves as the basis for a substantial claim of restraint of trade" (such as a market allocation agreement), but only "if those actions are of a kind clearly threatening to competition or clearly exclusionary." *Id. at 1028*; *accord* *Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1174 (9th Cir. 1988)* (Proof of specific intent may sometimes be supplied by inference from certain types of conduct. The conduct must, however, amount to an unreasonable restraint of trade under Sherman Act, *section 1* standards.)

Here, **[*38]** plaintiff does not allege competitors or competition were excluded or impacted. Indeed, plaintiff alleges that UPI and U.S. Steel were the only competitors in the market. No other competition existed. Competition consists of rivalry among competitors. *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1987)*, *aff'd*, *496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*. Both UPI and U.S. Steel purportedly possessed a portion of the market which they agreed to allocate in the Market Allocation Agreement. [6] UPI and U.S. Steel each had market power that was lawfully in their hands. No competitors were in the market, excluded from the market or prevented from entering the market because of the Market Allocation Agreement. *United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 612, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977)* (holding that "'increasing sales' and 'increasing market share' are normal business goals, not forbidden by *§ 2* without other evidence of an intent to monopolize").

Specific intent cannot be inferred from U.S. Steel's "exclusion" from the market. The purported "exclusion" of U.S. Steel from the relevant market was by agreement. U.S. Steel voluntarily agreed not to participate in the market. [7] This is not "exclusionary" conduct. No exclusionary conduct, predatory conduct or other anticompetitive conduct is alleged as to any competitor, including U.S. Steel. The agreement to exit the market may be an illicit "agreement" under *Section 1* for restraint of trade. It, however, is not a conspiracy to monopolize under *Section 2*, because the allegations do not allege exclusion of competitors or prevention of competitors from entering the market. Offenses under *section 1* and *section 2* of the Sherman Act are legally distinct even though they may overlap. *See* *American Tobacco Co. v. United States, 328 U.S. 781, 788, 66 S.Ct. 1125, 1128, 90 L. Ed. 1575 (1946)* **[*40]** (*section 1* and *section 2* are separate statutory offenses and "require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap"); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59, 60 S.Ct. 811, 846 n. 59, 84 L. Ed. 1129 (1940)* ("the crime under *§ 1* is legally distinct from that under *§ 2* ... though the two sections overlap in the sense that a monopoly under *§ 2* is a species of restraint of trade under *§ 1*").

Further, the **[*41]** specific intent element cannot be inferred from the Market Allocation Agreement because of the remoteness in time between the acts and what plaintiff alleges is the resulting anticompetitive effects. When U.S. Steel exited the market in 2006, UPI's monopoly power purportedly came into existence. UPI could then raise

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[6] The TAC alleges, "Pursuant to the Market Allocation Agreement, U.S. Steel (acting directly and through its alter ego Pitcal) agreed to exit the Relevant Market by no longer competing in the Western United States. . . .) (Doc. 268 **[*39]** TAC ¶74.) Plaintiff alleges that U.S. Steel entered into the Market Allocation Agreement with the specific intent to destroy the actual competition U.S. Steel provided in the Relevant Market . . ." (Doc. 268, TAC ¶75; see also ¶¶76-78 (allegations re POSCO and UPI).) The TAC does not allege other competition was impacted.

[7] In evaluating the allegations of competitors in the market, the Court does not ignore plaintiff's prior, inconsistent allegation. Plaintiff previously alleged that U.S. Steel exited the Western United States market in 1986 when UPI was formed as a joint venture between U.S. Steel and POSCO. Plaintiff had alleged U.S. Steel exited in 1986 because it would not compete against its joint venture. See Doc. 216, FAC ¶70-72. In the TAC, plaintiff alleges U.S. Steel exited the market much later, in 2006. In light of the inconsistent allegation of facts which are easily verifiable and verifiable without the need for discovery, this particular allegation is highly implausible.

prices. However, as noted above, the prices were not raised to supracompetitive prices for another three years after U.S. Steel purportedly left the market. The conspiracy to monopolize through the Market Allocation Agreement did not result in anticompetitive effects for three years. The conspiracy "finalized" in 2006, but prices were not increased until three years later in 2009. [8] There is no "link" between acts and anticompetitive effect in which to infer intent. The focus on an anticompetitive effect is essential, because "it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." *Rebel Oil Co. Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*, *cert. denied*, *516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995)*.

Specific intent to monopolize cannot be inferred when no independent competition is excluded from or effected by the conduct and where the anticompetitive effect is delayed for an extended time. Here, the conduct did not have any effect upon competition because plaintiff does not allege competition was excluded or prevented, and no price increase occurred for over 3 years. Accordingly, this Court finds that, although granted multiple occasions to amend, plaintiff cannot allege specific intent to monopolize. Therefore, this claim will be dismissed with prejudice.

E. Cartwright Act

The parties agree that plaintiff's California Cartwright Act claim either falls or succeeds on the success or failure of the claims under the Sherman Act. (See Doc. 280, Opposition p. 23 ("the TAC satisfies the elements of a Cartwright Act claim if it satisfies the elements of a *Section 1* claim under the Sherman Act."); **[*43]** (Doc. 281, Reply p.7-8 ("plaintiff seems to concede that its Cartwright Act and UCL claims rise or fall with its Sherman Act claim.).)

The Cartwright Act is California's antitrust statute. *Bus. & Prof Code §§16700-16770*. Cases decided under the Sherman Act are applicable to interpreting the Cartwright Act. *See* *Marin County Bd. Of Realtors, Inc. v. Palsson, 16 Cal.3d 920, 130 Cal.Rptr.1, 549 P.2d 833 (1976)*. Indeed, the analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act. *County of Tuolumne v. Sonora Community Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Therefore, the analysis and conclusions would be the same under the Cartwright Act, as under the federal claims.

Given the analyses and conclusions regarding the federal claims, the Court incorporates those rulings for the state Cartwright Act antitrust claim as well. To the extent that the motion has been granted or denied on the Sherman Act claims, that ruling is incorporated for the Cartwright Act.

F. Unfair Competition Claim.

Plaintiff's count 4 alleges a claim under California's Unfair Practices Act, also called the Unfair Competition Act ("UCL"). The purposes **[*44]** of the UCL are "to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." *Cal.Bus.&Prof.Code § 17001*. "The UC[L] works by 'borrowing' violations of other laws and treating those transgressions, when committed as a business activity, as 'unlawful business practices.'" *Stevens v. Superior Court, 75 Cal. App. 4th 594, 602, 89 Cal. Rptr. 2d 370 (1999)*. These "unlawful business practices" are "independently actionable under *section 17200 et seq.* and subject to the distinct remedies provided thereunder." *Id.*

The UCL claim predicates liability based on the Sherman Act and the Cartwright Act. Given the analyses and conclusions regarding the federal and state claims, the Court incorporates those rulings for the UCL claim as well.

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[8] The section 1 claim, conspiracy to restrain trade, is not fatally flawed even though it contains the same allegations **[*42]** of delay in increasing prices. Proof is different for a *Section 1* and a *Section 2* claim. To prove a *Section 2* conspiracy to monopolize, one must show a specific intent to monopolize. By comparison, a case brought under *§ 1* of the Sherman Act only requires proof of an anticompetitive agreement.

CONCLUSION

For the foregoing reasons, the Court rules on the defendants' motion to dismiss the third amended complaint as follows:

(1) The motion to dismiss the First Claim for California Cartwright Act, *Cal.Bus. & Prof. Code §16720* is DENIED in part, to the extent that it is **[*45]** predicated on *Section 1 of the Sherman Act* and GRANTED in part, to the extent it is predicated on *Section 2* of the Sherman Act;

(2) The motion to dismiss the Second Claim for *Section 1* of the Sherman Act, *15 U.S.C. §1* (Restraint of Trade) is DENIED;

(3) The motion to dismiss the Third Claim for *Section 2* of the Sherman Act, *15 U.S.C. §2* (Conspiracy to Monopolize) is GRANTED with prejudice;

(4) The motion to dismiss the Fourth Claim for Relief for Unfair Competition, *Cal.Bus & Prof Code §17200* is DENIED in part, to the extent that it is predicated on *Section 1 of the Sherman Act* and GRANTED in part, to the extent it is predicated on *Section 2* of the Sherman Act.

Defendants shall have 30 days from the date of entry of this order to file an answer.

IT IS SO ORDERED.

Dated: July 7, 2011

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

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Van Hoose v. Gravois

Court of Appeal of Louisiana, First Circuit

July 7, 2011, Judgment Rendered

NO. 2011 CA 0976

Reporter

70 So. 3d 1017 *; 2011 La. App. LEXIS 859 **; 2011 0976 (La.App. 1 Cir. 7/7/11);

LEIGH VAN HOOSE, JR. AND LEIGH VAN HOOSE, JR. INSURANCE AGENCY, INC. VERSUS GRANT P. GRAVOIS, GRANT P. GRAVOIS INSURANCE AGENCY, INC., ROBERT A. ENGLAND, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, AND STATE FARM GENERAL INSURANCE COMPANY

Subsequent History: Remanded by *Van Hoose v. State Farm Mut. Auto. Ins. Co., 2015 U.S. Dist. LEXIS 141089 (E.D. La., Oct. 15, 2015)*

Prior History: [1]** Appealed from the Twenty-Second Judicial District Court, In and for the Parish of St. Tammany, Louisiana. Suit No. 2011-10102. The Honorable Raymond S. Childress, Judge Presiding.

Disposition: REVERSED AND REMANDED.

Core Terms

antitrust claim, restraint of trade, policyholders, conspiracy, no cause of action, unfair trade practice, antitrust, vertical, allegations, cause of action, rule of reason, horizontal, peremptory exception, material fact, writ denied, Federal Trade Commission Act, plaintiffs-appellees, competitors

LexisNexis® Headnotes

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

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

The objection that a petition fails to state a cause of action is properly raised by the peremptory exception. *La. Code Civ. Proc. Ann. art. 927(A)(5)*. The purpose of the peremptory exception of no cause of action is to determine the sufficiency in law of the petition, in terms of whether the law extends a remedy to anyone under the petition's factual allegations. For purposes of determining the issues raised by a peremptory exception of no cause of action, the well-pleaded facts in the petition must be accepted as true, and the court must determine if the law affords the plaintiff a remedy under those facts. Any doubts are resolved in favor of the sufficiency of the petition.

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

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] **Standards of Review, De Novo Review**

Appellate review of the denial of a peremptory exception of no cause of action is de novo because an exception of no cause of action presents a question of law and the trial court's decision is based only on the sufficiency of the petition.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

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

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN3[] **Trade Practices & Unfair Competition, State Regulation**

Though the denial of an exception of no cause of action is normally not appealable, *La. Rev. Stat. Ann. §§ 51:134* and 135 provide for an immediate appeal of such an interlocutory judgment related to antitrust claims. While there is no specific statutory provision providing for an immediate appeal of an interlocutory judgment related to Louisiana Unfair Trade Practices Act (LUTPA), *La. Rev. Stat. Ann. § 51:1401 et seq.*, claims, courts have addressed LUTPA claims along with antitrust claims on appeals authorized by *§§ 51:134* and 135.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN4[] **Conspiracy to Monopolize, State Regulation**

See *La. Rev. Stat. Ann. § 51:122(A)*.

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

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

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The federal and Louisiana antitrust laws were intended to be sweeping in breadth, encompassing every conspiracy, contract, or combination that restrains trade. Not every business arrangement that restrains trade in some manner is illegal, however. The first step in analyzing an agreement to restrain trade is to determine whether it should be categorized as horizontal or vertical.

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

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

HN6[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A horizontal conspiracy is an agreement between competitors that restrains trade at the same level of distribution, and such agreements are generally considered "per se" violations of ***antitrust law***.

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

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

HN7[] Price Fixing & Restraints of Trade, Vertical Restraints

A vertical restraint is imposed by persons at different levels of distribution, usually by one higher up in the distribution chain than the party restrained. When a vertical conspiracy is alleged, the plaintiffs must show that the restraint of trade violates the "rule of reason."

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

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

HN8[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The rule of reason analysis under both federal and Louisiana law requires proof of three elements: that the defendants (1) engaged in a conspiracy (2) that restrained trade or injured competition (3) in a particular market. Where the alleged restrictions are vertical, and not directed at fixing prices, their legality is governed by the rule of reason, and in order to prevail under the rule of reason, a plaintiff must show that the defendants' conduct has an adverse effect on competition.

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

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

Horizontal combinations are agreements between competitors at the same level of distribution.

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

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

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Under the rule of reason, and in order to state an antitrust claim under *La. Rev. Stat. Ann. § 51:122*, a plaintiff must adequately allege injury to competition. This requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Even an act of pure malice by one business competitor against another does not, without more, state an antitrust claim. Since Louisiana is a fact-pleading state, a plaintiff must set forth "material facts" that form the basis for the asserted cause of action. A mere conclusion unsupported by material facts does not set forth a cause of action. Therefore, conclusory statements of fact or formulaic recitations of the elements of an antitrust violation are insufficient to state a claim.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN11[] Trade Practices & Unfair Competition, State Regulation

See the Louisiana Unfair Trade Practices Act, *La. Rev. Stat. Ann. § 51:1405(A)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN12[] Trade Practices & Unfair Competition, Federal Trade Commission Act

The Louisiana Unfair Trade Practices Act, *La. Rev. Stat. Ann. § 51:1401 et seq.*, is patterned after the Federal Trade Commission Act and prohibits the same type of deceptive and anticompetitive conduct as prohibited by the Federal Trade Commission Act. Therefore, in interpreting Louisiana's statute, a court must consider how the Federal Trade Commission and the federal courts have applied the Federal Trade Commission Act to various types of conduct.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN13[] Trade Practices & Unfair Competition, Federal Trade Commission Act

Under the Federal Trade Commission Act, vertical territorial and customer restrictions are not prohibited absent a showing of injury to competition. The real thrust of the Louisiana Unfair Trade Practices Act, *La. Rev. Stat. Ann. § 51:1401 et seq.*, modeled after the Federal Trade Commission Act, is to deter injury to competition.

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Judges: BEFORE: WHIPPLE, GUIDRY, AND GAIDRY, JJ.

Opinion by: GAIDRY

Opinion

[*1019] [Pg 3] **GAIDRY, J**.

This appeal involves an action by an insurance agent and his agency seeking damages for breach of contract, unfair trade practices, antitrust violations, and interference with contractual relations. The defendants-appellants, Grant P. Gravois ("Gravois") and Grant P. Gravois **[**2]** Insurance Agency, Inc. ("Gravois Agency"), State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company (collectively, "State Farm"), and Robert A. England ("England"), seek reversal of the trial court's judgment denying their peremptory exceptions of no cause of action in favor of the plaintiffs-appellees, Leigh Van Hoose, Jr. ("Van Hoose") and Leigh Van Hoose, Jr. Insurance Agency Inc. ("Van Hoose Agency").[1] **[*1020]** We reverse the trial court's judgment for the following reasons and remand the case in order to allow plaintiffs to amend their petition pursuant to *La. Code Civ. P. art. 934*.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Van Hoose entered into a "State Farm Agent's Agreement" with State Farm, effective November 1, 1980, which provided that Van Hoose would be an independent contractor and the Van Hoose Agency would only sell State Farm insurance. The Van Hoose Agency is located in Slidell, Louisiana. **[**3]** Curtis Martin was another State Farm agent located in Slidell. Martin and Van Hoose were close friends, and when Martin developed cancer and his death became imminent, he requested that Van Hoose consider hiring his most valued employee, Fanny Pichon. Soon after Martin's passing, Van Hoose hired Pichon with an effective employment [Pg 4] date of July 1, 2009. Sometime after July 1, 2009, Gravois began operating the Gravois Agency in Slidell.

Van Hoose filed a petition for damages on January 5, 2011, in which he claims that one week after hiring Pichon he received a call from England, an agency field executive for State Farm, who stated that "he better not see any policyholder transfers from the Curtis [Martin] Agency to the Van Hoose Agency." Van Hoose stated that he told England that neither he nor Pichon had solicited or would solicit any business from the former Curtis Martin Agency. Plaintiffs allege that Gravois, a former State Farm employee, was promised and expected to have all the policyholders from the former Curtis Martin Agency. The petition further alleges that several policyholders decided to transfer from the Curtis Martin Agency to the Van Hoose Agency of their own volition. **[**4]** Subsequently, England again contacted Van Hoose and stated that he had the power to shut down the Van Hoose Agency if more policyholders requested transfers. In the fall of 2009, England and State Farm allowed some policyholders to transfer agencies at their request, but Gravois contacted several policyholders in an attempt to convince them not to switch. Plaintiffs claim that on January 7, 2010, Gravois stated in an email to Van Hoose, copying England and others, that as of that date he would not allow any more policyholders to transfer to the Van Hoose Agency. Since that time, any transfer requests from policyholders have been blocked by England.

Plaintiffs' petition seeks to allege causes of action for (1) breach of contract; (2) unfair trade practices in violation of the Louisiana Unfair Trade Practices Act ("LUTPA"), *La. R.S. 51:1401, et seq*.; (3) restraint of trade in violation of the Louisiana antitrust statute, *La. R.S. 51:122*; and (4) interference with contractual relations. Defendants filed exceptions of no [Pg 5] cause of action with respect to the unfair trade practices and antitrust claims. The trial court held a hearing on the exceptions on May 11, 2011, and subsequently **[**5]** signed a judgment on May 23, 2011, denying the exceptions of no cause of action. This appeal followed.

ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Defendants-appellants contend that the trial court erred in denying their exceptions of no cause of action. State Farm and England frame the issues presented for our review as follows:

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[1] Gravois and Gravois Agency filed a separate exception from State Farm and England. However, the substance of the exceptions and the arguments made in this appeal are substantially similar.

[*1021] 1. Whether a plaintiff meets his burden of pleading an antitrust claim under Louisiana law where the allegations of his petition plead only a reduction in intrabrand competition and not interbrand competition, and injury to himself with no corresponding antitrust injury or injury to competition?

2. If there is a contract, combination, or conspiracy, which State Farm and England dispute, does Louisiana ***antitrust law*** recognize a *per se* horizontal restraint of trade under *La. R.S. 51:122* where a plaintiff pleads only one same-level competitor?

3. In a case where plaintiffs have only nominally pleaded a vertical restraint of trade (wherein they are required to plead with material facts a relevant product and geographic market), does a petition that states only that the relevant geographic market is the "greater Slidell area" and the relevant product market is "State **[**6]** Farm approved and authorized products" satisfy the fact-pleading standard to advance a State antitrust claim?
4. Where a plaintiff pleads a LUTPA claim that is premised entirely on the existence of an antitrust claim, and the antitrust claim is insufficiently pleaded, must the LUTPA claim be dismissed?

Gravois and Gravois Agency's issues for review are similar:

1. Whether the trial court incorrectly found that plaintiffs properly pled a claim under *La. R.S. 51:122*?
2. Whether plaintiffs have alleged a vertical restraint of trade?
3. Whether plaintiffs failed to show there is an unreasonable restraint on competition?
4. Whether plaintiffs failed to plead a relevant market?
5. Whether plaintiffs have also failed to allege a cause of action under the LUTPA?

[Pg 6] **APPELLATE REVIEW OF JUDGMENT DENYING PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION**

HN1[] The objection that a petition fails to state a cause of action is properly raised by the peremptory exception. *La. C.C.P. art. 927(A)(5)*. The purpose of the peremptory exception of no cause of action is to determine the sufficiency in law of the petition, in terms of whether the law extends a remedy to anyone under the petition's factual allegations. *Stroscher v. Stroscher, 2001-2769 (La. App. 1st Cir. 2/14/03), 845 So.2d 518, 523*. **[**7]** For purposes of determining the issues raised by a peremptory exception of no cause of action, the well-pleaded facts in the petition must be accepted as true, and the court must determine if the law affords the plaintiff a remedy under those facts. *Id*. Any doubts are resolved in favor of the sufficiency of the petition. *Id*.

HN2[] Appellate review of the denial of a peremptory exception of no cause of action is *de novo* because an exception of no cause of action presents a question of law and the trial court's decision is based only on the sufficiency of the petition. *City of Denham Springs v. Perkins, 2008-1937 (La. App. 1st Cir. 3/27/09), 10 So.3d 311, 321-22*, *writ denied*, *2009-0871 (La. 5/13/09), 8 So.3d 568*. ***HN3***[] Though the denial of an exception of no cause of action is normally not appealable, *La. R.S. 51:134* and *135* provide for an immediate appeal of such an interlocutory judgment related to antitrust claims. *Plaquemine Marine, Inc. v. Mercury Marine, 2003-1036 (La. App. 1st Cir. 7/25/03), 859 So.2d 110, 114, n.* ***[*1022]*** *3*. While there is no specific statutory provision providing for an immediate appeal of an interlocutory judgment related to LUTPA claims, courts have addressed LUTPA claims along **[**8]** with antitrust claims on appeals authorized by *R.S. 51:134* and *135*. *See* *Southern Tool & Supply, Inc. v. Beerman Precision, Inc., 2003-0960 (La. App. 4th Cir. 11/26/03), 862 So.2d 271*, [Pg 7] *writs denied*, *2003-3481, (La. 3/12/04), 869 So. 2d 821*, *2003-3518, (La. 3/12/04),869 So. 2d 825*, & *2003-3536 (La. 3/12/04), 869 So. 2d 826*; *see also* *Jefferson v. Chevron U.S.A. Inc., 97-2436, 98-0254 (La. App. 4th Cir. 5/20/98), 713 So.2d 785*, *writ denied*, *98-1681 (La. 10/16/98), 727 So.2d 441*. Regardless, in the event that the Court does not have appellate jurisdiction over the LUTPA claim, we choose to exercise our supervisory jurisdiction pursuant to *Article V, Section 10(A) of the Louisiana Constitution of 1974*.

DISCUSSION

A. Antitrust claim under *La. R.S. 51:122*

The Louisiana antitrust statute provides that ***HN4***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal." *La. R.S. 51:122(A)*. ***HN5***[] The federal and state antitrust laws were intended to be sweeping in breadth, encompassing every conspiracy, contract, or combination that restrains trade. *Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So.2d 1149, 1154-55 & n. 12 (La. 1986)*. Not every business arrangement **[**9]** that restrains trade in some manner is illegal, however. The first step in analyzing an agreement to restrain trade is to determine whether it should be categorized as horizontal or vertical. ***HN6***[] A horizontal conspiracy is an agreement between competitors that restrains trade at the same level of distribution, and such agreements are generally considered "per se" violations of ***antitrust law***. *Plaquemine Marine, Inc., 859 So.2d at 117*; *Southern Tool & Supply, Inc., 862 So.2d at 280*. ***HN7***[] A vertical restraint is imposed by persons at different levels of distribution, usually by one higher up in the distribution chain than the party restrained. When a vertical conspiracy is alleged, plaintiffs must show that the restraint of trade violates the "rule of reason." *Plaquemine Marine, Inc., 859 So.2d at 118*.

[Pg 8] ***HN8***[] The rule of reason analysis under both federal and Louisiana law requires proof of three elements: that the defendants (1) engaged in a conspiracy (2) that restrained trade or injured competition (3) in a particular market. *Abraham v. Richland Parish Hosp. Service Dist. 1-B, 41,141 (La. App. 2d Cir. 8/23/06), 938 So.2d 1163, 1172*, *writ denied*, *2006-2534 (La. 1/8/07), 948 So.2d 124*. Where the **[**10]** alleged restrictions are vertical, and not directed at fixing prices, their legality is governed by the rule of reason, and in order to prevail under the rule of reason, a plaintiff must show that the defendants' conduct has an adverse effect on competition. *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005 (5th Cir.)*, *cert. denied*, *454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981)*.

In this case, plaintiffs-appellees argue that a horizontal conspiracy is alleged, which implicates the per se rule. However, jurisprudence is clear that ***HN9***[] horizontal combinations are agreements *between competitors* at the same level of distribution. *See Plaquemine Marine, Inc., 859 So.2d at 117*; *see also Southern Tool & Supply, Inc., 862 So.2d at 280*. The agreement alleged here is among Gravois, the Gravois Agency, and England. While it is not entirely clear under Louisiana law and the facts of this case whether Gravois **[*1023]** could conspire with the Gravois Agency, even assuming that he could, there is no allegation that Gravois, the Gravois Agency, and England compete with each other. Therefore, under the facts alleged thus far, there could not be a horizontal conspiracy since the alleged **[**11]** agreement is not "between competitors." The agreement alleged is properly categorized as a vertical conspiracy, triggering the rule of reason analysis.

HN10[] Under the rule of reason, and in order to state an antitrust claim under *La. R.S. 51:122*, a plaintiff must adequately allege injury to competition. *Plaquemine Marine, Inc., 859 So.2d at 118*. This requirement cannot be met [Pg 9] by broad allegations of harm to the "market" as an abstract entity. *Id*. Even an act of pure malice by one business competitor against another does not, without more, state an antitrust claim. *Id. at 119*. Since Louisiana is a fact-pleading state, a plaintiff must set forth "material facts" that form the basis for the asserted cause of action. *Id. at 118*. A mere conclusion unsupported by material facts does not set forth a cause of action; therefore, conclusory statements of fact or formulaic recitations of the elements of an antitrust violation are insufficient to state a claim. *Tuban Petroleum, LLC v. SIARC, Inc., 2009-0302 (La. App. 4th Cir. 4/15/09), 11 So.3d 519, 522-23*, *writ denied*, *2009-0945 (La. 6/5/09), 9 So.3d 877*.

In this case, plaintiffs allege in their petition that the conspiracy to restrain trade "prevent[ed] **[**12]** or discourage[d] State Farm policyholders from moving their State Farm policies from the Gravois Agency to the Van Hoose Agency," which "injured competition in the market by denying policyholders a free choice to select the State Farm agency they wished to have their business placed with." Plaintiffs further allege that the defendants' conspiracy "significantly injured competition among the remaining agencies." These allegations are broad and conclusory claims of harm to the market. The material facts underlying these allegations assert that the alleged agreement prevented State Farm policyholders from switching from the Gravois Agency to the Van Hoose Agency. While the petition contains an allegation regarding injury to "competition among the remaining agencies," there are no material facts plead to support such an allegation. There are no allegations that the State Farm policyholders in question were not allowed to transfer their policies to any other State Farm agency or any other insurance company. Therefore, the allegations of injury [Pg 10] to competition in the petition are insufficient to state a valid antitrust claim under *La. R.S. 51:122*.

Since we find that plaintiffs-appellees **[**13]** have not adequately alleged injury to competition to support their antitrust claim and reverse the trial court's judgment on this basis, it is unnecessary to address the other issues related to the antitrust claim raised by appellants.

B. Unfair Trade Practices claim under LUTPA

The Louisiana Unfair Trade Practices Act, *La. R.S. 51:1401, et seq*., does not enumerate those instances of conduct that constitute unfair trade practices, but *La. R.S. 51:1405(A)* provides that ***HN11***[] "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." This Court has noted that ***HN12***[] the LUTPA is patterned after the Federal Trade Commission Act and prohibits the same type of deceptive and anticompetitive conduct as prohibited by the Federal Trade Commission Act. *Capitol House Preservation Co., LLC v. Perryman Consultants, Inc., 2008-0367 (La. App. 1st Cir. 8/28/09), 47 So.3d 408, 417*, *writ denied*, **[*1024]** *2009-2638 (La. 2/12/10), 27 So.3d 856*, *cert. denied*, *__ U.S. __, 131 S. Ct. 104, 178 L. Ed. 2d 30 (2010)*. Therefore, in interpreting Louisiana's statute, a court must consider how the Federal Trade Commission and the federal courts have **[**14]** applied the Federal Trade Commission Act to various types of conduct. *Id*. ***HN13***[] Under the Federal Trade Commission Act, vertical territorial and customer restrictions are not prohibited absent a showing of injury to competition. *Red Diamond Supply, Inc., 637 F.2d at 1008*. In addition, the U.S. Fifth Circuit has noted that "the real thrust of the LUTPA, modeled after the Federal Trade Commission Act, ... is to deter injury to competition." *Reingold v. Swiftships, Inc. 126 F.3d 645, 652 (5th Cir. 1997)* (quoting *Omnitech International, Inc. v. Clorox Company, 11 F.3d 1316, 1331 (5th Cir.)*, [Pg 11] *cert. denied*, *513 U.S. 815, 115 S. Ct. 71, 130 L. Ed. 2d 26 (1994)*. As discussed above regarding the antitrust claim, plaintiffs-appellees have failed to adequately allege injury to competition in this case. Therefore, plaintiffs-appellees have similarly failed to state a claim for unfair trade practices under the LUTPA.

DECREE

The judgment of the trial court denying the peremptory exceptions of no cause of action is reversed, and the case is remanded in order to allow plaintiffs to amend their petition pursuant to *La. C.C.P. art. 934*. Costs of this appeal shall be split equally between the parties.

REVERSED [15] AND REMANDED**.

End of Document

Brady v. NFL

United States Court of Appeals for the Eighth Circuit

June 3, 2011, Submitted; July 8, 2011, Filed

No. 11-1898

Reporter

644 F.3d 661 *; 2011 U.S. App. LEXIS 14111 **; 190 L.R.R.M. 3441; 161 Lab. Cas. (CCH) P10,394; 2011-1 Trade Cas. (CCH) P77,518

Tom Brady; Drew Brees; Vincent Jackson; Ben Leber; Logan Mankins; Peyton Manning; Von Miller; Brian Robison; Osi Umenyiora; Mike Vrabel; Carl Eller; Priest Holmes; Obafemi Ayanbadejo; Ryan Collins; Antawan Walker, individually, and on behalf of all others similarly situated, Appellees, v. National Football League; Arizona Cardinals Football Club, LLC; Atlanta Falcons Football Club, LLC; Baltimore Ravens Limited Partnership; Buffalo Bills, Inc.; Panthers Football, LLC; The Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns Football Company LLC; Dallas Cowboys Football Club, Ltd; PDB Sports, Ltd., doing business as The Denver Broncos Football Club, Ltd.; The Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston NFL Holdings, L.P.; Indianapolis Colts, Inc.; Jacksonville Jaguars, Ltd.; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football, LLC; New England Patriots L.P.; New Orleans Louisiana Saints, L.L.C.; New York Football Giants, Inc.; New York Jets LLC; The Oakland Raiders, L.P.; Philadelphia Eagles, LLC; Pittsburgh Steelers LLC; The St. Louis Rams LLC; Chargers Football Company, LLC; San Francisco Forty Niners, Limited; Football Northwest LLC; Buccaneers Limited Partnership; Tennessee Football, Inc.; Pro-Football, Inc., Appellants.

Subsequent History: Related proceeding at *Eller v. NFLPA, 2012 U.S. Dist. LEXIS 74088 (D. Minn., May 29, 2012)*

Prior History: **[**1]** Appeal from the United States District Court for the District of Minnesota.

Brady v. NFL, 640 F.3d 785, 2011 U.S. App. LEXIS 11355 (8th Cir. Minn., 2011)

Core Terms

injunction, players, League, labor dispute, employees, lockout, Clayton Act, exemption, district court, antitrust, Norris-LaGuardia Act, legislative history, anti trust law, disclaimer, enjoined, parties, courts, collective bargaining, terminating, Relations, nonstatutory, terms, employer and employee, organized labor, federal court, labor organization, free agent, Sherman Act, organizations, bargaining

LexisNexis® Headnotes

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

HN1[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN2[] **Federal Preemption, Primacy of Labor Policy**

The Norris-LaGuardia Act, *29 U.S.C.S. § 101 et seq.*, restricts the power of federal courts to issue injunctions in cases involving or growing out of a labor dispute.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN3[] **Federal Preemption, Primacy of Labor Policy**

The Norris-LaGuardia Act (NLGA), *29 U.S.C.S. § 101 et seq.*, curtails the authority of a district court to issue injunctions in a labor dispute. The NLGA responded directly to the United State Supreme Court's construction of § 20 of the Clayton Act of 1914, *29 U.S.C.S. § 52*, and to other decisions of federal courts entering or upholding injunctions in labor disputes. The Clayton Act bars federal courts, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, from issuing an injunction to prohibit any person or persons from ceasing to perform any work or labor or terminating any relation of employment. *29 U.S.C.S. § 52*. The NLGA effectively superseded United States Supreme Court decisions by precluding federal courts from enjoining certain secondary activity by workers in labor disputes.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN4[] **Federal Preemption, Primacy of Labor Policy**

The impetus for the Norris-LaGuardia Act, *29 U.S.C.S. § 101 et seq.*, was dissatisfaction with injunctions entered against workers in labor disputes, but the statute also requires that an injunction against an employer participating in a labor dispute must conform to the Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN5[] **Federal Preemption, Primacy of Labor Policy**

See *29 U.S.C.S. § 101*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN6[] **Federal Preemption, Primacy of Labor Policy**

The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. *29 U.S.C.S. § 113(c)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN7[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 113(a) states that "labor dispute" is defined in *§ 113*, and the United States Supreme Court consistently has described *§ 113(c)* as a definition of "labor dispute."

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN8[] **Federal Preemption, Primacy of Labor Policy**

See *29 U.S.C.S. § 113(a)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN9[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 113(a) states that a case shall be held to involve or grow out of a labor dispute when such dispute is between one or more employers or associations of employers and one or more employees or associations of employees. *29 U.S.C.S. § 113(a)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN10[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 113(a) provides that a case shall be held to involve or grow out of a labor dispute when the case involves any conflicting or competing interests in a labor dispute of persons participating or interested therein.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN11[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 102 declares, among other things, that the individual unorganized worker shall be free from the interference of employers in the designation of representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. *29 U.S.C.S. § 102*. Employees may engage in activities for the purpose of mutual aid or protection without the present existence of a union.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN12[] **Federal Preemption, Primacy of Labor Policy**

The definitions in the Norris-LaGuardia Act (NLGA), *29 U.S.C.S. § 101 et seq.*, provide that a case shall be held to involve or grow out of a labor dispute if a controversy over terms and conditions of employment is between an employer and "one or more employees. *29 U.S.C.S. § 113(a)*. The Act's reference to "concerted activities" appears only in the public policy section, *29 U.S.C.S. § 102*. If the NLGA nonetheless were construed to require concerted activity by employees to establish a labor dispute, a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is "concerted activity" under § 7 of the National Labor Relations Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN13[] **Federal Preemption, Primacy of Labor Policy**

The text of the Norris-LaGuardia Act, *29 U.S.C.S. § 101 et seq.*, and the cases interpreting the term "labor dispute" do not require the present existence of a union to establish a labor dispute.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN14[] **Federal Preemption, Primacy of Labor Policy**

See *29 U.S.C.S. § 104*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN15[] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

There is no uniform definition of the term "lockout," but one practical definition used by the United States Court of Appeals for the Eighth Circuit is a refusal by an employer to furnish available work to its regular employees. As used by the National Labor Relations Board and the courts, a lockout is most simply and completely defined as the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN16[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 105 of the Norris-LaGuardia Act, 29 U.S.C.S. § 101 et seq., states that a district court cannot issue an injunction on the ground that parties to a labor dispute are violating the antitrust laws by doing in concert the acts enumerated in 29 U.S.C.S. § 104.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN17[] **Federal Preemption, Primacy of Labor Policy**

Employers, of course, are among the persons participating in a labor dispute. The introductory clause of 29 U.S.C.S. § 104 thus plainly encompasses employers. If language in a particular subsection is applicable on its face to employees and employers alike (or to employers alone), then there is no need for a specific mention of employers. An employer against whom injunctive relief is sought may invoke the protection of a subsection as a person participating or interested in the labor dispute. The United States Court of Appeals for the Eighth Circuit already has recognized that § 104(c) applies to injunctions against employers.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN18[] **Federal Preemption, Primacy of Labor Policy**

The language in 29 U.S.C.S. § 104(a) — "remain in any relation of employment" — may apply to an employer. 29 U.S.C.S. § 103 of the Norris-LaGuardia Act, 29 U.S.C.S. § 101 et seq., makes clear that both employers and employees can be in a "relation of employment." 29 U.S.C.S. § 103(b) contemplates that either party to a labor agreement can agree to withdraw from an employment relation.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN19[] **Federal Preemption, Primacy of Labor Policy**

The phrase "refusing. to remain in any relation of employment" in 29 U.S.C.S. § 104(a) encompasses a non-permanent work stoppage. To "remain" is to continue unchanged in place, form, or condition, or to continue, as in one place, condition, or character. While a strike or lockout may not permanently end a relation of employment, it changes the condition or character of that relationship. The relation of employer and employee is temporarily suspended during a strike.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN20[] **Federal Preemption, Primacy of Labor Policy**

Employees may refuse to perform work under the first clause of 29 U.S.C.S. § 104(a), and they may refuse to remain in a relation of employment under the second. There is likely overlap between the two clauses, and courts (including the U.S. Supreme Court) have cited both clauses in holding that a strike may not be enjoined. The employer, by contrast, does not perform work, so it may invoke only the second clause. Insofar as an employer's lockout extends to acts by other employers who refuse to take in the late employees of the first employer, the terms of *§ 104(a)* do not forbid an injunction against refusing to offer new work or employment. The lack of symmetry, however, does not render *§ 104(a)* inapplicable to employers altogether. The evenhanded introductory clause of *§ 104* still forbids a court to enjoin "any person or persons" in a labor dispute from "refusing. to remain in any relation of employment." That the terms of *§ 104(a)* afford employers less protection against injunctions than they afford employees (who were, after all, the target of the controversial injunctions that prompted the Norris-LaGuardia Act, *29 U.S.C.S. § 101 et seq.*) does not mean that Congress gave employers no protection at all.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN21[] **Federal Preemption, Primacy of Labor Policy**

It is not a court's province to define the purpose of Congress apart from what it has said in its enactments, and if a party's activities fall within the classes defined by the Clayton and Norris-LaGuardia acts, the court is bound to accord the party the benefit of the legislative provisions.

Governments > Legislation > Interpretation

HN22[] **Legislation, Interpretation**

Statements by opponents of a bill and failure to enact suggested amendments, although they have some weight, are not the most reliable indications of congressional intent.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN23[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 104(a) of the Norris-LaGuardia Act, *29 U.S.C.S. § 101 et seq.*, deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN24[] **Federal Preemption, Primacy of Labor Policy**

29 U.S.C.S. § 107 provides that a court has no authority to issue an injunction except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

HN25[] Federal Preemption, Primacy of Labor Policy

29 U.S.C.S. § 107(c) requires the court to evaluate the relative harms to the parties.

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For Arizona Cardinals Football Club, LLC, Atlanta Falcons Football Club, LLC, Baltimore Ravens Limited Partnership, Buffalo Bills, Inc., Panthers Football, LLC, The Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns Football Company LLC, Dallas Cowboys Football Club, Ltd, PDB Sports, Ltd., doing business as The Denver Broncos Football Club, Ltd., The Detroit Lions, Inc., Green Bay Packers, Inc., Houston NFL Holdings, L.P., Indianapolis Colts, Inc., Jacksonville Jaguars, Ltd., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Minnesota Vikings Football, LLC, New England Patriots L.P., New Orleans Louisiana Saints, L.L.C., New York Football Giants, Inc., New York Jets LLC, The Oakland Raiders, L.P., Philadelphia Eagles, **[**3]** LLC, Pittsburgh Steelers LLC, The St. Louis Rams LLC, Chargers Football Company, LLC, San Francisco Forty Niners, Limited, Football Northwest LLC, Buccaneers Limited Partnership, Tennessee Football, Inc., Pro-Football, Inc., Defendants - Appellants: Benjamin Conrad Block, James M. Garland, Gregg Howard Levy, COVINGTON & BURLING, Washington, DC; David Boies, Robert M. Cooper, William A. Isaacson, BOIES & SCHILLER, Armonk, NY; Daniel Joseph Connolly, Aaron Daniel Van Oort, FAEGRE & BENSON, Minneapolis, MN.

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For Sports Fans Coalition, Amicus on Behalf of Appellee: Stephen F. Ross, THE PENNSYLVANIA STATE UNIVERSITY, University Park, PA; Daniel Rees Shulman, GRAY & PLANT, Minneapolis, MN.

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For Elected Officials and Small Business Owners, Amicus on Behalf of Appellee: Mark Stancil, ROBBINS & RUSSELL, Washington, DC.

For National Football League Coaches Association, Amicus on Behalf of Appellee: Barak D. Richman, Duke University Law School, Durham, NC.

Judges: Before BYE, COLLOTON, and BENTON, Circuit Judges. BYE, Circuit Judge, dissenting.

Opinion by: COLLOTON

Opinion

[*663] COLLOTON, Circuit Judge.

This appeal arises from an action filed by nine professional football players and one prospective football player ("the Players") against the National Football League and its thirty-two separately-owned clubs, more commonly known as football teams (collectively, "the NFL" or "the League"). On March 11, 2011, a collective bargaining agreement between the League and a union representing professional football players expired. The League had made known that if a new agreement was not reached before the expiration date, then it would implement a lockout of players, during which the athletes would not be paid or permitted to use club facilities. The League viewed a lockout as a legitimate tactic under the labor laws to bring economic pressure to bear on the players as part of the bargaining process. **[**5]** *See Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 301-02, 318, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965)*.

The players, aware of the League's strategy, opted to terminate the union's status as their collective bargaining agent as of 4:00 p.m. on March 11, just before the agreement expired. Later that day, the Players filed an action in the district court alleging that the lockout planned by the League would constitute a group boycott and price-fixing agreement that would violate *§ 1* of the Sherman Antitrust Act. The complaint explained that "the players in the NFL have determined that it is not in their interest to remain unionized if the existence of such a union would serve to allow the NFL to impose anticompetitive restrictions with impunity." The plaintiffs also alleged other violations of the antitrust laws and state common law.

The League proceeded with its planned lockout on March 12, 2011. The Players moved for a preliminary injunction in the district court, urging the court to enjoin the lockout as an unlawful group boycott that was causing irreparable harm to the Players. The district court granted a preliminary injunction, and the League appealed. We conclude that the injunction did not conform to the provisions **[**6]** of the Norris-LaGuardia Act, *29 U.S.C. § 101 et seq.*, and we therefore vacate the district court's order.

A.

Some historical background will place this case in context. In *Radovich v. NFL, 352 U.S. 445, 451-52, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*, the Supreme Court held that professional football — unlike major league baseball — is not categorically exempt from the antitrust laws. In 1968, the National Labor Relations Board ("NLRB") recognized the NFL Players Association ("NFLPA") as the exclusive bargaining representative of all NFL players, **[*664]** and the NFL and the NFLPA entered into their first collective bargaining agreement ("CBA"). *Mackey v. NFL, 543 F.2d 606, 610 (8th Cir. 1976)*. Since then, the relationship between the League and its players has been punctuated by both collective bargaining agreements and antitrust lawsuits.

In 1972, several players filed an antitrust action against the League in *Mackey v. NFL*, alleging that the League's policy with respect to free agents — that is, players whose contracts with a particular team have expired — violated § 1 of the Sherman Act, *15 U.S.C. § 1*.[1] *Mackey, 543 F.2d at 609*. This court concluded that the restriction at issue, known as the "Rozelle Rule," unreasonably restrained **[**7]** trade in violation of *§ 1*, because it was "significantly more restrictive than necessary to serve any legitimate purposes" of maintaining competitive balance in the NFL. *Id. at 622*. While the *Mackey* litigation was pending, the CBA between the League and the NFLPA expired, and seventy-eight NFL players filed a separate class action antitrust suit against the League. *See Reynolds v. NFL, 584 F.2d 280, 282 (8th Cir. 1978)*; *Alexander v. NFL, No. 4-76-123, 1977 U.S. Dist. LEXIS 14685, 1977 WL 1497, at *1 (D. Minn. Aug. 1, 1977)*. In 1977, the League and the players entered into a settlement agreement incorporating a

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[1] That section provides, in relevant part: ***HN1***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

new CBA that implemented a revised system of free agency known as "right of first refusal/compensation." Alexander, 1977 U.S. Dist. LEXIS 14685, 1977 WL 1497, at *1-2. As part of the settlement, the League withdrew its petition for a writ of *certiorari* in Mackey. Reynolds, 584 F.2d at 282.

This state of affairs lasted until December 1982, when the NFL players engaged in a fifty-seven-day strike before agreeing **[**8]** to a new CBA that included a modified version of the "right of first refusal/compensation" system. Powell v. NFL, 930 F.2d 1293, 1295-96 (8th Cir. 1989); Powell v. NFL, 678 F. Supp. 777, 780-81 (D. Minn. 1988), *rev'd*, 930 F.2d 1293. This CBA expired in 1987, and when negotiations for a new CBA proved unsuccessful, the NFLPA conducted another strike. Powell, 930 F.2d at 1296. Immediately after the strike ended in October 1987, the NFLPA and several individual players commenced an antitrust suit in *Powell v. NFL*, alleging among other things that the League's free agency restrictions violated the Sherman Act. *Id*. This court held that a nonstatutory labor exemption from the antitrust laws shielded the League from antitrust liability. Id. at 1303. The Supreme Court "has implied this exemption from federal labor statutes," reasoning that "to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions." Brown v. Pro Football, Inc., 518 U.S. 231, 236- 37, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996). This court in *Powell* concluded that the nonstatutory labor exemption can **[**9]** extend beyond an impasse in negotiations, and that application of the exemption was appropriate in that case, because the parties still could resolve their differences through the use of the "offsetting tools" of labor law, including strikes, lockouts, and petitions for intervention by the NLRB. 930 F.2d at 1302-03. The court declined, however, "to look into the future and pick a termination point for the labor exemption." Id. at 1303.

Two days after this court's decision in *Powell*, on November 3, 1989, the NFLPA's executive committee decided to **[*665]** abandon the organization's collective bargaining rights in an effort to end the NFL's nonstatutory labor exemption from the antitrust laws. Powell v. NFL, 764 F. Supp. 1351, 1354 (D. Minn. 1991). The NFLPA disclaimed its union status, enacted new bylaws prohibiting it from engaging in collective bargaining with the League, filed a labor organization termination notice with the U.S. Department of Labor, obtained a reclassification by the Internal Revenue Service as a "business league" rather than a labor organization, and notified the NFL that it would no longer represent players in grievance proceedings. *Id*.

In 1990, eight individual football **[**10]** players brought a new antitrust action against the League in *McNeil v. NFL*, contending that new player restraints imposed by the League during the 1990-1991 season violated § 1 of the Sherman Act. Id. at 1359. Following a ten-week trial in late 1992, a jury rendered a verdict in favor of the *McNeil* plaintiffs and awarded substantial damages. *See* McNeil v. NFL, No. 4-90- 476, 1992 U.S. Dist. LEXIS 21561, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992).

Two new antitrust lawsuits were filed in the two-week period after the *McNeil* verdict. Ten NFL players brought suit in *Jackson v. NFL*, alleging that the League's free agency restrictions violated the Sherman Act. Jackson v. NFL, 802 F. Supp. 226, 228-229, 234 n.14 (D. Minn. 1992). Five other NFL players instituted *White v. NFL*, a class action alleging that various practices of the League, including free agency restraints, the college draft, and the use of a standard NFL player contract, violated the antitrust laws. *See* White v. NFL, 822 F. Supp. 1389, 1395 (D. Minn. 1993).

Many disputes between the League and the players were resolved when the parties entered into a class action settlement agreement in *White*. In January 1993, the parties reached a tentative agreement **[**11]** designed to resolve *White* and related cases. Id. at 1395-96. The NFLPA subsequently collected authorization cards from NFL players re-designating the organization as the players' exclusive collective bargaining representative, and the NFL voluntarily recognized the NFLPA as the players' union on March 29, 1993. Id. at 1396-97. The district court approved the parties' Stipulation and Settlement Agreement ("SSA") in April 1993, and the NFL and the NFLPA entered into a new CBA shortly thereafter. White v. NFL, 836 F. Supp. 1458, 1465-66 (D. Minn. 1993). The NFL and the NFLPA agreed to amend various portions of the SSA to conform to the provisions of the new CBA, and the district court approved the requested amendments. Id. at 1466, 1468. The court entered a consent decree incorporating the terms of the amended SSA on August 20, 1993. White v. NFL, 836 F. Supp. 1508, 1511 (D. Minn. 1993).

In 1996, the Supreme Court decided an important case concerning professional football and the scope of the nonstatutory labor exemption from the antitrust laws, *Brown v. Pro Football, Inc., 518 U.S. 231, 116 S. Ct. 2116, 135 L. Ed. 2d 521*. After the expiration of the collective bargaining agreement in 1987, the League and the NLFPA bargained **[**12]** to impasse over player salaries for members of each club's "developmental squad," which consisted of up to six first-year players who were not on the regular player roster. The League then unilaterally implemented an agreement among the clubs to pay a salary of $1000 per week to these players. A group of the players sued, alleging that the employers' agreement violated *§ 1* of the Sherman Act. The Supreme Court held that the nonstatutory labor exemption applied to the employer conduct at issue, which (1) took place during and immediately after a collective-bargaining negotiation, (2) grew out of, and **[*666]** was directly related to, the lawful operation of the bargaining process, (3) involved a matter that the parties were required to negotiate collectively, and (4) concerned only the parties to the collective-bargaining relationship. *Id. at 250*. In a closing paragraph, the Court added the following:

> Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly **[**13]** interfere with that process. See, *e.g.*, *50 F.3d at 1507* (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union); *El Cerrito Mill & Lumber Co., 316 N.L.R.B., at 1006-1007* (suggesting that "extremely long" impasse, accompanied by "instability" or "defunctness" of multiemployer unit, might justify union withdrawal from group bargaining). We need not decide in this case whether, or where, within these extreme boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future."

Id. (citations omitted).

The Supreme Court's most recent decision regarding this industry came in American *Needle, Inc. v. NFL, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. The Court held that the alleged conduct of the NFL teams in forming National Football League Properties to develop, license, and market their individually owned intellectual property, and then to grant an exclusive license for that property, was concerted action not categorically beyond **[**14]** the coverage of *§ 1* of the Sherman Act. At the same time, the Court remarked that "[f]ootball teams that need to cooperate are not trapped by ***antitrust law***," to wit: "The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions." *Id. at 2216*. Yet these interests did not justify treating the NFL teams as a single entity for purposes of *§ 1* of the Sherman Act when it came to the marketing of their intellectual property. *Id. at 2217*.

B.

Since 1993, the players and the League have operated under the *White* SSA, and the district court has continued to oversee the settlement by resolving numerous disputes over the terms of the SSA and CBA. *White v. NFL, 585 F.3d 1129, 1133 (8th Cir. 2009)*. Whenever the NFL and the NFLPA have agreed to change a provision in the CBA, a conforming change has also been made to the SSA. *Id. at 1134*. The SSA has been amended several times over the past eighteen years, most recently in 2006, when the NFL and the NFLPA reached an agreement on a new CBA that would last through **[**15]** the 2012-2013 football season. *See id*. The 2006 SSA and CBA gave both sides the right to opt out of the final two years of each agreement upon written notice.

In May 2008, the NFL opted out of the final two years of the SSA and CBA, citing concerns about operating costs and other elements of the agreements. *White v. NFL, 766 F. Supp. 2d 941, 2011 WL 706319, at *1 (D. Minn. 2011)*. As a result, the SSA and CBA were scheduled to expire in early March 2011. *Id*. Although the NFL and the NFLPA engaged in more than two years **[*667]** of negotiations toward a new CBA, the League and the players were unable to reach an agreement. The League filed an unfair labor practice charge with the NLRB in February 2011, asserting that the union failed to confer in good faith. The Players say that the charge is meritless.

As the deadline approached, a substantial majority of NFL players voted to end the NFLPA's status as their collective bargaining representative. On March 11, 2011 — the expiration date of the SSA and CBA — the NFLPA notified the NFL that it disclaimed interest in continuing to serve as the players' collective bargaining representative, effective at 4:00 p.m. The NFLPA also amended its bylaws to **[**16]** prohibit collective bargaining with the League or its agents, filed a labor organization termination notice with the Department of Labor, asked the Internal Revenue Service to reclassify the NFLPA as a professional association rather than a labor organization, and notified the NFL that it would no longer represent players bringing grievances against the League.

The League filed an amended unfair labor practice charge on March 11, alleging that the NFLPA's disclaimer was a "sham" and that the combination of a disclaimer by the union and subsequent antitrust litigation was "a ploy and an unlawful subversion of the collective bargaining process." The Players dispute the charge, citing an advice memorandum of an associate general counsel of the NLRB in *Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 NLRB GCM LEXIS 63, 1991 WL 144468 (NLRB G.C. June 26, 1991)*. The memorandum concluded that the NLFPA's 1989 disclaimer was valid, and that it was "irrelevant" whether the disclaimer was motivated by "litigation strategy," so long as the disclaimer was "otherwise unequivocal and adhered to." *Id. at *2, 1991 NLRB GCM LEXIS 63* & n.8.

The Players, funded by the NFLPA, commenced this action on the same day as the disclaimer, March 11, 2011. Four **[**17]** of the plaintiffs are under contract with an NFL club; five are free agents, and one is a prospective player who had entered the 2011 NFL draft and was ultimately selected in that draft. The Players brought this action on behalf of themselves and a putative class consisting of players who are under contract with any NFL club, free agents seeking employment with any NFL club, and college or other players who have not previously been under contract with any NFL club and who are eligible to play as a rookies for any club. As the case comes to us, no class has been certified.

The Players explained in their complaint that "[t]he players . . . have ended the role of the NFLPA as their collective bargaining representative and no longer have a collective bargaining relationship with the NFL defendants." They asserted, based on the Supreme Court's language in *Brown*, that the nonstatutory labor exemption therefore no longer protects the League from antitrust liability. The complaint alleged that the NFL's planned lockout was an illegal group boycott and price-fixing arrangement that violated *§ 1* of the Sherman Act. In addition, the Players claimed that the lockout would violate state contract **[**18]** law by depriving players of contractually owed compensation, and would violate state tort law by interfering with players' existing contracts as well as their opportunities to enter into new contracts with NFL teams.

The complaint further alleged that the League planned to institute or to continue several anticompetitive practices that would violate *§ 1* of the Sherman Act, including a limitation on the amount of compensation that can be paid to recently drafted first-year "rookie" players, a cap on salaries for current players, and "franchise **[*668]** player" and "transition player" designations that restrict the ability of free agents to join a team other than their former team. The Players requested damages and declaratory and injunctive relief regarding these practices, including an injunction prohibiting the League from implementing or continuing the lockout.[2]

The SSA **[**19]** and CBA expired at 11:59 p.m. on March 11. At 12:00 a.m. on March 12, the League instituted a lockout of members of the NFLPA's "bargaining unit," which includes professional football players under contract, free agents, and prospective players who have been drafted by or entered into negotiations with an NFL team. The NFL informed players under contract that the lockout would prohibit them from entering League facilities, from receiving any compensation or benefits, and from performing any employment duties including playing, practicing, working out, attending meetings, making promotional appearances, and consulting medical and training personnel except in limited situations. The League also notified the players that they could be required to report back to work immediately "[o]nce a new labor agreement is reached" between the NFL and the NFLPA.

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[2] Several retired professional football players brought a similar but separate action on March 28, 2011, also seeking a preliminary injunction. The district court consolidated the two actions, and denied the retired players' motion for a preliminary injunction as moot after issuing an injunction in the previously filed action.

On April 25, 2011, the district court granted the Players' motion to enjoin the lockout, rejecting the League's assertions that the court lacked jurisdiction to enter the injunction, that the court should defer to the primary jurisdiction of the NLRB, and that the League is in any event immune from antitrust liability under the nonstatutory **[**20]** labor exemption. *See Brady v. NFL, No. 11-639, 779 F. Supp. 2d 992, 2011 U.S. Dist. LEXIS 44523, 2011 WL 1535240, at *37 (D. Minn. Apr. 25, 2011)* [hereinafter *Brady I*]. The court concluded that ***HN2***[] the Norris-LaGuardia Act ("NLGA" or "Act"), *29 U.S.C. § 101 et seq.*, which restricts the power of federal courts to issue injunctions in cases "involving or growing out of a labor dispute," *id*. *§ 1*, was inapplicable, because the term "labor dispute" connotes a dispute between an employer and a union, and the Act therefore does not apply "absent the present existence of a union." *Brady I, 2011 U.S. Dist. LEXIS 44523, 2011 WL 1535240, at *24-26*. In the court's view, the conflict between the League and the players ceased to be a "labor dispute" subject to the Act when the NFLPA terminated its status as a union by disclaiming its role as the players' collective bargaining representative. *2011 U.S. Dist. LEXIS 44523, [WL] at *26-27*.

The district court also declined to stay the action pending the NLRB's resolution of the League's pending unfair labor practice charges. *See 2011 U.S. Dist. LEXIS 44523, [WL] at *9*. The court determined that a stay would not be appropriate because the delay could cause significant hardship for the plaintiffs, and because "[t]he Board has articulated the standard under which disclaimers must be evaluated in **[**21]** a clear and consistent fashion, and application of that established standard requires no particular specialized expertise." *2011 U.S. Dist. LEXIS 44523, [WL] at *14-15, 18*. Finally, the district court concluded that the nonstatutory labor exemption does not protect the League from antitrust liability related to the lockout. *See 2011 U.S. Dist. LEXIS 44523, [WL] at *34*. In the court's view, the exemption applies only to agreements concerning "mandatory subjects of collective bargaining," such as wages, hours, and other terms and conditions of employment, and an employer's imposition of a lockout **[*669]** is not exempted because "[a] lockout is not a substantive term or condition of employment." *2011 U.S. Dist. LEXIS 44523, [WL] at *35-36*. The court distinguished the Supreme Court's decision in *Brown* on the basis that the parties here "have left the collective bargaining framework entirely." *2011 U.S. Dist. LEXIS 44523, [WL] at *35*.

The district court's order stated only that "[t]he 'lockout' is enjoined," *2011 U.S. Dist. LEXIS 44523, [WL] at *37*, and did not expressly define the scope of the injunction. In concluding that the plaintiffs would suffer irreparable harm absent an injunction, however, the court indicated that its order would prevent the harm that players would suffer if the League were able to bar them from playing or practicing **[**22]** for an extended period of time. *See 2011 U.S. Dist. LEXIS 44523, [WL] at *29-30*. The court also suggested that the injunction would provide free agents and rookies with significant opportunities to market their services to individual teams, *see 2011 U.S. Dist. LEXIS 44523, [WL] at *31-32*, although it later remarked in denying a motion for stay pending appeal that the injunction did not require the League to enter into contracts. *See Brady v. NFL, No. 11-639, 779 F. Supp. 2d 1043, 2011 U.S. Dist. LEXIS 45511, 2011 WL 1578580, at *5 (D. Minn. Apr. 27, 2011)*. From this discussion, we understand the court's order to mean that the League must allow players under contract to play football, attend practice sessions, and collect compensation, and that the League must provide free agents and rookies with an opportunity to market their services to potential employers.

The League appealed, challenging the district court's application of the Norris-LaGuardia Act, the doctrine of primary jurisdiction, and the nonstatutory labor exemption. This court granted the NFL's motion to expedite the appeal and its motion for a stay of the district court's order pending appeal. We now consider the merits of the appeal.

II.

We consider first the League's contention that the Norris-LaGuardia Act deprived the district court **[**23]** of jurisdiction to enter the injunction. ***HN3***[] The NLGA, enacted in 1932, curtails the authority of a district court to issue injunctions in a labor dispute. "Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act." *Marine Cooks & Stewards v. Pan. S.S. Co., 362 U.S. 365, 369, 80 S. Ct. 779, 4 L. Ed. 2d 797 (1960)*.

The Supreme Court has explained that the NLGA responded directly to the Court's construction of § 20 of the Clayton Act of 1914, *29 U.S.C. § 52*, in *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed.*

349, 18 Ohio L. Rep. 366 (1921), and to other decisions of federal courts entering or upholding injunctions in labor disputes. Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 438, 107 S. Ct. 1841, 95 L. Ed. 2d 381 (1987). The Clayton Act bars federal courts, "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment," from issuing an injunction to prohibit "any person or persons" from "ceasing to perform any work or labor" or "terminating **[**24]** any relation of employment." 29 U.S.C. § 52. In *Duplex Printing*, however, the Court held that § 20 of the Clayton Act did not prohibit an injunction against a secondary boycott undertaken by union members who were not "proximately and substantively concerned as parties to **[*670]** an actual dispute respecting the terms or conditions of their own employment." 254 U.S. at 472. Similarly, in Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927), the Court ruled that § 20 did not prohibit an injunction against a union's refusal to perform work on stone produced by a particular company with which the union had an ongoing dispute. Id. at 42-43, 55. The NLGA effectively superseded these decisions by precluding federal courts from enjoining certain secondary activity by workers in labor disputes.

The language of the Act, however, extends well beyond the specific issues decided in such cases as *Duplex Printing* and *Bedford Cut Stone*. **HN4**[] The impetus for the NLGA was dissatisfaction with injunctions entered against workers in labor disputes, but the statute also requires that an injunction against an employer participating in a labor dispute must conform to the Act. *E.g.,* Bodecker v. Local Union No. P-46, 640 F.2d 182, 185 (8th Cir. 1981); **[**25]** District 29, United Mine Workers v. New Beckley Mining Corp., 895 F.2d 942, 944-47 (4th Cir. 1990); Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc., 550 F.2d 1237, 1238 (9th Cir. 1977); Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 876-77 (6th Cir. 1972); *see Greyhound Lines, Inc. v. Amalgamated Transit Union, Div. 1384, 429 U.S. 807, 97 S. Ct. 43, 50 L. Ed. 2d 68 (1976)*. This case requires us to decide whether, and if so how, the Act applies to the district court's injunction against the League.

To determine whether the NLGA forbids or places conditions on the issuance of an injunction here, we begin with the text of the statute. Section 1 provides that **HN5**[] "[n]o court of the United States . . . shall have jurisdiction to issue any . . . temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter." 29 U.S.C. § 101. As noted, the district court concluded that the Act is inapplicable to this action, because the case is not one "involving or growing out of a labor dispute."

Section 13(c) of the Act states that **HN6**[] "[t]he term 'labor dispute' includes *any controversy concerning* ***[**26]*** *terms or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (emphasis added). This lawsuit is a controversy concerning terms or conditions of employment. The Players seek broad relief that would affect the terms or conditions of employment for the entire industry of professional football. In particular, they urge the court to declare unlawful and to enjoin several features of the relationship between the League and the players, including the limit on compensation that can be paid to rookies, the salary cap, the "franchise player" designation, and the "transition player" designation, all of which the Players assert are anticompetitive restrictions that violate § 1 of the Sherman Act. The district court did not appear to question this point, even distinguishing authority cited by the Players on the ground that it involved a dispute over the sale of commodities rather than "a controversy over terms and conditions of employment." Brady I, 2011 U.S. Dist. LEXIS 44523, 2011 WL 1535240, at *24 n.44.

We **[**27]** are not convinced by the Players' contention that because § 13(c) uses the term "includes," rather than "means," to introduce the substance of a "labor dispute," Congress did not fully define the term. They urge that § 13(c) merely expanded **[*671]** in one respect (to disputes outside the employer-employee relationship) a preexisting definition of "labor dispute" — a definition that was not codified and that, according to the Players, extended only to disputes involving organized labor. Whatever might be the significance of the verb "include" when used in other contexts, *cf.* Massachusetts v. EPA, 549 U.S. 497, 556-58, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (Scalia, J., dissenting), Congress stated in § 13 of the NLGA that **HN7**[] "labor dispute" is "defined in this section," 29 U.S.C. § 113(a), and the Supreme Court consistently has described § 13(c) as a "definition" of "labor dispute." Burlington N. R.R. Co., 481 U.S. at 443; Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 711 n.11, 712, 102 S. Ct. 2672, 102 S. Ct. 2673, 73 L. Ed. 2d 327 (1982); H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 714 n.14, 715, 101 S. Ct. 2102, 68 L. Ed. 2d 558 (1981); Order of R.R. Telegraphers v. Chi. & N.W. Ry. Co., 362 U.S. 330, 335, 80 S. Ct. 761, 4 L. Ed. 2d 774 (1960); *see also* Bodecker, 640 F.2d at 185. Not only has **[**28]** the Supreme Court repeatedly characterized § 13(c) as a definition, but contrary to the suggestion that an established meaning should be used to narrow the text, the Court has observed that "the statutory definition itself is extremely broad," Jacksonville Bulk Terminals, Inc., 457 U.S. at 712, and explained that "Congress made the definition broad because it wanted it to be broad." Order of R.R. Telegraphers, 362 U.S. at 335-36.

The Act also states expressly that ***HN8***[] "[a] case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation." 29 U.S.C. § 113(a). This case, of course, involves persons engaged in the "same industry," namely, professional football. ***HN9***[] The statute continues that such a case "shall be held to involve or grow out of a labor dispute" when "such dispute is . . . between one or more employers or associations of employers and one or more employees or associations of employees." *Id*. This dispute is between one or more employers or associations of employers (the League and the NFL teams) and one or more employees (the Players under contract). By the plain terms of the Act, this case **[**29]** "shall be held to involve or grow out of a labor dispute."

The district court reached a contrary conclusion by departing from the text of § 13(a). The court thought the phrase "one or more employees or associations of employees" did not encompass the Players in this dispute, because "one or more employees" means "individual *unionized* employee or employees." Brady I, 2011 U.S. Dist. LEXIS 44523, 2011 WL 1535240, at 24 n.43 (emphasis added). We see no warrant for adding a requirement of unionization to the text.

A similar argument did not persuade the Supreme Court in New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 (1938). There, a company sought an injunction against the New Negro Alliance, which the Supreme Court described as "a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises." Id. at 555. The Alliance allegedly had conspired to picket and boycott one of the company's grocery stores to pressure the store to employ African-American clerks. Id. at 555-56. The company claimed, among other things, that the Alliance's acts were "unlawful, [and] constitute[d] a conspiracy in restraint of **[**30]** trade." Id. at 558-59. The district court granted an injunction against the Alliance. The court of appeals affirmed, reasoning in part as follows:

> **[*672]** "The controversy here is not a labor dispute. The defendants do not constitute a labor union or a labor organization of any kind. They do not compose, nor are they all members, of any single trade or class of trades. Their demands are not connected with any one industry. The questions about which they are now picketing have no connection with wages, hours of labor, unionization, or betterment of working conditions. . . . It is solely a racial dispute."

New Negro Alliance v. Sanitary Grocery Co. 92 F.2d 510, 512-13 (D.C. Cir. 1937) (quoting A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y.S. 946, 953 (N.Y. Sup. Ct. 1934)).

The Supreme Court reversed. Although no labor organization was involved in the dispute, and the company argued that "a recognized labor union or unions or individual members thereof were involved" in all but one of the "labor dispute" precedents cited by the Alliance, Brief for Respondent at 24, New Negro Alliance, 303 U.S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 (No. 511), the Court ruled that the definitions in the Act "plainly embrace the controversy which gave **[**31]** rise to the instant suit and classify it as one arising out of a dispute defined as a labor dispute." New Negro Alliance, 303 U.S. at 560. The Court observed that ***HN10***[] § 13(a) provides that a case shall be held to involve or grow out of a labor dispute "when the case involves any conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested' therein," and ruled that the Alliance and its individual members were "persons interested in the dispute." *Id*. (internal quotation omitted). If *§ 13(a)* were limited to controversies involving unions or unionized employees, then the Court could not have reached this conclusion.

Further confirmation that the present existence of a union is not required for a "labor dispute" comes from *NLRB v. Washington Aluminum Co., 370 U.S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)*. There, a group of seven employees who were "wholly unorganized" and had "no bargaining representative" or "representative of any kind to present their grievances to their employer" staged a walkout to protest cold working conditions in a machine shop. *Id. at 14-15*. Although the employees were not part of a union, the Supreme Court held that the walkout "did grow out of a 'labor dispute' **[**32]** within the plain meaning of the definition of that term in *§ 2(9)* of the [National Labor Relations] Act." *Id. at 15*. The definition of "labor dispute" in the National Labor Relations Act is "virtually identical" to the definition of "labor dispute" in the NLGA, and the two provisions "have been construed consistently with one another" by the Supreme Court. *Jacksonville Bulk Terminals, Inc., 457 U.S. at 711 n.11*; *accord* *United States v. Hutcheson, 312 U.S. 219, 234 n.4, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*.

Even *§ 2 of the NLGA*, cited by the Players as an interpretive guide for the Act based on its declaration of "[p]ublic policy in labor matters," conflicts with the district court's conclusion. ***HN11***[] *Section 2* declares, among other things, that the "individual unorganized worker" shall be free from the interference of employers in "the designation of . . . representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or *other mutual aid or protection*." *29 U.S.C. § 102* (emphasis added). Employees may engage in activities for the purpose of "mutual aid or protection" *without* the present existence of a union. *Wash. Aluminum, 370 U.S. at 14-15*; *First Nat'l Bank of Omaha v. NLRB, 413 F.2d 921, 926 (8th Cir. 1969)*; **[**33]** *Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237, 241 (6th Cir. 1980)*; *NLRB v. Phoenix **[*673]** Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948)*; *see* *Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1508 (8th Cir. 1993)*.

The Players, citing *Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557 (8th Cir. 1986)*, argue that circuit precedent requires "concerted labor activity" by "collectively organized employees" to establish a labor dispute under the Act. Appellees' Br. 12. *Ozark Air Lines* did not so hold. That case involved an employee's disability retirement claim arising under the Railway Labor Act, which includes specific provisions that take precedence over the more general provisions of the NLGA. *797 F.2d at 559, 563*. This court also said the case had "nothing to do with terms and conditions of employment." *Id. at 563*.

HN12[] The definitions in the NLGA provide that a case shall be held to involve or grow out of a labor dispute if a controversy over terms and conditions of employment is between an employer and "*one or* more employees." *29 U.S.C. § 113(a)* (emphasis added). The Act's reference to "concerted activities" appears only in the public policy section, *29 U.S.C. § 102*. If the NLGA nonetheless **[**34]** were construed to require concerted activity by employees to establish a labor dispute, a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is "concerted activity" under *§ 7* of the National Labor Relations Act. *Mohave Elec. Co-op, Inc. v. NLRB, 206 F.3d 1183, 1189, 340 U.S. App. D.C. 391 & n.8 (D.C. Cir. 2000)*; *Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976)*; *Leviton Mfg. Co. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973)*; *see* *Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 57 L. Ed. 2d 428 & n. 15 (1978)*.

HN13[] The text of the Norris-LaGuardia Act and the cases interpreting the term "labor dispute" do not require the present existence of a union to establish a labor dispute. Whatever the precise limits of the phrase "involving or growing out of a labor dispute," this case does not press the outer boundary. The League and the players' union were parties to a collective bargaining agreement for almost eighteen years prior to March 2011. They were engaged in collective bargaining over terms and conditions of employment for approximately two years through March 11, 2011. At that point, the parties were involved in a classic "labor dispute" by the Players' **[**35]** own definition. Then, on a single day, just hours before the CBA's expiration, the union discontinued collective bargaining and disclaimed its status, and the Players filed this action seeking relief concerning industry-wide terms and conditions of employment. Whatever the effect of the union's disclaimer on the League's immunity from antitrust liability, the labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining.

III.

The Players argue alternatively that even if this case does involve or grow out of a labor dispute, the district court's injunction conforms to the provisions of the NLGA, and should be affirmed on this alternative ground. The League counters that *§ 4* of the Act includes a flat prohibition on injunctions against a lockout, and, alternatively, that even if the court has authority to enjoin a lockout under certain circumstances, the district court did not comply with the procedural requirements set forth in *§ 7* of the Act.

A.

Section 4 of the NLGA, *29 U.S.C. § 104*, is entitled, "Enumeration of specific acts not subject to restraining orders or injunctions." It provides:

> **[*674]** ***HN14***[] No **[**36]** court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in *section 103* of this title;
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) **[**37]** Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in *section 103* of this title.

The League relies on *§ 4(a)*. It argues that this subsection forbids an injunction to prohibit a lockout. ***HN15***[] There is no uniform definition of the term "lockout," but one "practical definition" used by this court is "a refusal by [an employer] to furnish available work to its regular employees." *Laclede Gas Co. v. NLRB, 421 F.2d 610, 615 & n.9 (8th Cir. 1970)*; *see also* 2 *The Developing Labor Law* 1639-40 (John E. Higgins, Jr. et al. eds., 5th ed. 2006) ("As used by the Board and the courts, . . . a lockout is most simply and completely defined as the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them."). The League **[**38]** maintains that by locking out all professional football players, it is "[r]efusing to . . . remain in any relation of employment," and is thus doing one of the acts that cannot be enjoined according to *§ 4*. Because ***HN16***[] *§ 5* of the Act states that a district court cannot issue an injunction on the ground that parties to a labor dispute are violating the antitrust laws by doing in concert the acts enumerated in *§ 4*, the League contends that *§ 5* is a further barrier to the district court enjoining the lockout.[3]

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[3] *Section 5* provides that "[n]o court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in *section 104* of this title." *29 U.S.C. § 105*.

The Players respond that § 4(a) does not apply to employer injunctions at all. They cite the First Circuit's decision in De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970), **[*675]** which was followed by the Ninth Circuit in Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983 (9th Cir. 1981). **[**39]** These cases involved injunctions issued in a different context — actions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking orders directing an employer to rehire employees who were discharged in violation of a collective bargaining agreement — but they include some reasoning that addresses more generally whether § 4(a) prohibits injunctions against employers.

De Arroyo rejected a "literal" application of § 4(a) sought by an employer, because the court's "understanding of the legislative history behind section 4(a)" led it to conclude that § 4(a) "was not intended as a protection for employers." De Arroyo, 425 F.2d at 290-91. Rather, the court said: "The 'remain in any relation of employment' language in section 4(a), which forms the basis of the Company's literal interpretation, was used, we think, simply to make clear that employee strikes could not be enjoined either if the employees claimed to have ceased or refused to work temporarily or if they claimed to have completely ended their employment relation with their employer." Id. at 291. Citing § 4(b) of the Act, which proscribes an injunction to prohibit "[b]ecoming or remaining a member of any labor organization **[**40]** or of any employer organization," the court reasoned that "the drafters did specifically include employers when protection was intended for them." *Id*.[4] The Players, based on *De Arroyo* and *Lumber & Sawmill Workers*, urge that § 4(a) applies only to employees, with the first clause — "perform any work" — directed to "temporary work stoppages" and the second clause — "remain in any relation of employment" — aimed solely at "permanent work stoppages."

With due respect to these courts, we think it better to begin the analysis with **[**41]** the text of § 4(a). The introductory clause of § 4 forbids a court to issue an injunction to prohibit "*any person or persons* participating or interested" in a labor dispute from doing any of the acts set forth below, including those in § 4(a). ***HN17***[] Employers, of course, are among the persons participating in a labor dispute. The introductory clause thus plainly encompasses employers. If language in a particular subsection is applicable on its face to employees and employers alike (or to employers alone), then there is no need for a specific mention of employers. An employer against whom injunctive relief is sought may invoke the protection of a subsection as a "person . . . participating or interested" in the labor dispute. This court already has recognized that § 4(c) applies to injunctions against employers, Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1352, 1355 (8th Cir. 1995), so the premise of *De Arroyo* and Lumber & Sawmill Workers that employers are protected against injunction under § 4 only when specifically mentioned in § 4(b) is a non-starter under circuit precedent. *See also* Bodecker, 640 F.2d at 185-86 (holding **[**42]** that intra-union dispute over funding stock acquisition and profit-sharing plans by payroll deferrals was a "labor **[*676]** dispute," and explaining that district court had refused to issue injunction against employer's implementation of payroll deferrals because it was forbidden by § 4(c)).[5]

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[4] The Sixth Circuit reached the opposite conclusion, holding that § 4(a) of the NLGA prohibits an injunction in a § 301 action requiring an employer to reinstate an employee who was discharged in violation of a collective bargaining agreement. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1124-25 (6th Cir. 1981). This court has cited De Arroyo for the general proposition that a court has discretion to award equitable relief by way of reinstatement in a § 301 action, Tatum v. Frisco Transp. Co., 626 F.2d 55, 60 (8th Cir. 1980); Butler v. Local Union 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 455 (8th Cir. 1975), but has not discussed § 4(a) of the NLGA in that context.

[5] The Players also rely on Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., 310 F.2d 513 (7th Cir. 1962), which held that the NLGA did not deprive a district court of power to grant an injunction that prohibited railroad carriers from putting into effect revisions in work rules in a dispute governed by the Railway Labor Act. The court reasoned that "the purpose of Congress" in enacting the NLGA "was to protect only employees and unions," and found "nothing in the statement of policy to indicate any intention to deny jurisdiction to issue injunctions against employers." Id. at 518. To the extent that the Seventh Circuit would apply this broad reasoning outside the context of the Railway Labor Act, *but cf.* Chi. Midtown Milk Distribs., Inc. v. Dean Foods Co., Nos. 18577, 18578, 1970 U.S. App. LEXIS 8256, 1970 WL 2761, at *1 (7th Cir. July 9, 1970) (per curiam), it is inconsistent with this court's precedent that § 4 **[**43]** applies to injunctions against employers, Bridgestone/Firestone, 61 F.3d

HN18[] The disputed language in § 4(a) — "remain in any relation of employment" — may apply to an employer. Section 3 of the Act makes clear that both employers and employees can be in a "relation of employment." Section 3(b) contemplates that either party to a labor agreement can agree to "withdraw from an employment relation." 29 U.S.C. § 103(b).

The term "any" is an expansive modifier for "relation of employment," and especially where the Supreme Court has emphasized the breadth of the NLGA's prohibition on injunctions, it would be odd to apply a narrow construction of "any relation of employment." *Cf.* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219-20, 128 S. Ct. 831, 169 L. Ed. 2d 680 & n.4 (2008). We therefore reject a reading of the phrase that would limit the acts encompassed by the second clause of § 4(a) to refusing to remain in any relation of employment *whatsoever*, as with a permanent and complete work stoppage. The phrase is more naturally read to mean refusing to remain **[**44]** in any *particular* relation of employment, whether or not the refusal is complete and permanent. This reading corresponds to the meaning of "any" in the first clause of § 4(a), which refers to a refusal "to perform *any* work." In that clause, "any" does not mean that the prohibition applies only when there is a refusal to perform any work *whatsoever*, but rather it forbids an injunction against even a refusal to perform any particular work — including a certain type of work, *see* Jacksonville Bulk Terminals, 457 U.S. at 704-05; *cf.* Bedford Cut Stone, 274 U.S. at 42-43, or a certain amount of work, *see* Teledyne Wis. Motor v. Local 283, United Auto., Aerospace & Agric. Implement Workers, 530 F.2d 727, 728-30 (7th Cir. 1976) even when there is not a complete work stoppage. The term "any" should be given the same meaning in both clauses of § 4(a). *See* Sullivan v. Stroop, 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L. Ed. 2d 438 (1990).

So understood, **HN19**[] the phrase "refusing . . . to remain in any relation of employment" encompasses a non-permanent work stoppage. To "remain" is "[t]o continue unchanged in place, form, or condition," *Webster's New International Dictionary* 1802 (1932), or "[t]o continue, as in one place, condition, or **[**45]** character." Funk & Wagnalls New Standard Dictionary 2082 (1931). While a strike or lockout may not permanently end a relation of employment, it changes the condition or character of that relationship. As one court of the era expressed it: "The relation of employer and employe[e] is temporarily suspended during a strike." Tri-City Cent. **[*677]** Trades Council v. Am. Steel Foundries, 238 F. 728, 733 (7th Cir. 1917).

Other contemporaneous judicial decisions show that Congress likely would have understood "refusing to remain in any relation of employment" as including a non-permanent work stoppage such as a strike or lockout of employees. In his dissent in *Duplex Printing*, Justice Brandeis remarked that the very acts to which § 20 of the Clayton Act applied "sever the continuity of the legal relationship" between employer and employee. 254 U.S. at 488 (Brandeis, J., dissenting). The Brandeis dissent cited a separate opinion in Iron Molders' Union No. 125 v. Allis-Chalmers Co., 166 F. 45 (7th Cir. 1908), where a concurring judge described the "somewhat anomalous relationship" between employees and employers during a strike or lockout: "Manifestly, then, pending a strike or a lock out, and as to **[**46]** those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment." Id. at 52-53 (Grosscup, J., concurring). Other courts went so far as to hold that striking workers were no longer "employees" for purposes of the Clayton Act, either at the outset or after some duration of a strike. *See* Canoe Creek Coal Co. v. Christinson, 281 F. 559, 561-62 (W.D. Ky. 1922); *Dail-Overland Co. v. Willys-Overland, Inc., 263 F. 171, 188 (N.D. Ohio 1919)*. For these reasons, we believe a reasonable legislator in 1932 would have understood a strike or lockout of employees as a refusal to "remain in [a] relation of employment." *See also* 75 Cong. Rec. 5489 (1932) ("[T]he [Clayton] Act could not be successfully invoked when once the employer had refilled vacancies, because, it was held, there was no longer a relationship existing of employer and employee between the owner of the plant and the striker. A worker who picketed was no longer an employee to come under the protection of the **[**47]** Clayton Act. (See *Dail-Overland Co. v. Willys-Overland, 263 F. at 192*.)") (remarks of Rep. Celler).

at 1352, 1355, and with the Players' acknowledgment that an injunction against an employer lockout in a labor dispute must conform to § 7 of the NLGA. Appellees' Br. at 43 n.3.

It is true that if *§ 4(a)* is construed to include a lockout of employees, then the section is not symmetrical. Contrary to the League's suggestion, Appellants' Reply Br. at 16, we do not think the second clause should be understood as applying *only* to employers. *But cf. Local Union No. 861 of IBEW v. Stone & Webster Eng'g Corp., 163 F. Supp. 894, 896 (W.D. La. 1958)*. ***HN20***[] Employees may refuse to perform work under the first clause, and they may refuse to remain in a relation of employment under the second. There is likely overlap between the two clauses, and courts (including the Supreme Court) have cited both clauses in holding that a strike may not be enjoined. *Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410, 96 S. Ct. 3141, 49 L. Ed. 2d 1022 (1976)*; *Order of R.R. Telegraphers, 362 U.S. at 335*; *Waller Bros. Stone Co. v. United Steelworkers, 620 F.2d 132, 136-37 (6th Cir. 1980)* (quoting *Buffalo Forge*); *U.S. Steel Corp. v. United Mine Workers, 519 F.2d 1236, 1242, 1245 (5th Cir.1975)*; *Wilson & Co. v. Birl, 105 F.2d 948, 951 (3d Cir. 1939)*.

The employer, by contrast, does not perform work, so it may invoke only the **[**48]** second clause. Insofar as an employer's lockout extends to acts by other employers who refuse to take in the "late employees" of the first employer, *see Iron Molders' Union No. 125, 166 F. at 50*, the terms of *§ 4(a)* do not forbid an injunction against refusing to offer new work or employment. The lack of symmetry, however, does not render *§ 4(a)* inapplicable to employers altogether. The evenhanded introductory **[*678]** clause of *§ 4* still forbids a court to enjoin "*any* person or persons" in a labor dispute from "refusing . . . to remain in any relation of employment." That the terms of *§ 4(a)* afford employers less protection against injunctions than they afford employees (who were, after all, the target of the controversial injunctions that prompted the NLGA) does not mean that Congress gave employers no protection at all.

Aside from the text and structure of *§ 4*, the Players argue that the policy of the NLGA and the legislative history support their position that *§ 4(a)* offers no protection to employers. To be sure, the policy stated in *§ 2* is that the individual unorganized worker should be free from the interference, restraint, or coercion of employers in the designation of representatives, **[**49]** self-organization, or other concerted activities. But it does not follow that a prohibition on injunctions against employer lockouts is contrary to the policy of the Act. The Supreme Court has observed that while the Act was designed to protect workingmen, the broader purpose was "to prevent the injunctions of the federal courts from *upsetting the natural interplay of the competing economic forces of labor and capital."* *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 40, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957)* (emphasis added). An employer's lockout is part of this interplay; it is not the equivalent of a judicial injunction that interferes with the ability of workers to exercise organized economic power.

The Court elsewhere explained that "powerful judicial dissents," such as that of Justice Brandeis in *Duplex Printing*, urged that labor disputes were an "area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts." *Hutcheson, 312 U.S. at 231*. In support of that view, the Brandeis dissent cited this excerpt from the 1915 Report of the Committee on Industrial Relations:

> [T]here are apparently, only two lines of action **[**50]** possible: First to restrict the rights and powers of employers to correspond in substance to the powers and rights now allowed to trade unions, and second, to remove all restriction which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property and the public peace. The first method has been tried and failed absolutely. * * * *The only method therefore seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strike-breakers, and peaceful picketing*.

Duplex Printing, 254 U.S. at 486 n.7 (Brandeis, J., dissenting) (emphasis added); *see also* 75 Cong. Rec. 5478 (1932) (remarks of Rep. LaGuardia) ("If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now."); *id*. at 4915 (remarks of Sen. Wagner) ("The policy and purpose which give meaning to the present legislation is its implicit declaration that the Government shall occupy a neutral position, lending its extraordinary power neither to those who would have **[**51]** labor unorganized nor to those who would organize it and limiting its action to the preservation of order and the restraint of fraud."). A one-way interpretation of *§ 4(a)* — prohibiting injunctions against strikes but not against lockouts — would be in tension with the purposes of the Norris-LaGuardia Act to allow free play of economic forces and "to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." Marine Cooks & Stewards, **[*679]** 362 U.S. at 369 n.7. We are not convinced that the policy of the Act counsels against our textual analysis of § 4(a). *Cf.* Am. Med. Ass'n v. United States, 317 U.S. 519, 535, 63 S. Ct. 326, 87 L. Ed. 434 (1943) (**HN21**[] "It is not our province to define the purpose of Congress apart from what it has said in its enactments, and if [a party's] activities fall within the classes defined by the [Clayton and Norris-LaGuardia] acts, we are bound to accord [the party] . . . the benefit of the legislative provisions.").[6]

The Players also contend that the legislative history of the NLGA shows that § 4(a) prohibits only injunctions against employees. They cite a House Committee Report, which states that § 4 was "intended by more specific language" to overcome the effects of judicial decisions that upheld injunctions against workers. H.R. Rep. 72-669, at 728 (1932). They point as well to then-Professor Frankfurter's treatise, which characterized § 4(a) as "declaratory of the modern common law right to strike." Felix Frankfurter & Nathan Greene, *The Labor Injunction* 217-18 (1930). *Cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 469 n.3, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957) (Frankfurter, J., dissenting). These materials indicate **[**53]** that Members of Congress, and Professors Frankfurter and Greene as drafters of proposed legislation, were determined to forbid federal courts from entering injunctions against workers participating in labor disputes. But they do not address the specific question whether § 4(a) also prohibits injunctions against employers.[7]

Other materials cited by the League suggest that Members of Congress did contemplate that employers could invoke the plain language of § 4(a), although they do not address the precise question either. S. Rep. No. 72-163, at 19 (1932) ("[I]t will be observed that this section [§ 6], *as do most all of the other prohibitive sections of the bill*, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations **[*680]** of employers and employees.") (emphasis added); 75 Cong. Rec. 4507 (1932) ("*Wherever it can be done this bill applies equally to organizations of labor and to organizations of capital*. **[**55]** Organizations of employees and organizations of capital are treated exactly the same.") (remarks of Sen. Norris) (emphasis added); *id*. at 4509 ("[This bill] attempts to weigh in the scales of justice all the elements which ought to be considered in passing upon controversies between labor and capital. *It asks for the laboring man nothing that it does not concede to the corporation*.") (emphasis added); *see also* Edward B. Miller, *Antitrust Laws & Employee Relations* 15-25 (1984). As is often the case, the legislative history offers something for both parties, but it does not supply a convincing basis to depart from our analysis of the text.

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[6] The First Circuit in *De Arroyo* said that the employer's interpretation of § 4(a) in that case "completely disregard[ed] the primary purpose behind the anti-injunction **[**52]** provisions," 425 F.2d at 290-91, but that case did not involve a lockout, and the court observed in the same discussion that "the reemployment of improperly discharged employees can hardly be said to be one of the abuses sought to be eliminated by the Norris-LaGuardia Act." Id. at 291. *See also* Lumber & Sawmill Workers, 663 F.2d at 986-87 (discussing policy reasons that favor according federal courts power to order reinstatement of employees discharged in violation of collective bargaining agreements).

[7] The Players argue that the Senate's rejection of an amendment that would have included "employers" in the policy statement of § 2, 75 Cong. Rec. 4766, demonstrates that "Congress had no intent to relieve employers of any liability under the antitrust laws." Appellees' Br. 46-47 (internal quotation omitted). This bit of history does not alter our view of § 4(a). **HN22**[] "Statements by opponents of a bill and failure to enact suggested amendments, although they have some weight, are not the most reliable indications of congressional intent." Bryant v. Yellen, 447 U.S. 352, 376, 100 S. Ct. 2232, 65 L. Ed. 2d 184 (1980); *see* Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1315 (8th Cir. 1980). Other features of the proposed NLGA amendment may have contributed to its defeat. *See* 75 Cong. Rec. 4762-65 (1932). The argument also proves too much, because even without mention of employers in § 2, the Act expressly **[**54]** restricts the issuance of injunctions against employers in circumstances that might otherwise violate the antitrust laws. *See* Cal. State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 544-45 (9th Cir. 1980) (discussing 29 U.S.C. § 104(b)), *rev'd on other grounds*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). At any rate, we consider here only the scope of a district court's authority to issue injunctions, not the liability of employers under the antitrust laws.

One last point raised by the Players is that § 4(a) of the NLGA merely paraphrases language in § 20 of the Clayton Act that forbade injunctions prohibiting "any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor." 29 U.S.C. § 52; *see* Frankfurter & Greene, at 217. They contend that the Supreme Court in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 203, 42 S. Ct. 72, 66 L. Ed. 189 (1921), authoritatively construed a related portion of § 20 as applying *only* to employees, **[**56]** and that Congress should be understood to have incorporated this "settled meaning" when it enacted the Norris-LaGuardia Act. By way of post-argument submission, they also draw our attention to the legislative history of the Clayton Act. *E.g*., S. Rep. No. 63- 698, at 51 (1914) ("The words 'singly or in concert' are inserted . . . to guard the right of workingmen to act together in terminating, if they desire, any relation of employment, and to act together and in concert in doing or abstaining from doing any other of the acts named in that paragraph of the section.").

We do not agree that *American Steel Foundries* established the asserted meaning. The cited portion of the case did not concern the specific clauses that evidently were paraphrased in § 4(a) of the NLGA, and because the case arose from an injunction issued against employees, the court addressed § 20 of the Clayton Act only as it applied to employees. There was no question raised in the case about whether or how § 20 and the "terminating any relation of employment" clause applied to employers.

When the Second Circuit later addressed the Clayton Act in a discussion of mutiemployer collective bargaining, it reasoned that "[a]lthough **[**57]** Congress was largely concerned with the effect of [federal court] interference on unions, the statute was phrased in an evenhanded fashion to protect employer conduct in labor disputes as well as that of unions. Section 20 thus exempted from federal prohibition 'persons . . . terminating any relation of employment . . . or withholding . . . moneys or things of value,' language that would permit multiemployer lockouts." NBA v. Williams, 45 F.3d 684, 689 (2d Cir. 1995) (quoting 29 U.S.C. § 52); *see Brown, 50 F.3d at 1055* (quoting Williams, 45 F.3d at 689); *see also* 51 Cong. Rec. 14,334 (1914) ("[T]he paragraph is reciprocal.") (remarks of Sen. Thomas). We need not here decide whether the Clayton Act protects multiemployer lockouts; it is sufficient for present purposes that the NLGA incorporated no settled judicial interpretation that § 20 applied only to employees.

For these reasons, we conclude that ***HN23***[] § 4(a) of the Norris-LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its **[*681]** employees. This conclusion accords with the few decisions that have addressed the specific question. Clune v. Publishers' Ass'n of N.Y.C., 214 F. Supp. 520, 528-29 (S.D.N.Y.), **[**58]** *aff'd*, *314 F.2d 343, 344 (2d Cir. 1963)* (per curiam); Plumbers & Steamfitters Local 598 v. Morris, 511 F. Supp. 1298, 1311 (E.D. Wash. 1981); Stone & Webster Eng'g Corp., 163 F. Supp. at 896.[8] Because the Norris-LaGuardia Act prohibits the district court from issuing an injunction against the League's lockout of employees, the court's order cannot stand.

B.

Another portion of the injunction is not foreclosed by § 4(a). The district court enjoined not only the League's lockout of employees, *i.e*., players under contract, but also the League's refusal to deal with non-employees, *i.e*., free agents and prospective players or "rookies." As to these latter groups of players, § 4(a) does not **[**59]** apply. The refusal of the League and NFL clubs to deal with free agents and rookies is not a refusal "to remain in any relation of employment," for there is no existing employment relationship in which "to remain."

An injunction with respect to the League's actions toward free agents and rookies, however, cannot be issued except in strict conformity with § 7 of the NLGA, 29 U.S.C. § 107, because this is "a case involving or growing out of a labor dispute." *Id*. §§ 101, 107. The present injunction does not conform to § 7.

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[8] In Chicago Midtown Milk Distributors, 1970 U.S. App. LEXIS 8256, 1970 WL 2761, at *1, the Seventh Circuit reversed an injunction prohibiting two companies from refusing to supply and sell processed milk and other dairy products to certain distributors. The complaint alleged that "a refusal to deal based upon a lockout" violated the Sherman Act. In holding that the injunction was precluded by the NLGA, the court cited only § 1 of the Act. The court's reasoning is not well explained, and the opinion does not directly address § 4(a).

We disagree with the Players that the League forfeited its claim that the injunction must comply with *§ 7* by failing to raise the point in its brief in the district court. The district court raised the applicability of *§ 7* at oral argument, at which time the League argued that further procedures were required. Appellants' App. 521-23. The district court did not treat the point as forfeited or waived, concluding only that it was unnecessary to address *§ 7* because the court thought the NLGA wholly inapplicable. *Brady I, 2011 U.S. Dist. LEXIS 44523, 2011 WL 1535240, at *23 n.41*. And this court has considered compliance with the NLGA even when the issue was not raised in the district court. *Ozark Air Lines, Inc., 797 F.2d at 562*.

HN24[] *Section 7* **[**60]** provides that a court has no authority to issue an injunction "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto." *29 U.S.C. § 107*. Although a hearing is not required where the party enjoined does not contest on appeal that the relevant facts are undisputed, *Kansas City S. Transp. Co. v. Teamsters Local Union No. 41, 126 F.3d 1059, 1067-68 (8th Cir. 1997)*, the League does contest the facts in this case, and it is entitled to test the credibility of the Players' evidence by cross-examination. ***HN25***[] *Section 7(c)* requires the court to evaluate the relative harms to the parties, and the court's calculus with respect to free agents and rookies undoubtedly was affected by its view that the entire lockout could be enjoined. Whether to enter an injunction requiring the League to deal with free agents and rookies, only to have these players locked out as soon as they enter into any new contract of employment, was **[*682]** not considered. The League also raises arguments concerning *§ 7(a)* and *§ 7(e)*, which should be addressed by the district court in the first **[**61]** instance as necessary. *Compare, e.g., Mackey, 543 F.2d at 623, and Donnelly Garment Co. v. Dubinsky, 154 F.2d 38, 43 (8th Cir. 1946), with E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 708 (7th Cir. 2005), and Wilson & Co., 105 F.2d at 950-52*. We therefore conclude that the injunction as a whole must be vacated.

IV.

Given our conclusion that the preliminary injunction did not conform to the provisions of the Norris-LaGuardia Act, we need not reach the other points raised by the League on appeal. In particular, we express no view on whether the League's nonstatutory labor exemption from the antitrust laws continues after the union's disclaimer. The parties agree that the Act's restrictions on equitable relief are not necessarily coextensive with the substantive rules of ***antitrust law***, and we reach our decision on that understanding. *See Burlington Northern, 481 U.S. at 435 n.3*; *Order of R.R. Telegraphers, 362 U.S. at 339 n.15*; *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 103, 61 S. Ct. 122, 85 L. Ed. 63 (1940)*; *Burlington N. Santa Fe. Ry. Co. v. Int'l Bhd. of Teamsters Local 174, 203 F.3d 703, 712 n.12 (9th Cir. 2000)* (en banc); *cf. Hutcheson, 312 U.S. at 234-36*; **[**62]** *L.A. Meat & Provision Drivers' Union v. United States, 371 U.S. 94, 107 n.2, 83 S. Ct. 162, 9 L. Ed. 2d 150 (1962)* (Goldberg, J., concurring).

* * *

The district court's order of April 25, 2011, granting a preliminary injunction is vacated, and the case is remanded for further proceedings.

Dissent by: BYE

Dissent

BYE, Circuit Judge, dissenting.

In 1914, after twenty years of judicial interference in labor conflicts on the side of the employers, Congress stepped in to protect organized labor by passing *sections 6* and *20* of the Clayton Act. *Section 20* of the Act generally prohibited the issuance of injunctions in cases involving or growing out of labor disputes. *See 29 U.S.C. § 52*. It soon became apparent, however, that what was supposed to be the "charter of liberty of labor," Felix Frankfurter &

Nathan Greene, The Labor Injunction 164 (1930) (remarks of William Howard Taft), fell short of the promise. The *Lochner*-era judges adopted a narrow interpretation of the Act, restricting it to "trade union activities directed against an employer by his own employees." United States v. Hutcheson, 312 U.S. 219, 230, 61 S. Ct. 463, 85 L. Ed. 788 (1941). "[T]o protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act," id. at 236, Congress **[**63]** passed the Norris-LaGuardia Act, under which "the allowable area of union activity was not to be restricted . . . to an immediate employer-employee relation." Id. at 231. Through its holding in this case today, the majority reaffirms the wisdom of the old French saying used by Felix Frankfurter and Nathan Greene when describing judicial reluctance to enforce § 20 of the Clayton Act: "the more things are legislatively changed, the more they remain the same judicially." Felix Frankfurter & Nathan Greene, The Labor Injunction 176 (1930). Despite the repeated efforts of the legislative branch to come to the rescue of organized labor, today's opinion puts the power of the Act in the service of employers, to be used against non-unionized employees who can no longer avail themselves of protections of labor laws. Because I cannot countenance such interpretation of the Act, I must and hereby dissent.

[*683] I.

A. "Labor Dispute"

First, I have to disagree with the majority's reading of the term "labor dispute." As the majority recounts, "[t]he underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, **[**64]** so Congress believed, by unduly restrictive judicial construction." United States v. Hutcheson, 312 U.S. at 235-36. The unequivocal goal of the new legislation was to overturn the Supreme Court's decisions in *Duplex Printing* and *Bedford Cut Stone*, which had restricted § 20 of the Clayton Act to labor union activities directed against employees' immediate employers. Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 805, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945). Congress accomplished the goal by clarifying that the term "labor dispute"

> includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*.

29 U.S.C. § 113(c) (emphasis added).

However, in passing the NLGA, Congress never intended to change the well-accepted calculus of the Clayton Act as the legislation for the benefit of organized labor. The Clayton Act was always understood as an attempt to assist the organized labor movement at the time its progress was impeded **[**65]** by judicial misuse of injunctions. *See, e.g.,* Hutcheson, 312 U.S. at 229-30 (explaining § 20 of the Clayton Act "withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them"); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of N. Am., 274 U.S. 37, 56, 47 S. Ct. 522, 71 L. Ed. 916 (1927) (separate opinion by Stone, J.) (describing the Clayton Act as being concerned with "organized labor"); Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 208-09, 42 S. Ct. 72, 66 L. Ed. 189 (1921) ("Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects."); *see also* Frankfurter & Green, The Labor Injunction, at 130-31, 139 (describing the Clayton Act's preoccupation with organized labor). It is this well-entrenched understanding of the term "labor dispute" as centered on the struggle between employers and organized labor that informs interpretation of the same definition under the NLGA. *See* Bruesewitz v. Wyeth LLC, 131 S.Ct. 1068, 1082, 179 L. Ed. 2d 1 (2011) ("When 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we **[**66]** presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute.") (citation omitted).

Like the Clayton Act, the NLGA has been consistently cited in connection with protection of unions' rights. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 253 n.2, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996) (dubbing §§ 6 and 20 of the Clayton Act and the NLGA as the "organized labor's exemption from federal antitrust laws"); *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 726, 102 S. Ct. 2672, 102 S. Ct. 2673, 73 L. Ed. 2d 327 (1982)* (elaborating on the plain meaning of *§ 13(a)* of the NLGA and noting the Act protects "union organizational efforts and efforts to improve working conditions"); *H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 717 n.20, 101 S. Ct.* ***[*684]*** *2102, 68 L. Ed. 2d 558 (1981)* ("Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization. . . ."); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)* (stating the Clayton Act and the NLGA "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities" from their purview); *Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 772, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961)* **[**67]** ("The Norris-LaGuardia Act, 47 Stat. 70, *29 U.S.C. §§ 101-115*, expresses a basic policy against the injunction of activities of labor unions."); *Hutcheson, 312 U.S. at 231* (the NLGA "established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation"). This interpretation is in part dictated by *§ 2* of the Act, which "explicitly formulated the 'public policy of the United States' in regard to the industrial conflict." *Hutcheson, 312 U.S. at 231*. Such public policy expressed concern with the plight of the "individual unorganized worker," whom Congress deemed "helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment" when confronted with "corporate and other forms of ownership association" assumed by employers. *29 U.S.C. § 102*. Commenting on the judicial respect *§ 2* deserves, the Supreme Court explained that "[t]here are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction **[**68]** that will protect the congressional policy the Act adopted." *See* *Order of R.R. Telegraphers v. Chicago & N. W. R.R. Co., 362 U.S. 330, 335, 80 S. Ct. 761, 4 L. Ed. 2d 774 (1960)*. In the NLGA's case, the congressional policy was about helping the unions.

The majority attempts to diminish the significance of *§ 2*'s emphasis on organized labor by drawing attention to the part of the section which declares that an "individual unorganized worker" shall be free from the interference of employers in "self-organization or other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The majority finds it significant that the National Labor Relations Act, which guarantees employees the right to "self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," *29 U.S.C. § 157*, has been interpreted not to require the presence of the union. *NLRB v. Washington Aluminium Co., 370 U.S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)*; *Mohave Elec. Co-op, Inc. v. NLRB, 206 F.3d 1183, 1189, 340 U.S. App. D.C. 391 & n.6 (D.C. Cir. 2000)*. While the definitions of the term "labor dispute" in the NLGA and NLRA, it is true, overlap, "the extent of the prohibition against injunctive **[**69]** relief contained in Norris-LaGuardia [is] not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices." *First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 686 n.23, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981)*. To give one example of the differences between the two statutes, the NLGA's injunction immunity is limited to labor disputes involving parties in "the same industry, trade, craft, or occupation," *29 U.S.C. § 113(a)-(b)*, whereas the NLRA does not have a similar limitation, *see* *29 U.S.C. § 152(9)*. And while the NLGA covers strikes about political issues which are beyond the scope of the immediate employment relationship, *Jacksonville Bulk Terminals, Inc., 457 U.S. at 710-15*, the NLRA does not, *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225-26, 102 S. Ct.* ***[*685]*** *1656, 72 L. Ed. 2d 21 (1982)*. Most critically, unlike the NLRA, the NLGA does not expressly protect concerted employee activities.

The phrase "mutual aid or protection" in *§ 2 of the NLGA* had a "heuristic purpose" — i.e., to inform the courts of the "considerations moving Congressional action." Richard Michael Fischl, *Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, *89 Colum. L. Rev. 789, 847 (1989)* **[**70]** (quoting Frankfurter & Greene, The Labor Injunction, at 212). The phrase most likely originated from the "ideology of mutualism, rooted in working-class bondings and struggles," as contrasted with the philosophy of individualism embraced by "the prosperous and wellborn." *Id. at 851*(quoting D. Montgomery, The Fall of the House of Labor 2, 171 (1987)). The judicial gloss put on the terms "concerted activity" and "mutual aid and protection" years later, in the context of a different statute, cannot be used to undermine the Act's express concern with the success of the organized labor movement.

The majority also overstates by attributing too much significance to the Supreme Court's decision in *New Negro Alliance*, where the NLGA was applied in the context of a picket by an association of African Americans who, having been largely excluded from membership in the established unions, adopted the "traditional tactics of organized labor." Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, *115 Yale L. J. 256, 319 (2005)*. Such reliance on New Negro Alliance is unjustified. The decision presented a different question of whether the association had to have the **[**71]** employment relationship with the employer and whether the racial struggle underlying the dispute was antithetical to finding a "labor dispute" within the meaning of the NLGA. Prior to the Supreme Court's decision, various circuits had apparently disagreed on the answers, and the lower courts' rulings held the NLGA inapplicable on these grounds. While setting the courts on the correct path with respect to the questions raised, the Court did not discuss whether a union was a *sine qua non* to the NLGA's applicability. In addition, in subsequent decisions the Court clarified, "a party seeking refuge in the statutory exemption [from antitrust liability] must be *a bona fide labor organization*, and not an independent contractor or entrepreneur." *H.A. Artists & Associates, Inc., 451 U.S. at 717 n.20* (emphasis added). The Eighth Circuit agreed the absence of concerted labor activities disqualifies the subjects of the injunction from protection under the NLGA. *Ozark Air Lines, Inc. v. Nat'l Mediation Bd., 797 F.2d 557, 563 (8th Cir. 1986)* (stating a concerted activity is at the heart of the NLGA, which does not apply to the case because, among other things, it "has nothing to do with . . . concerted **[**72]** labor activities"). Even if *New Negro Alliance* could leave the impression that a union is not required for the NLGA to apply, the Supreme Court's subsequent insistence on the NLGA's beneficiary status as a bona fide labor organization exposes such impression as being false.

This is not surprising. Organized labor activity serves as the necessary limiting principle circumscribing the application of the NLGA. Without such limiting principle, the Act would tie the courts' hands in granting injunctive relief in many routine cases where parties seek to enforce various aspects of individual employment contracts. Because courts have never viewed the NLGA as an obstacle to such exercise of equity powers, *see, e.g., N.I.S. Corp. v. Swindle, 724 F.2d 707 (8th Cir. 1984)* (upholding the grant of a preliminary injunction enforcing a covenant not to compete), **[*686]** the reading of the term untethered to unionization and collective bargaining activity does not make sense.

B. "Involving or Growing Out"

Second, I must take issue with the majority's conclusion as to this case not representing the outer boundary of the phrase "involving or growing out of a labor dispute." Like the nonstatutory labor exemption, **[**73]** statutory exemption from antitrust liability, which rests in part on the Norris-LaGuardia Act, *Connell Construction Co., 421 U.S. at 621-22*, lies at the intersection between labor and antitrust laws. *Allen Bradley Co., 325 U.S. at 806* (elaborating on the responsibility to reconcile "two declared congressional policies" — one "seek[ing] to preserve a competitive business economy" and one seeking "to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining"); *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 76 (1st Cir. 2008)* (stating that both the statutory and the nonstatutory labor exemption were developed "[t]o balance the competing federal policies supporting organized labor on one hand and business competition on the other"); *Mackey v. NFL, 543 F.2d 606, 613 (8th Cir. 1976)* (availability of the labor exemption "turns upon whether the relevant federal labor policy is deserving of preeminence over federal antitrust policy under the circumstances of the particular case"). "While the Norris-LaGuardia Act's bar of federal-court labor injunctions is **[**74]** not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Associates, Inc., 451 U.S. at 714*. The scope of the two exemptions differs somewhat — "the statutory exemption allows unions to accomplish some restraints by acting unilaterally, [whereas] the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market," *see Connell Construction Co., 421 U.S. at 622*, — but there is no place for the application of either at the time labor laws no longer govern and labor policy is no longer implicated.

The Supreme Court recognized as much when it explained that nonstatutory immunity from antitrust review is no longer necessary when "an agreement among employers [is] sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." Brown, 518 U.S. at 250. As an example of such endpoint, the Court cited "collapse of the **[**75]** collective-bargaining relationship, as evidenced by decertification of the union." *Id*. (quoting *Brown v. Pro Football, Inc., 50 F.3d 1041, 1057, 311 U.S. App. D.C. 89 (D.C. Cir. 1995))*. With the players having voted to end the NFLPA's status as their collective bargaining representative and the NFLPA likewise having disclaimed its status as the players' representative, this case has reached that endpoint. *See* Brady v. NFL, 640 F.3d 785, 798-99 (8th Cir. 2011) (Bye, J., dissenting) (elaborating on the reasons why the union disclaimer should end the protection against antitrust liability).

Indeed, the League itself anticipated dissolution of antitrust remedy fetters upon disclaimer of union representation, as is evident from its concessions in previous cases. *See* Powell v. NFL, 930 F.2d 1293, 1303 n.12 (8th Cir. 1989) (describing the League's concession that "the Sherman Act could be found applicable, depending **[*687]** on the circumstances, . . . if the affected employees ceased to be represented by a certified union"); *see also* Appellees Special Add. at 370 (transcript of the League's Supreme Court argument in *Brown v. Pro Football, Inc*., where the League conceded antitrust immunities would not apply when "employees **[**76]** ultimately elect, in good faith, . . . to give up their rights under the labor laws"). The League's view was consistent with those of the courts, who saw disassociation from the union as the point beyond which labor laws yield to the antitrust regime. *Brown, 50 F.3d at 1057* ("If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions. We note that the NFL players took exactly this latter step after the Eighth Circuit's *Powell* decision."); Powell, 930 F.2d at 1305 (Heaney, J., dissenting) (criticizing the majority opinion for continuing the labor exemption for too long — in effect, "until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union"). This realization as to the players' membership in a union acting as a shield against the possibility of antitrust charges is the reason why, in the 1993 *White* settlement, the League insisted the NFLPA be reconstituted as the players' representative and the collective bargaining relationship between the parties be reestablished.

At some point in the "arising out of" spectrum, the antitrust immunities **[**77]** stemming from statutory and nonstatutory labor exemptions must come to an end and give way to antitrust remedies. Such point does not come a year from the union disclaimer, nor one business cycle from it, as suggested by the League's counsel. Rather, such point comes at the moment of the union disclaimer.

II.

Although I would conclude the district court correctly determined this case does not involve or grow out of a labor dispute, thus negating any further application of the NLGA, I am compelled to write further addressing the majority's conclusion as to § 4(a) of the NLGA protecting employers. At least three other circuit courts have reached the opposite conclusion and, for the reasons set forth below, I find their reading persuasive. In interpreting § 4(a), these courts were guided by the legislative history of the NLGA, as well as the legislative history of the Clayton Act — from which the NLGA was drawn — both of which indicate the NLGA was not intended to protect employers. Finally, the stated purpose in § 2 of the NLGA confirms the statute should be interpreted in such a manner as to protect employees, rather than employers.

I start from where the majority began its analysis, with **[**78]** a review of the pertinent cases discussing whether § 4(a) prohibits injunctions against employers. In De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 291 (1st Cir. 1970), the First Circuit concluded § 4(a) does not protect employers, albeit in the context of whether the remedy of reinstatement in a case under § 301 of the Labor Management Relations Act was barred by the NLGA. *De Arroyo* rejected a strictly literal interpretation of § 4(a) because such a reading "completely disregards the primary purpose behind the anti-injunction provisions, 'to protect working men in the exercise of organized, economic power . . . to correct existing abuses of the injunctive remedy in labor disputes . . . to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.'" Id. at 290- 91 (quoting Bhd. of R.R. Trainmen v. Chicago R. & I.R. Co., 353 U.S. 30, 40-41, **[*688]** 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957)). The court also referenced the legislative history behind § 4(a), which indicated the provision "was not intended as a protection for employers." Id. at 291. Instead, the court reasoned, "[t]he 'remain in any relation of employment' language **[**79]** . . . was used . . . simply to make clear that employee strikes could not be enjoined either if the employees claimed to have ceased or refused to work temporarily or if they claimed to have completely ended their employment relation with their employer." *Id*.

De Arroyo was in line with a case decided by the Seventh Circuit eight years earlier, *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., 310 F.2d 513, 517 (7th Cir. 1962)*, which conducted "a thorough examination of the Act and its pertinent legislative history." According to the Seventh Circuit, "our study of that history and the language of the Act . . . convinces us that the purpose of Congress in this respect was to protect only employees and unions." *Id. at 518*. The court continued, "[w]e find nothing in the statement of policy to indicate any intention to deny jurisdiction to issue injunctions against employers," save for the same exceptions referenced by *De Arroyo. Id*. In sum, the Seventh Circuit deferred to Congress's authority:

> The enactment of the Act, was, of course, the responsibility of Congress, and not that of this court. That Congress may have been intent upon shielding organizations of employees **[**80]** from injunctions rather than employers was and is a matter within its province. The same can be said of the exemption of labor organizations from the sanctions of antitrust laws. Those are matters over which the courts have no control, in the absence of a constitutional attack.
> The language used clearly negatives any intention to recognize any general reciprocity of rights of capital and labor. Essentially the Act is frankly a charter of the rights of labor against capital.

Id. Given the language and history of *§ 4*, the Seventh Circuit concluded the NLGA did not prevent the issuance of an injunction. *Id*.

Building upon the decisions of the First and Seventh Circuits, the Ninth Circuit issued perhaps the most comprehensive decision on the issue in *Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983 (9th Cir. 1981)*. Although *Lumber & Sawmill Workers* again involved *§ 301 of the LMRA*, the court discussed at length the application of *§ 4(a)*. *Id. at 985-987*. Specifically, the court agreed with *De Arroyo* because "*section 4(a)* does not refer to any right of an employer not to continue the employment relationship, but was used to make clear that strikes could not be enjoined even when **[**81]** the strikers claimed to have completely ended the employment relationships, as well as when they claimed to have ceased work only temporarily." *Id. at 986*. To further support this assertion, the court noted, "[t]he second clause of *section 4(a)* apparently originated in *section 20* of the Clayton Act, where it was clearly intended to apply to the termination of the work relationship by the employee rather than the employer." *Id*. Ultimately, after considering the text and history of *§ 4(a)*, as well as the history of the Clayton Act, the Ninth Circuit concluded "*[s]ection 4(a)* was intended to protect the right of workers and labor unions to strike," and thus the reinstatement order under *§ 301* was not barred by the NLGA. *Id. at 986- 87*; *see also Retail Clerks Union Local 1222, AFL-CIO v. Alfred M. Lewis, Inc., 327 F.2d 442, 446 (9th Cir. 1964)* ("While the writer of this opinion agrees with the view expressed by the 7th Circuit . . . that the purpose of Norris-LaGuardia was to protect only employees and unions, except for two isolated exceptions appearing in *section 3(a*, *b*), and **[*689]** in *section 4(b)*, it is not necessary for us in this case to go so far.") (internal citations omitted).

While the **[**82]** majority acknowledges each of the above decisions, it criticizes the courts' reasoning at the outset by focusing on one of the underlying aspects contained therein "that when employers were intended to be protected, as in *section 4(b)*, they were specifically named." *Lumber & Sawmill Workers, 663 F.2d at 985*. Citing to *Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1352, 1355 (8th Cir. 1995)*, the majority concludes, "[t]his court already has recognized that *§ 4(c)* applies to injunctions against employers . . . so the premise of *De Arroyo* and *Lumber & Sawmill Workers* that employers are protected against injunction under *§ 4* only when specifically mentioned in *§ 4(b)* is a non-starter under circuit precedent." Ante at 24; *see also id*. at 24 n.5 (distinguishing the Seventh Circuit's decision due to "this court's precedent that *§ 4* applies to injunctions against employers").

With due respect to the majority, *Bridgestone/Firestone* did not so hold. *Bridgestone/Firestone* revolved around an injunction issued in favor of a union against an employer under an exception to the NLGA provided in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970)*, **[**83]** which applies "'if the strike is over a dispute which under the parties' collective bargaining agreement should be submitted to arbitration.'" *61 F.3d at 1352* (quoting *John Morrell & Co. v. Local Union 304A, 804 F.2d 457, 459*

(8th Cir. 1986)). Within this context, the court was tasked with determining "whether the *Boys Markets* exception applies . . . where the union has sought and obtained an injunction against the company," which was "an issue of first impression in this circuit." *Id*. Following the lead of three circuits which had "unanimously concluded that the *Boys Markets* rationale should be extended to allow for injunctions against employers," the court likewise held the exception applied equally to employers. *Id*. The court then went on to analyze whether the *Boys Markets* test was satisfied, answering such question in the negative because the union "failed to demonstrate that without the injunction the arbitration proceeding would be frustrated or rendered a nullity." *Id*.

A careful reading of *Bridgestone/Firestone* reveals it has no bearing on the present question of whether § 4(a) protects employers. Namely, whether the *Boys Markets* exception applies to employers and employees **[**84]** alike is an entirely different question than whether § 4(c), much less § 4(a), touches even-handedly on employers and employees. *See, e.g.,* Aeronautical Indus. Dist. Lodge 91 of Int'l Ass'n of Machinists & Aerospace Workers v. United Techs. Corp., 230 F.3d 569, 581 (2d Cir. 2000) (distinguishing Niagara Hooker Emp. Union v. Occidental Chem. Corp., 935 F.2d 1370 (2d Cir. 1991), which *Bridgestone/Firestone* relied on, because "*Niagara Hooker*'s focus was not all conceivable labor disputes, but only those concerning arbitrable issues," and thus the reverse *Boys Markets* exception was "wholly inapplicable to a case, like this one, in which the labor dispute concerns non-arbitrable issues"). In sum, while it is true *Bridgestone/Firestone* ultimately overturned an injunction against the employer, *see* id. at 1355, the court made no inquiry whatsoever as to whether § 4 itself protects employers equally, notwithstanding the *Boys Markets* exception, and therefore Bridgestone/Firestone does not contain any recognition or precedent applying § 4(c) to employers. Correspondingly, *Bridgestone/Firestone* is not in conflict with the three circuit cases discussed **[*690]** above which bear directly on the question **[**85]** at hand.

Even if *Bridgestone/Firestone* stands for the proposition asserted by the majority, I respectfully disagree with the majority's subsequent statutory interpretation. The majority rejects the Players' argument distinguishing between temporary and permanent work stoppages in the first and second clauses of § 4(a). Instead, advancing the broad scope of the term "any," the majority construes "[r]efusing to . . . remain in any relation of employment" to encompass non-permanent work stoppages "such as a strike or lockout of employees." Ante at 25-26. However, the majority rejects the NFL's counterpart argument that "the second clause should be understood as applying *only* to employers." *Id*. at 27 (emphasis in original). In doing so, the majority concedes its interpretation is asymmetrical because "[e]mployees may refuse to perform work under the first clause, and they may refuse to remain in a relation of employment under the second." *Id*.

I have considerable doubt about the majority's interpretation of § 4(a). First, there is little basis in the text for reading § 4(a) as referring only to employees under the first clause but to both employees and employers under the second clause. Moreover, **[**86]** the breadth with which the majority interprets the second clause as it relates to employers ostensibly covers the employee conduct encompassed under the majority's reading of the first clause. Stated differently, under the majority's remarkably broad interpretation, a refusal to perform any work by employees would be tantamount to a refusal to remain in any relation of employment because "it changes the condition or character of that relationship" in some fashion. Ante at 25-26. Such an interpretation, which conflates the two clauses, cannot stand because it renders the first clause superfluous. *See* Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 609 (8th Cir. 2011) ("We avoid interpreting a statute in a manner that renders any section of the statute superfluous or fails to give effect to all of the words used by Congress.") (internal quotation marks and citation omitted).

Second, and perhaps more importantly, the majority's interpretation fails to give effect to Congress's intent in passing the NLGA. *See* Ortega-Marroquin v. Holder, 640 F.3d 814, 818 (8th Cir. 2011) (noting courts must give effect to the intent of Congress when clear); *see also* Boys Markets, Inc., 398 U.S. at 250 **[**87]** ("Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."). Returning to the legislative history discussed in depth above, which bears some repetition in the context of § 4, the NLGA "was enacted in response to federal-court intervention on behalf of employers," which "had caused the federal judiciary to fall into disrepute among large segments of this Nation's population." Jacksonville Bulk Terminals, Inc., 457 U.S. at 715; *see also* id. at 716 ("The legislative history is replete with criticisms of the ability of powerful employers to use federal judges as 'strike-breaking' agencies").

Attempting to remedy this inequity, the House Committee on the Judiciary explained about the NLGA, "[t]he purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . . , which act, by reason of its construction and application by the Federal courts is ineffectual to accomplish the congressional intent." H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932). According to the **[**88]** Committee, **[*691]** because federal courts were in the pocket of employers, the restrictions contained in § 20 of the Clayton Act had "'become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect.'" *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102, 61 S. Ct. 122, 85 L. Ed. 63 (1940)* (quoting H.Rep. No. 669, pp. 7, 8). Reviewing these committee reports, the Supreme Court concluded, "[w]hether or not one agrees with the committees that the cited cases constituted an unduly restricted interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act." *Id. at 103*. Indeed, even the League concedes this much. *See* Blue Br. at 27 ("There is no doubt that concerns about injunctions against labor unions, rather than injunctions against employers, were the principal catalyst for the bill.").

Then-Professor Frankfurter, a drafter of the NLGA, wrote § 4 "provides that in cases growing out of labor **[**89]** disputes, no persons participating in, or affected by, such disputes shall be enjoined from striking, or from striking for the success of strikes, by customary labor union effort, short of fraud or violence." Felix Frankfurter & Nathan Greene, *The Labor Injunction* 215 (1930). Professor Frankfurter explained § 4 was "a paraphrase of like language in the Clayton Act which was held to be merely declaratory of the modern common law right to strike." *Id. at 217-18*; *see generally* *Carcieri v. Salazar, 555 U.S. 379, 129 S.Ct. 1058, 1065 n.5, 172 L. Ed. 2d 791 (2009)* (noting the author of the legislation was "an unusually persuasive source as to the meaning of the relevant statutory language"). Eleven years later, then Supreme Court Justice Frankfurter confirmed this principle on the Supreme Court:

> The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the **[**90]** Judiciary.

Hutcheson, 312 U.S. at 235-36.

As an assist in the interpretation of § 4(a), it is therefore helpful to look to § 20 of the Clayton Act, which prohibits injunctions against "terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do." *29 U.S.C. § 52*. The Supreme Court construed this language as forbidding injunctions against "recommending, advising or persuading others by peaceful means to cease employment and labor." *Am. Steel Foundries, 257 U.S. at 203*. The Court continued, "[i]t is clear that Congress wished to forbid the use by the federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute." *Id*.

Delving deeper into the Clayton Act, the legislative history behind the "terminating any relation of employment" clause further confirms Congress intended to protect only employees. *See* *Lumber & Sawmill Workers, 663 F.2d at 986* ("The second clause of section 4(a) apparently originated in section 20 of the Clayton Act, where it was clearly intended to apply to the termination **[*692]** of the work **[**91]** relationship by the employee rather than the employer."). The House Committee acknowledged, "[t]he consensus of judicial view . . . is that workingmen may lawfully combine to further their material interests without limit or constraint, and may for that purpose adopt any means or methods which are lawful. It is the enjoyment and exercise of that right and none other that this bill forbids the courts to interfere with." H.R. Rep. No. 63-627, at 32 (1914). The Senate Committee likewise stated the language was intended "to guard the right of workingmen to act together in terminating, if they desire, any relation of employment, and to act together and in concert in doing or abstaining from doing any other of the acts named in that paragraph of the Section." *Lumber & Sawmill Workers, 663 F.2d at 986 n.5* (quoting S. Rep. No. 63-698, at 51 (1914)).

Finally, if the legislative history left any lingering doubt about whether § 4(a) protects employers, Congress conclusively resolved any ambiguity by building the purpose into the NLGA itself via § 2. "Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining 'acceptable **[**92]** terms and conditions of employment'" and thus the NLGA "sought to ensure workers the right to organize and conduct union activities 'free from the interference, restraint, or coercion' of employers or their agents by means of labor injunctions." *Burlington N. R. Co. v. United Transp. Union, 848 F.2d 856, 861 (8th Cir. 1988)* (citing *29 U.S.C. § 102*). Senator Norris made clear *§ 2* was to be utilized as a guide to judicial interpretation which would "'relieve . . . many of the difficulties which have heretofore existed when a court has been called upon to interpret the law' — obviously thinking of the Supreme Court's interpretation of the Clayton Act." James M. Altman, *Antitrust: A New Tool for Organized Labor?*, *131 U. Pa. L. Rev. 127, 151 (1982)* (quoting 75 Cong. Rec. 4503 (1932)).

In response to the policy statement offered by Senator Norris, Senator Hebert, the author of the Senate Judiciary Committee's minority report, proposed language to § 2 to protect "both the employer and the employee." *Id. at 152* (quoting 75 Cong. Rec. 4677 (1932)). Senator Hebert disclosed his substitute "'trie[d] to afford the same degree of consideration to the employer in his relations to his employees **[**93]** as it does to the employee in his relations with his employer'" because the majority bill contained "'very little, if any, reference to the consideration that is to be given to the employer in his relations with his employee.'" *Id*. (quoting 75 Cong. Rec. 4678). Following a colloquy, Senator Hebert's substitute "was defeated soundly." *Id*. (noting the vote was 47 to 18). "That vote . . . makes it quite clear that in passing the Norris-LaGuardia Act Congress had no intent to relieve employers of any liability under the antitrust laws." *Id. at 153*. Even if Congress had such intent, "the scope of such an exemption would be narrowly limited by the terms of the Act." *Id. at 154* ("[T]he only subsection in section 4 that refers to an employer's activities is 4(b)").

Although the majority attempts to minimize the congressional defeat of employer protections in the NLGA, there can be little doubt this legislative history provides yet more support for a reading of § 4(a) which protects only employees. *See, e.g., United States v. United Steelworkers of Am., 271 F.2d 676, 683 (3d Cir. 1959)* ("Our conclusion in this regard is confirmed, we think, by contrasting the statute as enacted with the House **[**94]** proposal which was rejected."). Indeed, the Supreme Court has previously placed significant weight on similar legislative history when construing **[*693]** the NLGA, as well as other labor statutes. *See, e.g., Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 439-440, 107 S. Ct. 1841, 95 L. Ed. 2d 381 (1987)* ("After lengthy debate, punctuated with numerous references to the notorious Pullman Strike of 1894, the House refused an amendment proposed by Representative Beck that would have exempted railroads from the coverage of the Act. The historical background of the Norris-LaGuardia Act thus reveals that Congress intended to preclude courts from enjoining secondary as well as primary activity, and that the railroads were to be treated no differently from other industries in this regard.") (citation omitted); *Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 412-416, 101 S. Ct. 1836, 68 L. Ed. 2d 248 (1981)* ("The legislative debates and the process of legislative amendment demonstrate that Congress deliberately chose" not to include a provision defeated in the House bill regarding section 301 of the Labor Management Relations Act).

Viewing the legislative history of § 4(a) in its entirety, Congress did not intend to protect employers under the **[**95]** provision. *See De Arroyo, 425 F.2d at 291* ("Our understanding of the legislative history behind section 4(a) leads us to conclude that that section was not intended as a protection for employers."). Moreover, the purpose delineated in § 2 further bolsters this conclusion. *See Baseball Players and the Antitrust Laws*, 53 Colum. L. Rev. 242, 249 n.71 (1953) ("Given the purpose of the Norris-LaGuardia Act it is improbable that an association of employers which deprives an 'individual unorganized worker' of his 'freedom of labor' comes within its protection."). Interpreting the text of § 4(a) in light of the legislative history and express policy of the NLGA, I would conclude § 4(a) does not protect employers.

In the end, I find illustrative the wise words of Judge Learned Hand:

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is

> one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, **[**96]** whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945). In this case, "the fact remains that Congress passed the Norris-LaGuardia Act to forestall judicial attempts to narrow labor's statutory protection." *Bhd. of Maint. of Way Emps., 481 U.S. at 443*. This is exactly what the majority has done. As a consequence, I am compelled to and must dissent.[9]

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[9] Although the majority confines its analysis to the NLGA, I remain strongly convinced the other traditional injunction factors favor the Players. *See* *Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304, 310 (8th Cir. 2011)* (setting forth the factors a court must consider). For the reasons set forth in my prior dissent, *see* *Brady v. NFL, 640 F.3d 785, 794-96 (8th Cir. 2011)* (Bye, J., dissenting), which have only intensified given the current juncture, I would affirm the district court.

Oregon v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.)

United States District Court for the Northern District of California

July 11, 2011, Decided; July 12, 2011, Filed

No. M 07-1827 SI; MDL No. 1827; No. C 10-4346 SI

Reporter

2011 U.S. Dist. LEXIS 76562 *; 2011-1 Trade Cas. (CCH) P77,524

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION; This Order Relates To: STATE OF OREGON, Plaintiff, v. AU OPTRONICS CORPORATION, et al., Defendants.

Subsequent History: Motion granted by *T-Mobile U.S.A., Inc. v. AU Optronics Corp. (In re TFT-LCDd Antitrust Litig.), 2011 U.S. Dist. LEXIS 76561 (N.D. Cal., July 12, 2011)*

Costs and fees proceeding at *In re TFT-LCD Flat Panel Antitrust Litig., 2016 U.S. Dist. LEXIS 193612 (N.D. Cal., Jan. 22, 2016)*

Prior History: *Nokia Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 72389 (N.D. Cal., July 6, 2011)*

Core Terms

disgorgement, Antitrust, unjust enrichment, defendants', equitable relief, Sherman Act, profits, available remedy, equitable, motion to dismiss, federal court, authorize, damages

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For Ari Hakim, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Brian Joseph Barry , Esq., Law Offices of Brian Barry, Los Angeles, CA; Christopher L. Lebsock, Jon T. King, Hausfeld LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Arthur Sorokin, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Jon T. King, Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Amy Forlan, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Jon T. King, Hausfeld LLP, San Francisco, CA; Thomas **[*4]** Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Frederick Rozo, Plaintiff: Craig C. Corbitt, Qianwei Fu, Christopher Thomas Micheletti, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Demetrius X. Lambrinos, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Kimberly Ann Kralowec, The Kralowec Law Group, San Francisco, CA; Russell F. Brasso, Foreman & Brasso, San Francisco, CA.

For Computer World Solution, Inc., General Digital Corporation, Industrial Computing, Inc., Omni Circuits International, LLC., Plaintiffs: Paul F. Bennett, LEAD ATTORNEY, C. Andrew Dirksen, Steven Orrin Sidener, Gold Bennett Cera & Sidener LLP, San Francisco, CA; Joseph M. Barton, Glancy Binkow & Goldberg LLP, San Francisco, CA.

For Crago Corporation, Plaintiff: Cadio R. Zirpoli, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Dan Owen, Shughart Thomson & Kilroy, P.C., Kansas City, MO; Patrick John Brady, Polsinelli Shughart, P.C., Kansas City, MO.

For John McKay, Plaintiff: Allan Steyer, **[*5]** Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN; Michael L. Roberts, Roberts Law Firm, Little Rock, AR; Richard Quintus, Roberts Law Firm, PA, Little Rock, AR.

For James Burt, Plaintiff: Christopher L. Lebsock, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Christopher Thomas Micheletti, Francis Onofrei Scarpulla, Craig C. Corbitt, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Demetrius X. Lambrinos, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA; Thomas F. Bush, Bush Law Offices.

For Jeffrey Figone, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Joseph Mario Patane, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare Russell, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA.

For Candace Rowlette, Michael Francis Ayers, **[*6]** Plaintiffs: Craig C. Corbitt, LEAD ATTORNEY, Christopher Thomas Micheletti, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Demetrius X. Lambrinos, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Orion Home Systems LLC, Plaintiff: Guido Saveri, LEAD ATTORNEY, Richard Alexander Saveri, Cadio R. Zirpoli, Saveri & Saveri, Inc., San Francisco, CA; Randy R. Renick, Law Offices of Randy Renick, Pasadena, CA.

For Audio Video Artistry, Plaintiff: B. J. Wade, LEAD ATTORNEY, Glassman Edwards Wade & Wyatt, P. C., Memphis, TN.

For Nathan Muchnick, Inc., Plaintiff: H. Laddie Montague , Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Jeffrey Herrmann, Cohn Lifland Pearlman Herrmann & Knopf LLP, Saddle Brook, NJ; Marc Howard Edelson, Edelson & Associates, LLC, Doylestown, PA; Peter S. Pearlman , Cohn Lifland Pearlman Herrmann and Knopf, LLP, Saddle Brook, NJ.

For Richard A. Markham, **[*7]** Plaintiff: Allyn Z. Lite, LEAD ATTORNEY, Lite DePalma Greenberg & Rivas, LLC, Newark, NJ.

For Roberta Harrell, Plaintiff: Allyn Z. Lite, Bruce D. Greenberg, LEAD ATTORNEYS, Lite DePalma Greenberg & Rivas, LLC, Newark, NJ; Benjamin F. Johns, Joseph G. Sauder, LEAD ATTORNEYS, Chimicles & Tikellis LLP, Haverford, PA; Jason Elliot Macias, LEAD ATTORNEY, Lite DePalma Greenberg & Rivas, LLC, Newark, NJ.

For or Chris Ferencsik, Plaintiff: Daniel Hume, LEAD ATTORNEY, Kirby McInerney LLP, New York, NY; Beverly Tse, Kirby McInerney, LLP, New York, NY.

For Gladys Baker, Jack Elbaz, Robert Schuyler Watson, Steven Nakash, Plaintiffs: Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian LLP, New York, NY.

For Marshall Myers, Plaintiff: Stephen Michael Garcia, LEAD ATTORNEY, Garcia Law Firm, Long Beach, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For Phelps Technologies, Inc., Plaintiff: Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Patrick John Brady, Polsinelli Shughart, P.C., Kansas City, MO.

For Sara Cabezas, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Jon T. King, Hausfeld LLP, San Francisco, CA.

For **[*8]** CMP Consulting Services, Inc., Plaintiff: Richard Jo Kilsheimer , LEAD ATTORNEY, Kaplan Fox And Kilsheimer LLP, New York, NY; Laurence D. King, Kaplan Fox & Kilsheimer LLP, San Francisco, CA; Linda Phyllis Nussbaum, Grant & Eisenhofer P.A., New York, NY; Lori Sambol Brody, Kaplan Fox & Kilsheimer LLP, Los Angeles, CA; Robert N. Kaplan, Kaplan Kilsheimer & Fox LLP, New York, NY; Archana Tamoshunas, Barry Steven Taus, Taus, Cebulash & Landau, LLP, New York, NY.

For Ajax Philadelphia, Inc., Plaintiff: Mindee J. Reuben, LEAD ATTORNEY, David Haym Weinstein, Weinstein Kitchenoff & Asher, LLC, Philadelphia, PA; Steven A. Asher, Weinstein Kitchenoff & Asher LLC, Philadelphia, PA.

For Karen Stromberg, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Lynn Lincoln Sarko, Keller Rohrback L.L.P., Seattle, WA.

For Bart LLC, Plaintiff: Daniel C. Girard, LEAD ATTORNEY, Elizabeth Cheryl Pritzker, Girard Gibbs LLP, San Francisco, CA.

For Michael Juetten, Plaintiff; Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Craig C. Corbitt, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA.

For Arthur Goodelman, Plaintiff: Joseph Richard Saveri, **[*9]** LEAD ATTORNEY, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, LEAD ATTORNEY, Lieff Cabraser Heimann & Bernstein, INTERIM LEAD COUNSEL, DIRECT PURCHASER CASES, San Francisco, CA; Andrew Scirica

Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Brendan Patrick Glackin, Eric B. Fastiff, Jordan S Elias, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Robert G. Eisler, Cohen, Milstein, Hausfeld & Toll, PLLC, New York, NY.

For Isaac Salem, Erin Drew, Plaintiffs: Aaron H. Darsky, Audet & Partners, LLP, San Francisco, CA; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY.

For Dr. Steven Martel, Plaintiff: Micha Star Liberty, LEAD ATTORNEY, Liberty Law Office, Oakland, CA; Aaron H. Darsky, Audet & Partners, LLP, San Francisco, CA; Robert C. Schubert, Schubert Jonckheer & Kolbe LLP, San Francisco, CA.

For Michael J. Eliav, Plaintiff: Kathleen Styles Rogers, LEAD ATTORNEY, San Mateo, CA; Susan Gilah Kupfer, Sylvie K. Kern, Glancy Binkow & Goldberg LLP, San Francisco, CA.

For Albert Wong, Plaintiff: Terry Gross, Gross & Belsky LLP, San Francisco, CA.

For Royal Data Services, Inc., Plaintiff: Elizabeth R. Odette, W. Joseph **[*10]** Bruckner, LEAD ATTORNEYS, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN.

For Diplomat Merchandise Corp., Plaintiff: Christopher J. McDonald, LEAD ATTORNEY, Labaton Sucharow & Rudoff LLP, New York, NY; Craig L. Briskin, LEAD ATTORNEY, PRO HAC VICE, Mehri & Skalet, PLLC, Wasington, DC; Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For Jonathan Hee, Plaintiff: Jack Wing Lee, LEAD ATTORNEY, Derek G. Howard, Minami Tamaki LLP, San Francisco, CA; Joseph M. Alioto , Sr., LEAD ATTORNEY, Angelina Alioto-Grace, Joseph Michelangelo Alioto , Jr, Theresa Driscoll Moore, Thomas Paul Pier, Alioto Law Firm, San Francisco, CA.

For Byron Ho, Plaintiff: Daniel Joseph Mulligan, St. James Recovery Services, P.C., San Francisco, CA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Derek G. Howard, Minami Tamaki LLP, San Francisco, CA; Gilmur Roderick Murray, Murray & Howard, LLP, San Francisco, CA; Larry Gabriel, Jenkins, Mulligan & Gabriel, San Francisco, CA; Scott Justin Yundt, Murray & Howard, LLP, Larkspur, CA.

For Home Technologies Bellevue LLC, Plaintiff: Anthony D. Shapiro, Steve W. Berman, LEAD ATTORNEYS, George W. Sampson, Hagens Berman Sobol Shapiro LLP, Seattle, **[*11]** WA; Ronnie Seidel Spiegel, Hagens Berman Sobol Shapiro, Seattle, WA.

For Christopher Bessette, Plaintiff: Eric James Pickar , LEAD ATTORNEY, Bangs, McCullen, Butler, Foye & Simmons, L.L.P., Rapid City, SD; Gregory James Erlandson, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Christopher Murphy, Plaintiff: Daniel D'Angelo, Kenneth George Gilman, LEAD ATTORNEYS, Gilman and Pastor, LLP, Boston, MA.

For Miles H Humphrey, Plaintiff: Thomas D. Kershaw , Jr., LEAD ATTORNEY, Twin Falls, ID; Ian Otto, Straus & Boies LLP, Fairfax, VA; Mark D. Stubbs, Matthew R. Howell, Fillmore Spencer LLC, Provo, UT; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Chad Hansen, Plaintiff: Clint L. Sargent , LEAD ATTORNEY, Danforth & Meierhenry, Sioux Falls, SD; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For Flourine On Call, Ltd., Plaintiff: Brian S Umpierre, Robert S. Green, Green Welling, P.C., San Francisco, CA.

For FME Architecture + Design, Plaintiff: Josef Deen Cooper, Cooper & Kirkham, P.C., San Francisco, CA.

For Joseph Kovacevich, Plaintiff: Daniel E. Gustafson, PRO HAC VICE, Brian **[*12]** L. Williams, Gustafson Gluek PLLC, Minneapolis, MN; Robert J. Gralewski , Jr., Gergosian & Gralewski LLP, San Diego, CA.

For EMW, Inc., File Reply Memorandum Indirect Purchaser Leadership Proposal of Lingel H. Winters P.C., Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Law Offices of Lingel H. Winters, San Francisco, CA; Thomas V. Girardi, Girardi & Keese, Los Angeles, CA.

For Jeffrey L. Walters, Plaintiff: Steven Edward Grubb , LEAD ATTORNEY, Harrisburg, PA; Christine A. Williams, Edward J. Westlow, DurretteBradshaw PLC, Richmond, VA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA; Richard Lyle Coffman, The Coffman Law Firm, Beaumont, TX; Wyatt B. Durrette , Jr., DurretteBradshaw, Richmond, VA.

For Tabbatha Benson, Scott Friedson, Michelle Brooks, Joe Solo, Brittany Chung, Plaintiffs: Gordon Ball, LEAD ATTORNEY, Ball & Scott, Knoxville, TN.

For Robert George, Jeffrey Larson, Plaintiffs: Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Renae D. Steiner, Gustafson Gluek PLLC, Minneapolis, MN; Jason Kilene, Minneapolis, MN; Michael S. Montgomery, Montgomery, Goff & Bullis, Fargo, ND.

For Thomas P Mitt, Plaintiff: Douglas P. Dehler, LEAD ATTORNEY, **[*13]** Shepard Findelman Miller & Shah LLC, Milwaukee, WI; Natalie Finkelman Bennett, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Nathan Zipperian, LEAD ATTORNEY, Shepherd Finkleman Miller & Shah, LLC, Media, PA.

For Michele Wojnowski, Plaintiff: Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Al Gober, Plaintiff: Daniel E. Gustafson, LEAD ATTORNEY, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN; Renae D. Steiner, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Jason Kilene, LEAD ATTORNEY, Minneapolis, MN.

For Susan Selfridge, Amiee Corlett, Plaintiffs: Dennis Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA.

For Tammy Long, Plaintiff: Grady F. Tollison , Jr., LEAD ATTORNEY, Tollison Law Firm, P.A., Oxford, MS; LeRoy Davis Percy, LEAD ATTORNEY, Tollison Law Firm P.A., Oxford, MS; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Judith Griffith, Plaintiff: Andrew A. Nickelhoff, LEAD ATTORNEY, Sachs Waldman, Detroit, MI; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Ling-Hung Jou, Plaintiff: S. Thomas Wienner , LEAD ATTORNEY, Wienner & Gould, P.C., Rochester, MI; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Christopher C Rywelski, **[*14]** Plaintiff: Barton Carl Gernander , LEAD ATTORNEY, Hellmuth & Johnson, PLLC, Eden Prairie, MN; J Robert Keena, LEAD ATTORNEY, Hellmuth & Johnson PLLC, Eden Prairie, MN; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Martha Mulvey, Plaintiff: Jordan M. Lewis, LEAD ATTORNEY, Siegel Brill Greupner Duffy & Foster, Minneapolis, MN; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Robert Harmon, Plaintiff: Christopher D. Jennings , John G. Emerson, Scott E. Poynter, LEAD ATTORNEYS, Emerson Poynter LLP, Little Rock, AR.

For Timothy J. Lauricella, Plaintiff: Andrew S. Friedman, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint, P.C, Phoenix, AZ; David Boies , III, Nathan Cihlar, Ian Otto, Timothy D. Battin, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA; Francis Joseph Balint , Jr., Bonnett Fairbourn Friedman & Balint, PC, Phoenix, AZ; Manfred Patrick Muecke, Bonnett, Fairbourn, Friedman, & Balint, P.C., San Diego, CA.

For Kou Srimoungchanh, Plaintiff: Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen, Bonner Springs, KS; Thomas H. Brill, LEAD ATTORNEY, Office of Thomas H. Brill, Mission Hills, KS.

For Peter Coyle, Plaintiff: Angela K. Drake, LEAD ATTORNEY, **[*15]** Lowther Johnson, Attorneys at Law, LLC, Springfield, MO; Michael L. Belancio, LEAD ATTORNEY, Bower Belancio LLC, Kansas City, MO; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Lee R. Chamberlain, Plaintiff: Chad A. McGowan, LEAD ATTORNEY, McGowan Hood Felder and Johnson, Rock Hill, SC; John Gressette Felder , Jr., LEAD ATTORNEY, McGowan Hood Felder and Johnson, Columbia, SC.

For Oscar Cintron, Plaintiff: Jose R. Gonzalez-Nogueras, LEAD ATTORNEY, Jimenez Graffam & Lausell, San Juan, PR; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Custom Audio Video, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Faucher LLP, Philadelphia, PA.

For Benjamin G Northway, Plaintiff: Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Allen Nassiff, Plaintiff: Mary Gilmore Kirkpatrick, LEAD ATTORNEY, Kirkpatrick & Goldsborough, PLLC, South Burlington, VT.

For Kari J Nehring, Plaintiff: Daniel E. Gustafson, LEAD ATTORNEY, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN; Jason Kilene, LEAD ATTORNEY, Minneapolis, MN; Renae Diane Steiner, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For R Rex Getz, Plaintiff: Rodney Olsen , LEAD ATTORNEY, Morrison, Frost, Olsen & Irvine, **[*16]** LLP, Manhattan, KS; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For James T Watson, Plaintiff: Darin M. Conklin, LEAD ATTORNEY, Alderson Alderson Weiler Conklin Burghart & Crow LLC, Topeka, KS; Joseph Michael Weiler , LEAD ATTORNEY, Topeka, KS; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Donna Jeanne Flanagan, Plaintiff: James F. Wyatt , III, LEAD ATTORNEY, Wyatt & Blake LLP, Charlotte, NC; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Scott Beall, Plaintiff: Mark J. Schirmer, LEAD ATTORNEY, Straus & Boies, LLP, Birmingham, AL; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Kathleen C. Davis, Plaintiff: C. Dewey Branstetter , Jr., James Gerard Stranch , IV, LEAD ATTORNEYS, Branstetter Stranch & Jennings, Nashville, TN; Daniel E. Gustafson, LEAD ATTORNEY, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN; Garrett D. Blanchfield , Jr., LEAD ATTORNEY, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jason Kilene, LEAD ATTORNEY, Minneapolis, MN; Renae Diane Steiner, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For Tom DiMatteo, Plaintiff: David E. Kovel, **[*17]** LEAD ATTORNEY, Mark Allen Strauss, Kirby McInerney LLP, New York, NY.

For Ryan J. Bierling, Plaintiff: Christopher A. Seeger, David R. Buchanan, LEAD ATTORNEYS, Seeger Weiss LLP, New York, NY; Jonathan Shub, Seeger Weiss LLP, Philadelphia, PA.

For Jose Juan, Plaintiff: David Boies , III, Nathan Cihlar, Ian Otto, Timothy D. Battin, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA; Kenneth G. Walsh , LEAD ATTORNEY, Kirby McInerney LLP, New York, NY.

For Giles Patricia, Plaintiff: Samuel W. Lanham , Jr., LEAD ATTORNEY, Lanham & Blackwell, Bangor, ME; Ian Otto, Straus & Boies, LLP, Fairfax, VA.

For John Martich, Plaintiff: M. Eric Frankovitch, LEAD ATTORNEY, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Michael G. Simon, LEAD ATTORNEY, Frankovitch Anetakis Colantonio & Simon - Weirton, Weirton, WV; Ian Otto, Straus & Boies, LLP, Fairfax, VA.

For Richard Granich, Plaintiff: Cory M. Jones, LEAD ATTORNEY, Royal Jones Miles Dunkley & Wilson, Henderson, NV.

For Allen Kelley, Plaintiff: George Oliver West , III, LEAD ATTORNEY, Law Offices of George O. West III, Las VEGAS, NV; Ian Otto, Straus & Boies, LLP, Fairfax, VA.

For Art's TV & Appliance, Plaintiff: Douglas A. Millen, LEAD ATTORNEY, Freed **[*18]** Kanner London & Millen LLC, Bannockburn, IL; Daniel Bruce Allanoff, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA; Eugene A. Spector, Spector Roseman Kodroff & Willis, PC, Philadelphia, PA; Harry Shulman, The Mills Law Firm, San Rafael, CA; Kathleen M. Konopka, Cohen Milstin Hausfeld & Toll PLLC, Washington, DC; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Richard Adam Koffman, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For George Mays, Plaintiff: Scott Ames, Steven J. Serratore, LEAD ATTORNEYS, Serratore & Ames, Los Angeles, CA.

For Cynthia Saia, Plaintiff: Floyd Mortimer Melton , III, Melton Law Firm PLLC, GREENWOOD, MS; James Michael Terrell, Nicholas W. Armstrong, Perry Michael Yancey, Robert Gordon Methvin , Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL.

For Geoffrey T. Korwan, Tina Chapman, Jeannette Edwards, Gayle L. Powelson, Plaintiffs: James Michael Terrell, Nicholas W. Armstrong, Perry Michael Yancey, Robert Gordon Methvin , Jr, McCallum, Methvin & Terrell, P.C., Birmingham, AL.

For Shawn Stern, Plaintiff: Christine A. Williams, Edward J. Westlow, Christopher Garrett **[*19]** Hill, LEAD ATTORNEYS, DurretteBradshaw PLC, Richmond, VA; Richard Lyle Coffman, LEAD ATTORNEY, Beaumont, TX; Wyatt B. Durrette , Jr., LEAD ATTORNEY, DurretteBradshaw, Richmond, VA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Wendy Williams, Plaintiff: Chief Nnamdi A. Ekenna , LEAD ATTORNEY, The Ekenna Law Firm, apc., Los Angeles, CA; Lawrence Dumzo Nwajei, LEAD ATTORNEY, Law Offices of Lawrence D. Nwajei, Los Angeles, CA.

For Rebecca Bly, Plaintiff: Donna F Solen, LEAD ATTORNEY, Mason LLP, Washington, DC.

For Univisions-Crimson Holding, Inc., Plaintiff: Christopher T. Heffelfinger, Manuel Juan Dominguez, Marc Jeffrey Greenspon, Berman DeValerio, Palm Beach Gardens, FL.

For Rosemary Valdez, Plaintiff: Gregg Vance Fallick, LEAD ATTORNEY, Albuquerque, NM; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Jai Paguirigan, Amy Paguirigan, Plaintiffs: Susan LaCava, LEAD ATTORNEY, Susan LaCava.SC, Madison, WI; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Tara Perry, Plaintiff: Andrew C. Skinner, LEAD ATTORNEY, Nichols & Skinner L.C., Charles Town, WV; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa **[*20]** Elzankaly, McManis, Faulkner, San Jose, CA.

For Sarah Hansen, Plaintiff: James Belford Brown, LEAD ATTORNEY, Jennifer Anne Scott, Herum Crabtree Brown, Stockton, CA.

For Lynne M. Holtkamp, Plaintiff: Adam Stein, LEAD ATTORNEY, Ferguson Stein Wallas Adkins Gresham & Sumter, PA, Chapel Hill, NC; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For William J. Fisher, Plaintiff: William F. Patterson , Jr., LEAD ATTORNEY, Forman Rossabi Black P.A., Greensboro, NC.

For Advanced Technology Distributors, Inc., Plaintiff: Clinton Paul Walker, Roger M. Schrimp, LEAD ATTORNEYS, Fred A. Silva, Kathy Lee Monday, Damrell, Nelson, Schrimp, Pallios, Pache, Modesto, CA.

For Magic Video, Inc., Plaintiff: Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Richard Adam Koffman, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; Kathleen M. Konopka, Cohen Milstin Hausfeld & Toll PLLC, Washington, DC.

For WOW LLC, Gina Cerda, Jean-Marie Wolf, Carlos Ponce, Patrick Piper, Gary Gornick, Karol Juskiewicz, Edward Decoite, John Candido, Anne Lewis, Don Carmignani, Terry Adami, Saki Kavouniaris, Linda Klare, Thomas Mitchell, Plaintiffs: Mario Nunzio Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, **[*21]** CA.

For Lisa Blackwell, Plaintiff: Reginald Von Terrell, LEAD ATTORNEY, The Terrell Law Group, Oakland, CA.

For Francis Frybarger, Plaintiff: Daniel Jay Mogin, LEAD ATTORNEY, The Mogin Law Firm P.C., San Diego, CA.

For Jeff Jafarian, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Smith Dollar PC, Santa Rosa, CA; Jon T. King, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Jayne Arnold Goldstein, Shepherd, Finkelman, Miller & Shah, LLP, Weston, FL; Lee Albert, Murray, Frank & Sailer LLP, New York, NY.

For Kaine Kornegay, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For Elena Ralik, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Ann Scott, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Steyer, Lowenthal, Boodrookas, Alvarez & Smith, San Francisco, CA.

For Omnis Computer Supplies, Inc., Plaintiff: Jon T. King, Christopher L. Lebsock, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA; Michael Paul Lehmann, LEAD ATTORNEY, Hausfeld LLP, San **[*22]** Francisco, CA.

For Gail H. Awakuni, John Okita, Plaintiffs: Gail Y. Cosgrove, Steven K. Hisaka, LEAD ATTORNEYS, Hisaka Stone Goto Yoshida Cosgrove & Ching, Honolulu, HI; Kunio Kuwabe , LEAD ATTORNEY, Hisaka Yoshida & Cosgrove, Honolulu, HI; David Boies , III, Ian Otto, Timothy D. Battin, Straus & Boies, LLP, Fairfax, VA.

For Aspen Building Technology, Inc., Plaintiff: Hector R. Martinez, LEAD ATTORNEY, Mallison & Martinez, Oakland, CA; Jennie Lee Anderson, Lori Erin Andrus, LEAD ATTORNEYS, Andrus Anderson LLP, San Francisco, CA; Stanley Scott Mallison, LEAD ATTORNEY, Law Offices of Mallison & Martinez, Lafayette, CA.

For Timothy J Purdy, Plaintiff: Mark Albright, LEAD ATTORNEY, Albright Stoddard Warnick & Albright, Las Vegas, NV; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For Lynn Sweatman, Plaintiff: Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For Joseph T. Piscitello, Plaintiff: Bruce Lee Simon, LEAD ATTORNEY, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Richard Adam Koffman, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; Kathleen M. Konopka, Cohen Milstin Hausfeld & Toll **[*23]** PLLC, Washington, DC.

For Timothy R. Gregory, Plaintiff: Steven N. Berk, LEAD ATTORNEY, Berk Law LLC, Washington, DC; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For David Walker, Plaintiff: Steven N. Berk, LEAD ATTORNEY, Berk Law LLC, Washington, DC; Daniel E. Gustafson, PRO HAC VICE, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN.

For Heidi Bates, Plaintiff: Jennifer R. Seltenrich , LEAD ATTORNEY, Michaels, Ward & Rabinovitz, LLC, Boston, MA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Elenor Giusti, Plaintiff: Michael S. Bearse, LEAD ATTORNEY, Finnegan & Bearse, Boston, MA.

For Gail Feser, Plaintiff: Soye Kim , LEAD ATTORNEY, Jeffrey A. Bartos, Guerrieri, Edmond, Clayman & Bartos, P.C., Washington, DC.

For Edward Lawrence, Jerry McCleery, Shelley Jean Peck, Roc Hutchison, Plaintiffs: James M. Dombroski, LEAD ATTORNEY, Attorney at Law, Petaluma, CA; Ekaterina Schoenefeld, Messina Law Firm, P.C., Holmdel, NJ; Eric I. Unrein, Gary D. McCallister, Chicago, IL; Gary Dean McCallister, Gary D. McCallister & Associates, LLC, Chicago, IL; Gil D. Messina , Messina Law Firm PC, Holmdel, NJ; Jamie Goldstein, Thomas A. Kelliher, **[*24]** Gary D. McCallister & Associates, Chicago, IL; Jeffery Kenneth Perkins, Law Offices of jeffrey K. Perkins, San Francisco, CA; John Haslet Boone, Law Offices of John H. Boone, San Francisco, CA; Russell F. Brasso, Foreman & Brasso, San Francisco, CA.

For Marcia Weingarten, Plaintiff: David Boies , III, Nathan Cihlar, Ian Otto, Timothy D. Battin, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA; David A. Freedman, LEAD ATTORNEY, Freedman Boyd Daniels Hollanderg Goldberg & Ives, P.A., Albuquerque, NM; Matthew L. Garcia , LEAD ATTORNEY, Freedman Boyd Hollander Goldberg & Ives, P.A; Albuquerque, NM; Adam C Briggs , PRO HAC VICE, Godfrey & Kahn SC, Madison, WI; Kevin J. O'Connor, Godfrey & Kahn, S.C., Madison, WI.

For Jerome O'Connell, Plaintiff: Adam C Briggs , PRO HAC VICE, Godfrey & Kahn SC, Madison, WI; Kevin J. O'Connor, Godfrey & Kahn, S.C., Madison, WI.

For Carman Pellitteri, Jeannie Pellitteri, Plaintiffs: Walter Henry Bundy , Jr., LEAD ATTORNEY, Smith Bundy Bybee & Barnett, P.C., Mount Pleasant, SC.

For John Pulasky, Plaintiff: Thomas E. Towe, LEAD ATTORNEY, Towe, Ball, Enright, Mackey & Sommerfeld, Billings, MT.

For Gregory P. Sloan, Plaintiff: Carl Lewis Solomon, LEAD ATTORNEY, Gergel **[*25]** Nickles and Solomon, Columbia, SC; Joseph Preston Strom , Jr., Mario Anthony Pacella , LEAD ATTORNEYS, Strom Law Firm, Columbia, SC.

For Walden Minoli, John David Kittleson, Plaintiffs: James Jonathan Rosemergy , LEAD ATTORNEY, Carey & Danis LLC, St. Louis, MO; Michael J. Flannery, LEAD ATTORNEY, Carey & Danis, LLC, St. Louis, MO.

For Scott Eisler, Plaintiff: Marc A. Wites, LEAD ATTORNEY, Wites & Kapetan, P.A., Lighthouse Point, FL; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Mauricio Defrancisco, Plaintiff: Greg A. Lewen, James Fox Miller, LEAD ATTORNEYS, Miller Schwartz & Miller, Hollywood, FL.

For Community Business Bank, Plaintiff: William Henry Parish, LEAD ATTORNEY, Parish & Small, Stockton, CA.

For IMCA, Inc., Plaintiff: Glenn Carl James-Hernandez, LEAD ATTORNEY, James Law Offices, Guaynabo, PR.

For William E. Stack, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA.

For Robin Feins, Annie Cirrone, Plaintiffs: Douglass A. Kreis, LEAD ATTORNEY, Aylstock, Witkin & Sasser, PLC, Pensacola, FL; Joshua Aaron Jones , Esq., LEAD ATTORNEY, Aylstock Witkin Kreis & Overholtz, Pensacola, FL; Justin Graem Witkin, LEAD ATTORNEY, Alystock Witkin **[*26]** Kreis & Sasser PLLC, Pensacola, FL; Neil D. Overholtz, LEAD ATTORNEY, Aylstock Witkin & Sasser, P.L.C., Pensacola, FL.

For Fred I. Waki, Plaintiff: Daniel E. Gustafson, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Donald Edward Fisher, Ryan W. Roylo, William Copulos, LEAD ATTORNEYS, Copulos Fisher & Roylo, LLC, Honolulu, HI; Jason Kilene, LEAD ATTORNEY, Minneapolis, MN; Renae Diane Steiner, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For ATS Claim, LLC, Plaintiff: David Paul Germaine, LEAD ATTORNEY, PRO HAC VICE, Chicago, IL; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA.

For Direct Purchaser Plaintiffs, Plaintiff: Daniel L. Warshaw, LEAD ATTORNEY, Pearson, Simon, Warshaw & Penny LLP, Sherman Oaks, CA; Eric B. Fastiff, LEAD ATTORNEY, Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Hilary Kathleen Ratway, LEAD ATTORNEY, Hausfeld, LLP, Washington, DC; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For Hewlett-Packard Company, Interested Party (5/19/09), Plaintiff: Beatrice B. Nguyen, Gregory D. Call , Esq., **[*27]** LEAD ATTORNEYS, Suzanne E. Rode, Crowell & Moring LLP, San Francisco, CA; Bryan Leach, Fred H. Bartlit , Jr., Lester Houtz, Attorney at Law, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO; Karma Micaela Giulianelli, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Denver, CO; Mark E Ferguson, Barlitt Beck Herman Palenchar & Scott, Chicago, Il; Mark S. Ouweleen, Attorney at Law, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL.

For BellSouth Telecommunications, Inc., Plaintiff: Christopher T. Leonardo , Kenneth L. Adams, R. Bruce Holcomb , Adams Holcomb LLP, Washington, DC; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Joshua C. Stokes, Crowell & Moring LLP; Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA.

For Pacific Bell Telephone Company, Southwestern Bell Telephone Company, AT & T Corp., AT & T Datacomm, Inc., AT & T Mobility LLC, AT & T Operations, Inc., AT & T Services, Inc., Plaintiffs: Christopher T. Leonardo , Kenneth L. Adams, R. Bruce Holcomb , Adams Holcomb LLP, Washington, DC; Joshua C. **[*28]** Stokes, Jerome A. Murphy, Joshua C. Stokes, Crowell & Moring LLP; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA.

For Nokia Corporation, Nokia Inc., Plaintiffs: Brian Parker Miller, Donald MacKaye Houser, Joann Elizabeth Johnston, Richard W. Stimson, Alston & Bird LLP, Atlanta, GA; Edward Paul Bonapfel, Kacy Christine McCaffrey, Alston and Bird LLP, Atlanta, GA; Kevin Michael Pitre, Alston and Bird, Atlanta, GA; Lisa Kathleen Bojko, Alston & Bird, Atlanta, GA; Matthew Scott Orrell, Atlanta, GA; Matthew D. Richardson, Peter Konito, ALSTON BIRD LLP, Atlanta, GA; Randall Lee Allen, Alston and Bird, Menlo Park, CA; Valarie Cecile Williams , PRO HAC VICE, Alston & Bird LLP, Atlanta, GA.

For Motorola, Inc., Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Joshua C. Stokes, Crowell & Moring LLP; R. Bruce Holcomb , Adams Holcomb LLP, Washington, DC.

For Electrograph Systems, Inc., Electrograph Technologies, Corp., Plaintiffs: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Philip J. Iovieno, Boies, **[*29]** Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Dell Inc., Dell Products, L.P., Plaintiffs: Andrew Jacob Tuck, Alston and Bird LLP, Atlanta, GA; Debra Dawn Bernstein, Elizabeth Helmer Jordan, Michael P. Kenny, Rodney J Ganske, Alston & Bird LLP, Atlanta, GA; Matthew David Kent, Alston + Bird LLP, Atlanta, GA; Steven Daniel Hemminger, Alston & Bird LLP, Menlo Park, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Joseph M. Alioto , Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Derek G. Howard, Jack Wing Lee, Minami Tamaki LLP, San Francisco, CA; Robert William Finnerty, Girardi Keese, Los Angeles, CA; Steven J Foley, Hellmuth and Johnson PLLC, Edina, MN; Gregory W. Landry, LaMarca & Landry, P.C.; Marvin A. Miller, Miller Law LLC.

For State of Oregon, ex rel. John Kroger, Attorney General, Plaintiff: Blake Lee Harrop, Office of the Attorney General, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael K. Kelley, Haglund Kelley Horngren **[*30]** Jones & Wilde LLP, Portland, OR; Tim David Nord, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

For Direct Purchaser Plaintiffs, Plaintiff: Joseph Richard Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Aaron M. Sheanin, Girard Gibbs LLP, San Francisco, CA; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Brendan Patrick Glackin, Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CAl Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA.

For Tracfone Wireless, Inc., Plaintiff: David Bedford Esau, Carlton Fields, P.A., West Palm Beach, FL; James Blaker Baldinger, Carlton Fields PA, West Palm Beach, FL; Robert L. Ciotti, Carlton Fields, Tampa, FL.

For State of Missouri, ex rel. Chris Koster, Attorney General, Plaintiff: Anne E. Schneider, Attorney General of Missouri; Liaison Counsel for the State Actions, LEAD ATTORNEY, Jefferson City, MO.

For State of Arkansas, ex rel. Dustin McDaniel, Attorney General, Plaintiff: David A. Curran, Assistant Attorney General, Little Rock, **[*31]** AR.

For State of Michigan, ex rel. Michael A. Cox, Attorney General, Plaintiff: Mary Elizabeth Lippitt , Michigan Attorney General, Lansing, MI.

For State of Missouri, ex rel. Chris Koster, Attorney General, Plaintiff: Andrew McNally Hartnett, Office of the Missouri Attorney General, Jefferson City, MO; Anne E. Schneider, Attorney General of Missouri, Consumer Protection, Jefferson City, MO.

For State of West Virginia, ex rel Darrell McGraw, Attorney General, Plaintiff: Douglas Lee Davis, Attorney General, Consumer Protection and Antitrust, Charleston, WV; Jill L. Miles, Assistant Attorney General, Charleston, WV.

For State of Wisconsin, ex rel J.B. Van Hollen, Attorney General, Plaintiff: Gwendolyn J. Cooley, Wisconsin Attorney General, Madison, WI.

For State of Florida, Office of the Attorney General, Department of Legal Affairs, Plaintiff: Eli Friedman, Office of the Attorney General, State of Florida, Tallahassee, FL; Lizabeth Ann Leeds Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Nicholas J. Weilhammer, Office of the Attorney General, State of Florida; Liaison Counsel for the State Actions, Tallahassee, FL; Robert Scott Palmer, Office of the Attorney **[*32]** General, Anititrust Division, State of Florida, Tallahassee, FL.

For Best Buy China Ltd., Plaintiff: David Martinez, LEAD ATTORNEY, Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Robins Kaplan Miller and Ciresi LLP, Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi, Minneapolis, MN; K. Craig Wildfang , Attorney at Law, Minneapolis, MN.

For Best Buy Co., Inc., Best Buy Enterprise Services, Inc., Best Buy Purchasing LLC, Best Buy Stores, L.P., Magnolia Hi-Fi, Inc., Plaintiffs: David Martinez, LEAD ATTORNEY, Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Robins Kaplan Miller and Ciresi LLP, Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi, Minneapolis, MN; K. Craig Wildfang , Attorney at Law, Minneapolis, MN; Lauren E. Wood, Robins Kaplan Miller & Ciresi L.L.P., Minneapolis, MN.

For Target Corp., Kmart Corp, Sears, Roebuck and Co., Good Guys, Inc., Newegg Inc., Old Comp Inc., Radioshack Corp., Plaintiffs: Christopher T. Leonardo, Adams Holcomb LLP, Washington, DC; Jason C. Murray, Crowell & Moring **[*33]** LLP, Los Angeles, CA; Jeffrey H. Howard, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Kenneth L. Adams, R. Bruce Holcomb , Adams Holcomb LLP, Washington, DC.

For The People of the State of California, ex rel. Edmund G. Brown, Jr., Attorney General of the State of California, as parens patriae on behalf of natural persons residing in the state, Plaintiff: Adam Miller, CA Dept of Justice, ***Antitrust Law*** Section, San Francisco, CA.

For Eastman Kodak Company, Plaintiff: John R. Foote, Karl David Belgum, Nixon Peabody LLP, San Francisco, CA.

For SB Liquidation Trust, Plaintiff: Allan Diamond, Jason Paul Fulton, Jim McCarthy, Diamond McCarthy LLP, Dallas, TX; Erica W. Harris, Susan Godfrey LLP, Houston, TX; Marc M. Seltzer, Ryan Christopher Kirkpatrick, Steven Gerald Sklaver, Susman Godfrey LLP, Los Angeles, CA.

For Costco Wholesale Corp., Plaintiff: Cori G. Moore, Noah G. Purcell, Perkins Coil LLP, Seattle, WA; David J. Burman, Troy Philip Sauro, Perkins Coie LLP, Seattle, WA.

For Sony Computer Entertainment America, LLC, (10-5620 - voluntery dismissa), Sony Electronics, Inc., (10-5620 - voluntary dismissal), **[*34]** Plaintiff: David Mark Goldstein , Esq., Orrick, Herrington & Sutcliffe LLP, San Francisco, CA; Richard James Mooney, Holme Roberts & Owen LLP, San Francisco, CA; Robert L. Stolebarger, Holmes Roberts & Owen LLP, San Francisco, CA; Shannon Christine Leong , Orrick Herrington and Sutcliffe, SF, CA; Stephen V. Bomse, Orrick Herrington & Sutcliffe, San Francisco, CA.

For Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust, Plaintiff: David Humberto Orozco, Susman Godfrey LLP, Los Angeles, CA; H. Lee Godfrey , Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Jordan Connors , Susman Godfrey LLP, Seattle, WA; Marc M. Seltzer, Susman Godfrey LLP, Los Angeles, CA; Parker C. Folse , III, Rachel S. Black, Susman Godfrey L.L.P., Seattle, WA.

For State of New York, Plaintiff: Geralyn Jeanette Trujillo, Richard L. Schwartz, Office of the Attorney General, State of New York, New York, NY; Jeremy R. Kasha, New York State Office of the Attorney General (NYC), New York, NY; John Andrew Ioannou, New York State Attorney General's Office, Antitrust Bureau, New York, NY.

For MetroPCS Wireless Inc., Plaintiff: Philip J Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; Anne M. **[*35]** Nardacci, Albany, NY; Lewis Titus LeClair, Scott R Jacobs, McKool Smith, Dallas, TX; Mike McKool , Jr., McKool Smith, P.C., Dallas, TX; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Office Depot, Inc., Plaintiff: Stuart H. Singer, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP, Fort Lauderdale, FL; Stuart Harold Singer, Boies Schiller & Flexner, Fort Lauderdale, FL.

For Jaco Electronics, Inc., Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA.

For T-Mobile USA Inc, Plaintiff: Brooke Ashley-May Taylor, Susman Godfrey L.L.P., Seattle, WA; Daniel B Rapport, PRO HAC VICE, FRIEDMAN KAPLAN SEILER ADELMAN LLP, NEW YORK, NY; David H. Orozco, PRO HAC VICE, SUSMAN GODFREY (LA,CA), LOS ANGELES, CA; Edward A. Friedman, Friedman Kaplan Seiler & Adelman LLP, New York, NY; Hallie B. Levin, PRO HAC VICE, FRIEDMAN KAPLAN SEILER & ADELMAN LLP, NEW YORK, NY; Parker C Folse , III, SUSMAN GODFREY LLP, SEATTLE, WA.

For LG Display Co., Ltd., formerly known as LG Philips LCD Co., LTD., Defendant: Michael Robert **[*36]** Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC; Arman Oruc, Jane Jung Ah Lee, Jonathan Lin, Simpson Thacher and Bartlett LLP, Washington, DC; Jeremy James Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Samsung Electronics Co. Ltd., Defendant: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, John S. Playforth, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Elizabeth Catherine Arens, Covington and Burling, L.L.P. (DC), Washington, DC; Neil K. Roman, Covington & Burling, Washington, DC; Steven D Sassaman, Covington and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Sharp Corporation, Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Ryan Takemoto, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Anne Benton Kaldor, Bingham McCutchen, San Francisco, CA; Colin C. West, Erin Alysa Smart, Bingham McCutchen LLP, San Francisco, CA; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA; Kenneth I. Schacter, Bingham **[*37]** McCutchen LLP, New York, NY; Kristen A. Palumbo, Bingham McCutchen LLP, San Francisco, CA; Lindsay A. Lutz, Pillsbury Winthrop Shaw Pittman, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY; Jon R. Roellke, Bingham McCutchen.

For Sharp Electronics Corporation, Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Anne Benton Kaldor, Bingham McCutchen, San Francisco, CA; Colin C. West, Erin Alysa Smart, Bingham McCutchen LLP, San Francisco, CA; Fusae Nara, Pillsbury Winthrop LLP, San Francisco, CA; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New York, NY; Kristen A. Palumbo, Bingham McCutchen LLP, San Francisco, CA; Lindsay A. Lutz, Pillsbury Winthrop Shaw Pittman, San Francisco, CA; Richard S. Taffet, Bingham McCutchen, New York, NY; Jon R. Roellke, Bingham McCutchen.

For Toshiba Corporation, Toshiba America Electronics Components, Inc., Toshiba America Information Systems, Inc., Toshiba Mobile Display Co., Ltd., Defendants: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, **[*38]** NY; Kristen Jentsch McAhren, LEAD ATTORNEY, White and Case LLP, Washington, DC.

For Toshiba Matsushita Display Technology Co., Ltd., Defendant: John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; Wayne A. Cross, White & Case LLP, New York, NY.

For Hitachi Ltd., Hitachi Displays, Ltd., Defendants: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA; Kristie Anne Bluett, Morgan Lewis et al, SF, CA; Michelle Minju Kim-Szrom, Morgan, Lewis & Bockius LLP, San Francisco, CA; John Clayton Everett , Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC.

For Hitachi America Ltd., Defendant: Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Electronic Devices (USA), Inc., Defendant: Kent Michael Roger, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA; Courtney Lynn Landis, Morgan, Lewis & Bockius, San Francisco, CA; Kristie Anne Bluett, Morgan Lewis et al, SF, CA; Michelle Minju Kim-Szrom, Morgan, Lewis & Bockius LLP, San Francisco, CA; John Clayton Everett , Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC.

For NEC LCD Technologies, Ltd., Defendant: Stephen Holbrook Sutro, Duane Morris LLP, San **[*39]** Francisco, CA.

For NEC Electronics America, Inc., Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA; Edward G. Biester , III, Duane Morris LLP, Philadelphia, PA.

For AU Optronics Corporation, Defendant: Christopher Alan Nedeau, LEAD ATTORNEY, Allison Marie Dibley , Esq., Carl Lawrence Blumenstein, Nossaman LLP, San Francisco, CA; Bryan B. Barnhart, Nossman LLP, San Francisco, CA; Jessica Rae Madrigal, Nossaman Guthner Knox Elliott, San Francisco, CA; Kirk Christopher Jenkins, Sedgwick Detert Moran Arnold, Chicago, IL; Michael F. Healy , Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

For AU Optronics Corporation America, Defendant: John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Sedgwick LLP, San Francisco, CA; Allison Marie Dibley , Esq., Carl Lawrence Blumenstein, Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Bryan B. Barnhart, Nossman LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Jessica Rae Madrigal, Nossaman Guthner Knox Elliott, San Francisco, CA; Kirk Christopher Jenkins, Sedgwick Detert Moran Arnold, Chicago, **[*40]** IL; Michael F. Healy , Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

For Chi Mei Optoelectronics, Defendant: Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA.

For Chi Mei Optoelectronics USA, Inc., Nexgen Mediatech USA Inc, Defendants: John Lyle Williams , Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Bradley R. Hansen, Jonathan D. Martin, Davis Polk and Wardwell LLP, New York, NY; Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Micah Galvin Block, Davis Polk and Wardwell LLP, Menlo Park, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., Defendant: Joel Steven Sanders, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Joel Calcar Willard, Gibson, Dunn Crutcher LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San **[*41]** Francisco, CA; Rebecca Justice Lazarus, Gibson, Dunn & Crutcher, San Francisco, CA; William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA; Robert W. Tarun, Roxane C. Busey, BAker & McKenzie LLP.

For Hannstar Display Corporation, Defendant: Christoher M. Wyant, LEAD ATTORNEY, Hugh F. Bangasser, K&L Gates LLP, Seattle, WA; Donald H. Mullins, Badgley Mullins Law Group PLLC, Seattle, WA; Hugh Frederick Bangasser, Julie Anne Halter, Ramona M. Emerson, K&L Gates, Seattle, WA; Ismail Jomo Ramsey, Mary Kelly Persyn, Ramsey & Ehrlich LLP, Berkeley, CA; Jeffrey L. Bornstein, K&L Gates LLP, San Francisco, CA; Mark K. Davis, PRO HAC VICE, Badgley Mullins Law Group PLLC, Seattle, WA.

For Samsung Semiconductor, Inc., Defendant: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, John S. Playforth, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Elizabeth Catherine Arens, Covington and Burling, L.L.P. (DC), Washington, DC; Neil K. Roman, Covington & Burling, Washington, DC; Steven D Sassaman, Covington and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, **[*42]** San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Epson Imaging Devices Corporation, Defendant: Jeffrey E. Faucette, LEAD ATTORNEY, Kimberly Linnell Taylor, Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA; Stephen P. Freccero, LEAD ATTORNEY, Derek Francis Foran, Morrison & Foerster LLP, San Francisco, CA.

For CMO Japan Co., Ltd., Defendant: John Lyle Williams , Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Bradley R. Hansen, Jonathan D. Martin, Davis Polk and Wardwell LLP, New York, NY; Christopher

B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Micah Galvin Block, Davis Polk and Wardwell LLP, Menlo Park, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA.

For NEC Electronic America, Inc., Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

For Chi Mei Corporation, Defendant: John Lyle Williams , Jr., LEAD ATTORNEY, Manchester, **[*43]** Williams & Seibert, San Jose, CA; Bradley R. Hansen, Jonathan D. Martin, Davis Polk and Wardwell LLP, New York, NY; Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Micah Galvin Block, Davis Polk and Wardwell LLP, Menlo Park, CA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA.

For LG Electronics Inc., Defendant: Samuel R. Miller, LEAD ATTORNEY, Robert Brooks Martin , III, Sidley Austin LLP, San Francisco, CA; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA.

For Royal Phillips Electronics NV, Defendant: Garrard R. Beeney, LEAD ATTORNEY, Sullivan & Cromwell, New York, NY; Bradley P. Smith, Theodore Edelman, New York, NY.

For NEC Display Solutions of America, Inc., Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, George Dominic Niespolo, Duane Morris LLP, San Francisco, CA.

For Samsung Electronics America, Inc., Defendant: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, John S. Playforth, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Elizabeth Catherine Arens, Covington and Burling, L.L.P. (DC), Washington, DC; Neil **[*44]** K. Roman, Covington & Burling, Washington, DC; Steven D Sassaman, Covington and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Phillips Consumer Electronics North America, Philips Electronics North America Corporation, Defendants: Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For LG Electronics U.S.A.,Inc., Defendant: A. Scott Ross, LEAD ATTORNEY, Neal & Harwell, Nashville, TN; Samuel R. Miller, LEAD ATTORNEY, Robert Brooks Martin , III, Sidley Austin LLP, San Francisco, CA; Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA.

For IPS Alpha Technology, LTD., IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendants: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Chi Mei Optoelectronics Corporation, Defendant: John Lyle Williams , Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Micah Galvin Block, Davis Polk and Wardwell LLP, Menlo Park, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, **[*45]** SEATTLE, WA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA; Joel Steven Sanders, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Mitsubishi Electric Corporation, Defendant: Terrence Joseph Truax, Jenner & Block LLC, Chicago, IL.

For Mitsubishi Electric & Electronics USA, Inc., Defendant: Donald R. Harris, Jenner & Block LLC, Chicago, IL; Kenneth E. Keller, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA; Michael T. Brody, PRO HAC VICE, Jenner & Block LLP, Chicago, IL; Michael David Lisi, Krieg Keller Sloan Reilley & Roman, San Francisco, CA; Robert J. Blazejowski, Jenner & Block, LLP, Chicago, IL; Terrence Joseph Truax, Jenner & Block LLC, Chicago, IL.

For Samsung Electronics Company, Ltd., Defendant: Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Seiko Epson Corporation, Defendant: Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA.

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For Apple Inc., Interested Party: Caroline Nason Mitchell, Robert Allan Mittelstaedt, Jones Day, LEAD ATTORNEY, San Francisco, CA.

For State of California, Amicus: Adam Miller, LEAD ATTORNEY, CA Dept of Justice, San Francisco, CA; Emilio Eugene **[*50]** Varanini , IV, State Attorney General's Office, San Francisco, CA.

For United States Antitrust Division,Department of Justice, Intervenor: Peter K. Huston, LEAD ATTORNEY, Department of Justice, Antitrust Division, San Francisco, CA; Alexandra Jill Shepard, U.S. Department of Justice, Antitrust Division, San Francisco, CA; David J. Ward, U.S. Department of Justice, Antritrust Divsion, San Francisco Field Office, San Francisco, CA; E. Kate Patchen, U.S. Department of Justice, San Francisco, CA; Heather S. Tewksbury, United States Department of Justice, Antitrust Division, San Francisco, CA; Micah Lanielle Wyatt, U.S. Department of Justice, Antitrust Division, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA.

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For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Intervenors: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Philips Electronics North America Corp., Intervenor: Brendan P. Cullen Sullivan & Cromwell, Palo Alto, CA.

For Sanyo Consumer Electronics Co., Ltd., Intervenor: Allison Ann Davis, Davis Wright Tremaine LLP, San Francisco, CA.

For State of Oregon, ex rel. John Kroger, Attorney General (3:10cv4346), Plaintiff: Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP, Portland, OR; Tim David Nord, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

For Hannstar Display Corporation, **[*52]** Defendant: Christoher M. Wyant, K&L Gates LLP, Seattle, WA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Now before the Court is defendants' motion to dismiss the State of Oregon's first amended complaint ("FAC"). The Court finds this matter suitable for decision without oral argument and therefore VACATES the hearing currently scheduled for July 15, 2011. Having considered the arguments presented in the moving papers, the Court hereby DENIES defendants' motion.

BACKGROUND

The State of Oregon ("Oregon") filed this antitrust action in 2010, seeking to recover for damages caused by a global price-fixing conspiracy allegedly perpetrated by the major manufacturers of liquid-crystal display ("LCD") panels. Oregon brought suit on behalf of itself, "its agencies, political subdivisions, and local governments, and all natural persons residing in Oregon who were indirect purchasers of . . . products containing LCD panels . . . ." *See* Complaint, ¶1.

On April 15, 2011, after this Court dismissed in part Oregon's original complaint, Oregon filed its FAC. The FAC contains four causes of action: 1) price-fixing in violation of the Sherman Act, *15 U.S.C. § 1*; **[*53]** 2) price-fixing in violation of the Oregon Antitrust Statute, *ORS 646.725-646.730*; 3) unjust enrichment under the Oregon Antitrust Statute, *ORS 646.775*; and 4) common law unjust enrichment. FAC, ¶¶155-72. The FAC sought damages and injunctive relief, as well as disgorgement of defendants' profits. FAC at 50, ¶4.

On May 2, 2011, defendants filed a joint motion to dismiss Oregon's FAC. Defendants' motion takes issue with only two aspects of the complaint. First, defendants claim that Oregon's third cause of action must be dismissed because the Oregon Antitrust Statute does not authorize claims for unjust enrichment. Second, defendants claim that Oregon's request for disgorgement of profits must be stricken from the complaint because disgorgement is not a proper remedy for unjust enrichment under Oregon law.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint that fails to state a claim upon which relief may be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" **[*54]** standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the Court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

DISCUSSION

As mentioned above, defendants' motion challenges only two aspects of Oregon's complaint: Oregon's statutory unjust enrichment claim under the Oregon Antitrust Statute; and Oregon's request for disgorgement of defendants' profits. The Court rejects both of defendants' challenges.

1. Unjust enrichment [*55] under the Oregon Antitrust Statute

Oregon bases its statutory claim for unjust enrichment on *ORS 646.775(1)(a)*. That section reads in its entirety as follows:

> The Attorney General may bring a civil action in the name of the State of Oregon, on behalf of a political subdivision in this state or as parens patriae on behalf of a natural person, in any circuit court in which venue is proper under ORS 646.790, *to secure equitable and monetary relief as provided in this section for injury sustained* by the natural person or political subdivision to the natural person's or political subdivision's property by reason of a violation of ORS 646.725 or 646.730. The Attorney General may bring the action authorized by this paragraph regardless of whether the natural person or political subdivision dealt directly or indirectly with the adverse party.

ORS 646.775(1)(a) (emphasis added). Oregon claims that the reference to "equitable . . . relief" in this section represents a broad grant of authority to the Oregon Attorney General to pursue equitable actions against antitrust offenders.

Defendants, however, argue that the equitable relief authorized under section 646.775(1)(a) is far more circumscribed. **[*56]** They argue that the statute only authorizes equitable relief to the extent it is "provided in this section." *See id.* Because no portion of section 646.775 explicitly authorizes claims for unjust enrichment, defendants argue that such claims are not among the equitable relief that the Oregon Attorney General may seek. Further, defendants point to the fact that the statute limits relief to "injury sustained" by plaintiffs. They argue that such language is inconsistent with the remedy of unjust enrichment, which focuses on a defendant's gain rather than a plaintiff's injury. [1] *See, e.g.,* Davis v. Tyee Indus., Inc., 295 Ore. 467, 668 P.2d 1186, 1188 n.2 (Or. 1983) ("[Unjust enrichment] allows the plaintiff to recover not merely compensation for his loss, but all of the defendant's gain as well.") (quoting D. Dobbs, Remedies § 5.15, at 414 (1973)).

The Court cannot agree with defendants' reading of the statute. While later portions of section 646.775 **[*58]** detail the remedies available in an action brought under section 646.775(1)(a), those portions only pertain to monetary relief. *See, e.g.*, ORS § 646.775(1)(b) (directing courts to exclude certain forms of monetary relief); ORS § 646.775(1)(c) (authorizing treble damages and attorneys' fees); ORS § 646.775(4) (authorizing proof of damages through "statistical or sampling methods"); ORS § 646.775(5) (discussing distribution of damage awards). After authorizing "equitable relief" in section 646.775(1)(a), section 646.775 does not use the term "equitable relief" or otherwise discuss the equitable relief available. Given the lack of any explicit reference to equitable relief in section 646.775, defendants' reading of that section would read equitable relief out of the Oregon Antitrust Statute entirely.

Contrary to defendants' arguments, the only provision of section 646.775 that remotely relates to equitable relief suggests that the Oregon legislature intended section 646.775(1)(a) to be an expansive grant of authority to pursue equitable claims: "The powers granted in this section are in addition to and not in derogation of the common law powers of the Attorney General to act as parens **[*59]** patriae, or the powers of the Attorney General to sue as a representative party on behalf of a class pursuant to ORCP 32." ORS 646.775(6).

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[1] Defendants also argue that the Oregon legislature's narrow understanding of the equitable powers conferred by section 646.775(1)(a) is evidenced by the legislature's rejection of a 2001 amendment to the Oregon Antitrust Statute that would have added the following language to the section: "The equitable relief authorized by this subsection includes, but is **[*57]** not limited to, restitution and disgorgement." Proposed Oregon House Bill 2218 (2001), *available at* http://www.leg.state.or.us/01reg/pdf/HB2218.pdf. Defendants claim that the legislature's rejection of this proposed amendment shows that it views the equitable powers that the statute confers narrowly.

Having reviewed the full legislative history of the proposed amendment, however, the Court finds defendants' argument unconvincing. The amendment was introduced by the Oregon Attorney General's Office to make explicit what the Attorney General believed the statute already authorized. *See* Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 2218 (Jan. 23, 2001) (statement of Assistant Attorney General Andrew Aubertine), *available at* http://www.leg.state. or.us/listn/archive/archive.2001s/HJUDCR-200101230810.ram. The Oregon House passed the amendment, but it was never voted on by the Senate. The transcript of Senate hearing suggests that the Attorney General withdrew the amendment because it was deemed unnecessary in light of other amendments to the statute. *See id.*

In light of this provision, the Court finds that the Oregon legislature intended *section 646.775(1)(a)* to authorize a broad spectrum of equitable relief. Accordingly, it finds that Oregon's claims for unjust enrichment are authorized by the statute.

2. Availability of disgorgement

As a remedy for defendants' alleged antitrust violations, Oregon requests disgorgement of defendants' profits. Defendants argue that disgorgement is not an appropriate remedy for the antitrust claims asserted in plaintiff's suit. Instead, they argue that restitution is the only remedy available for unjust enrichment under Oregon law. *See Bugge v. Far West Fed. Bank, S.B., 100 Ore. App. 133, 785 P.2d 1058, 1064 (Or. App. 1990)* ("The proper remedy is restitution for unjust enrichment . . . ."). Defendants argue that almost no Oregon decisions have allowed disgorgement of profits as a remedy for unjust enrichment claims.

The Court finds defendants' argument unconvincing. While no Oregon court has awarded disgorgement of profits in the antitrust context, few Oregon decisions have discussed the availability **[*60]** of disgorgement as a remedy in general. At least one Oregon court, however, has found disgorgement to be an appropriate remedy for unjust enrichment. *See Kerr v. Miller, 159 Ore. App. 613, 977 P.2d 438, 449 (Or. App. 1999)*.

Further, Oregon law makes the remedies available under the Sherman Act persuasive authority for the remedies available under the Oregon Antitrust Statute. *ORS 646.715(2)* ("The decisions of federal courts in construction of federal law relating to the same subject shall be persuasive authority . . . ."). Although rarely sought under the Sherman Act - perhaps because of the availability of treble damages - disgorgement appears to be an available remedy for violation of the federal antitrust laws.

The Southern District of New York recently concluded that federal courts may award disgorgement of profits as a remedy for Sherman Act violations. *See United States v. Keyspan Corp., 763 F. Supp. 2d 633 (S.D.N.Y. 2011)*. The precise question in *Keyspan* was whether the district court should approve a consent decree settlement that included disgorgement of the defendant's profits. *Id. at 635*. In deciding that question, however, the court first had to decide whether disgorgement was an available **[*61]** remedy under the Sherman Act. *Id. at 638-41*.

The court first looked to decisions in the securities law context, in which disgorgement is a more common remedy. Relying on the Second Circuit's decision in *S.E.C. v. Cavanagh, 445 F.3d 105 (2d Cir. 2006)*, the court concluded that federal courts possessed the power to authorize disgorgement of profits as part of their equity jurisdiction. *Keyspan, 763 F. Supp. 2d at 638-39* ("Thus, '[b]ecause chancery courts possessed the power to order equitable disgorgement in the eighteenth century, . . . contemporary federal courts are vested with the same authority by the Constitution and the Judiciary Act.'" (quoting *Cavanagh, 445 F.3d at 120*)). The court then determined that nothing in the Sherman Act would limit the availability of this traditional power. *Id. at 639-40* ("*[Section 1* and *section 4* of the Sherman Act] are broad and contain no language divesting a court of its 'inherent equitable powers.'").

Having determined that federal courts retain the power to order disgorgement under the Sherman Act, the court concluded that "disgorgement comports with established principles of ***antitrust law***." *Id. at 640*. The court believed disgorgement to be an **[*62]** effective remedy for ensuring that antitrust defendants are not able to retain any rewards for their wrongful behavior. In addition, the court noted that "there appears to be little disagreement among commentators about the propriety of disgorgement as an antitrust remedy." *Id.* (citing Phillip E. Areeda et al., ***Antitrust Law*** ¶ 325a (3d ed. 2007) and Einer Elhauge, Disgorgement as an Antitrust Remedy, 76 Antitrust L.J. 79, 79 (2009)).

The Court finds this analysis persuasive. In light of the availability of disgorgement under the Sherman Act, and the expansive grant of authority to seek equitable relief under the Oregon Antitrust Statute, the Court concludes that disgorgement is available to Oregon in this case.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES defendants' Motion to Dismiss Plaintiffs' First Amended Complaint. Docket No. 15 in 10-4346; Docket No. 2708 in 07-1827.

IT IS SO ORDERED.

Dated: July 11, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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Patel v. Smith

United States District Court for the Eastern District of Pennsylvania

July 11, 2011, Decided; July 12, 2011, Filed

Civil Action No. 10-4165

Reporter

2011 U.S. Dist. LEXIS 74645 *; 2011-1 Trade Cas. (CCH) P77,525

HIREN PATEL, Plaintiff, v. SHARON K. SMITH, NICOLE JOHNSON, and SJ SUBS, LLC, Defendants.

Subsequent History: Sanctions disallowed by, Motion dismissed by *Patel v. Smith, 2012 U.S. Dist. LEXIS 42765 (E.D. Pa., Mar. 26, 2012)*

Related proceeding at, Remanded by *Patel v. Smith, 2012 U.S. Dist. LEXIS 102524 (E.D. Pa., July 20, 2012)*

Core Terms

franchises, diversity, alleges, deposit, racketeering, wire, racketeering activity, motion to dismiss, defendants', memorandum, antitrust

Counsel: **[*1]** For HIREN PATEL, Plaintiff: MARC A. ZAID, LEAD ATTORNEY, WEST CONSHOHOCKEN, PA.

For SHARON K. SMITH, NICOLE JOHNSON, SJ SUBS LLC, Defendants: JOHN J. BARRETT, JR., LEAD ATTORNEY, REGER RIZZO & DARNALL LLP, PHILADELPHIA, PA.

Judges: Louis H. Pollak, J.

Opinion by: Louis H. Pollak

Opinion

MEMORANDUM

This is a diversity and federal question action brought by plaintiff Hiren Patel. Patel alleges that defendants Sharon Smith, Nicole Johnson, and SJ Subs, LLC defrauded him of $300,000. Patel further alleges that the defendants induced him to buy Subway franchises and then tortiously interfered with his re-sale of those franchises. In total, Patel brings seven causes of action. Defendants have moved to dismiss Patel's claims for lack of jurisdiction and, alternatively, for failure to state a claim.

I. Background[1]

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[1] The factual background is taken from the allegations contained in Patel's complaint. All allegations are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *See* *Keystone Redev. Partners v. Decker, 631 F.3d 89, 95 (3d Cir. 2011)*.

Subway sandwich shops are franchised through Development Agents ("Subway Agents"), which act as Subway's regional representatives. This case concerns Hiren **[*2]** Patel's unsuccessful efforts to become a Subway Agent in southern New Jersey.

In January and February 2008, defendants Sharon Smith and Nicole Johnson told Patel that they would be interested in selling him some of their Subway holdings and their position as Subway Agents. Patel, Smith, and Johnson met in Las Vegas on May 19, 2008 to arrange the sale. Patel examined Smith and Johnson's Subway Agent contract, but Smith told Patel that the content of the contract did not matter because Patel would enter into his own contract with Subway if Subway approved the transfer of the position to Patel. [2] Smith also encouraged Patel to increase his chances of being approved as a Subway Agent for southern New Jersey by purchasing Subway franchise locations in the area. Patel then verbally agreed to purchase from Smith and Johnson: (1) the position of Subway Agent for southern New Jersey for $1.3 million; (2) two franchise locations in southern New Jersey for a total of $400,000; and (3) a 1/3 interest in SJ Subs, LLC, which owned other franchises in southern New Jersey, for $200,000.

On May 28, 2008, Patel, Smith, **[*3]** and Johnson executed the sales. Patel signed three agreements: first, a purchase agreement for the Subway Agent position that included a $100,000 deposit; second, an amendment to the first agreement making the deposit refundable if Patel were not approved as a Subway Agent for southern New Jersey; and third, a purchase agreement for the interest in SJ Subs. [3] After the meeting, Patel wired $700,000 to Smith and Johnson: a $100,000 deposit toward the Subway Agent position; $400,000 for the two Subway franchise locations; and $200,000 for the interest in SJ Subs. Patel took ownership of the two Subway locations soon after, but did not receive any written evidence of, or cash distribution from, his interest in SJ Subs.

In August 2008, Smith, and now Johnson, encouraged Patel to purchase additional Subway franchises in southern New Jersey. **[*4]** Patel "and/or his affiliates" subsequently purchased six locations for a total purchase price of $957,000. Compl. at ¶ 30.

In early September 2008, Smith called Patel to tell him that "it would be desirable to enter into a replacement contract" for the Subway Agent position that increased the purchase price by $200,000. Compl. at ¶ 31. The new contract also called for a $300,000 deposit, but Smith told Patel that he would not have to pay the additional deposit because the "extra $200,000 would correspond to the $200,000 already paid by Patel" for the interest in SJ Subs. [4] Compl. at ¶ 33. On September 5, 2008, Patel, Smith, and Johnson executed the replacement contract. Smith assured Patel that the only change in the replacement contract was the increased purchase price and deposit, but in fact there were other differences, including that the $300,000 deposit was now non-refundable.

Later that month, Smith told Patel that Subway had not approved him as a Subway Agent. Patel then attempted to sell the Subway franchises he owned in southern New Jersey, but Smith and Johnson allegedly frustrated his efforts to do so by: (1) imposing conditions that made the transactions difficult to consummate; (2) telling potential buyers that the sale price was too high; and (3) making negative comments to potential buyers about the franchise locations. Patel was only able to sell one location, and he incurred a $25,000 loss on that sale.

On August 18, 2010, Patel filed a civil complaint in this court bringing seven claims: (1) restraint of trade; (2) conversion; (3) fraud; (4) civil conspiracy; (5) civil racketeering; (6) securities fraud; and (7) tortious interference with

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[2] Presumably the Subway Agent position is transferable, but only with Subway's approval.

[3] Only two of the three proposed transactions are accounted for: there is no mention in the complaint of an executed agreement concerning the two franchise locations in southern New Jersey which had been discussed at the meeting on May 19, 2008. Given that the locations were later transferred to Patel, this inconsistency appears to be an inadvertent omission.

[4] It is not clear from the complaint whether this agreement either: (a) extinguished Patel's interest in SJ Subs and shifted the $200,000 originally paid for SJ Subs to the Subway Agent deposit; or (b) meant that the additional deposit requirement was waived on account of Patel's previous purchase. Because **[*5]** one of Patel's central allegations concerns the undelivered interest in SJ Subs, the court assumes the latter.

business relations. Patel argues that the defendants defrauded him of $300,000 and received further financial gains from his purchase and re-sale of Subway locations.

II. Discussion

Patel invokes this court's jurisdiction on two grounds: diversity of citizenship, *28 U.S.C. § 1332(a)*, and federal question, **[*6]** *28 U.S.C. §1331*. Both bases are discussed below.

A. Diversity of Citizenship

The complaint states that two defendants, Smith and Johnson, have "a principal place of business" in New Jersey, but it says nothing about their permanent home. This pleading is insufficient to establish federal diversity jurisdiction, *see Chemical Leaman Tank Lines v. Aetna Cas. and Sur. Co., 177 F.3d 210, 222 n.13 (3d Cir. 1999)* (noting that "the plaintiff must state all parties' citizenships such that the existence of complete diversity can be confirmed"), and Patel will be given leave to amend his complaint for the purpose of establishing diversity, *see 28 U.S.C. § 1653* ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.").

B. Federal Question

Though Patel has not sufficiently pled diversity, this court may still have jurisdiction under *28 U.S.C. § 1331*. Three of Patel's claims arise under federal law: (1) a violation of federal ***antitrust law***; (2) a violation of federal racketeering law; and (3) a violation of federal securities fraud law. *See* Compl. at ¶¶ 60-100. The remainder of his claims arise under state law.

1. Standard of Review for a 12(b)(6) Motion

Rule 8 **[*7]** requires that a complaint contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. Facts alleged in the complaint must be taken as true, *see Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)*, but this presumption is "inapplicable to legal conclusions," *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. To survive a motion to dismiss, the factual allegations in the complaint must "plausibly give rise to an entitlement to relief." *Id. at 1950*. Furthermore, all reasonable inferences must be drawn in favor of the plaintiff. *See Keystone Redev. Partners v. Decker, 631 F.3d 89, 95 (3d Cir. 2011)*. With this general *12(b)(6)* standard in mind, the court turns to the three federal claims.

2. Antitrust Claim[5]

A restraint of trade in violation of *Section 1* of the Sherman Act has four elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that [the plaintiff] was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)* (citations omitted). With regard to the second element, the plaintiff has "the burden of defining the relevant market." *Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 436 (3d Cir. 1997)* (citations omitted). "Where the plaintiff fails to define its proposed relevant market with

[5] Plaintiff's complaint states that defendants' actions constitute "a restraint of trade or commerce by Patel [sic] in violation of 1 [sic] U.S.C. *§ 1 et seq.*" Compl. at ¶ 61. Plaintiff explains in his memorandum in opposition **[*8]** to the motion to dismiss that the Sherman Act was mistakenly "referred to in the [c]omplaint as *1 U.S.C. § 1 et seq*" instead of "*15 U.S.C. § 1 et seq.*" Pl.'s Resp. at 3 (Docket No. 6). Because "[p]leadings must be construed so as to do justice," these typographical mistakes are disregarded. *Fed. R. Civ. P. 8(e)*.

reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . , the relevant market is legally insufficient and a motion to dismiss may be granted." *Id.* (collecting **[*9]** cases). [6]

In this case Patel has failed to allege a relevant market at all. It may be, as Patel alleges, that defendants "us[ed] the power of their position" to harm him, but this behavior alone is not an antitrust violation. Pl.'s Resp. at 6 (Docket No. 6). Federal antitrust laws "do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or **[*10]** against persons engaged in interstate commerce." *Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (internal quotation marks omitted). Because Patel has failed to allege an antitrust violation, this claim will be dismissed.

3. Racketeering Claim

A *prima facie* violation of *18 U.S.C. § 1962(c)* (civil racketeering) is established when a plaintiff alleges, "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)* (footnote omitted). [7] Plaintiffs must allege all four elements to survive a motion to dismiss. *Id.*

Racketeering activities include, *inter alia*, mail fraud and wire fraud. *See 18 U.S.C. §§ 1341*, *1343*. Patel alleges that the defendants engaged in both acts. Compl. at ¶ 84. The federal wire fraud statute prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, **[*11]** representations, or promises . . . [that involves the use of] wire, television or radio communications." *18 U.S.C. § 1343*. The federal mail fraud statute prohibits the same using a mail carrier. *18 U.S.C. § 1341*.

A "pattern" of racketeering activity is defined as requiring "at least two acts of racketeering activity" within a ten-year period. *18 U.S.C. § 1961(5)*. A plaintiff must show that the "'racketeering [activities] are related, *and* that they amount to or pose a threat of *continued* criminal activity.'" *Tabas v. Tabas, 47 F.3d 1280, 1292 (3d Cir. 1995)* (second emphasis added) (quoting *H.J. Inc. v. Nw. Bell Tel., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989))*. The continuity requirement is satisfied by alleging "'past conduct that by its nature projects into the future with a threat of repetition,'" or, alternatively, a "'closed period of repeated conduct,'" *Tabas, 47 F.3d at 1292* (quoting *H.J. Inc., 492 U.S. at 241*).

Patel does not allege that defendants' conduct poses a threat of future repetition. Furthermore, even drawing all reasonable inferences in favor of the plaintiff, the court finds that the defendants' alleged conduct does not inherently pose such a threat: the alleged acts of racketeering **[*12]** concerned a single series of transactions—the sale of Subway assets to Patel—and a single victim. As a result, Patel must plead a "closed period of repeated conduct" by alleging "a series of related predicates extending over a *substantial* period of time." *Tabas, 47 F.3d at 1292* (quoting *H.J., 492 U.S. at 242*).

The Third Circuit has not defined a "substantial period of time," but has held that "[r]elated predicate acts lasting 'a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.'" *Hindes v. Castle, 937 F.2d 868, 872 (3d Cir. 1991)* (quoting *H.J. Inc., 492 U.S. at 242*)*; see also* Kehr Packages, Inc. v. Fidelcor Inc.,

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[6] The phrases "reasonable interchangeability" and "cross-elasticity of demand" refer to methods of defining the product market where anti-competitive effects are alleged to have occurred. The Third Circuit has summarized these methods as follows:

> The relevant product market is defined as those commodities reasonably interchangeable by consumers for the same purposes. Factors to be considered include price, use and qualities. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market.

Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) (internal quotation marks and citations omitted).

[7] A private civil remedy for a violation of *18 U.S.C. § 1962* is expressly granted by *18 U.S.C. § 1964(c)* ("Any person injured . . . by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court . . . .").

926 F.2d 1406, 1418 (3d Cir. 1991) (holding that an "eight-month period of fraudulent activity directed at a single entity does not constitute a pattern, absent a threat of future criminal acts"); Cooper v. Broadspire Services, No. 04-5289, 2005 U.S. Dist. LEXIS 14752, 2005 WL 1712390, *10 (E.D. Pa. July 20, 2005) ("Plaintiff alleges a series of events over a four month period; this is insufficient to support a closed-ended scheme.").

Patel references two instances of fraudulent conduct that allegedly constitute racketeering activities: (1) on May 28, 2008, **[*13]** Smith and Johnson sold Patel an interest in SJ Subs and never delivered that interest; and (2) in early September, 2008, Smith told Patel that the revised contract for the sale of the Subway Agent position was identical to the original in every respect except for the increased purchase price and deposit, even though there were other material differences. [8] In short, these two acts occurred over the course of a few months and did not threaten future criminal conduct. Under *Hindes*, Patel has not adequately pled the continuity requirement of civil racketeering; because Patel has failed to allege this element, the civil racketeering claim will be dismissed without prejudice. *See, e.g.,* *Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)* (stating that a complaint must have "'enough factual matter (taken as true) to suggest' [each] required element" of the claim alleged (quoting *Twombly, 550 U.S. at 545*)).

4. "Securities Fraud" Claim

Patel alleges that defendants committed "securities fraud" by violating *18 U.S.C. § 1343* **[*14]** (fraud by wire) when they sold membership interests in SJ Subs "without disclosing to Patel all of the information and risk factors." [9] Compl. at ¶ 91. The federal wire fraud statute is part of the criminal code. The statute contains no express private right of action, and judicial recognition of an implied right of action is generally discouraged. *Sosa v. Alvarez-Machain, 542 U.S. 692, 725-27, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)* ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."). District courts in this circuit have not recognized an implied private right of action for violations of *18 U.S.C. § 1343*, *see* *Jones v. Lockett, No. 08-16, 2009 U.S. Dist. LEXIS 129347, 2009 WL 2232812 (W.D. Pa. July 23, 2009)*, *Kovalev v. City of Philadelphia, No. 07-4875, 2008 U.S. Dist. LEXIS 103552, 2008 WL 5377625 (E.D. Pa. Dec. 23, 2008)*, *Fleishman v. Scilley, No. 03-4639, 2004 U.S. Dist. LEXIS 20066, 2004 WL 2203746 (E.D. Pa. Sept. 30, 2004)*, and neither have the other circuits that have confronted the issue, *see* *Wisdom v. First Midwest Bank, 167 F.3d 402, 408—09 (8th Cir. 1999)*, *Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 386 (6th Cir. 1997)*, *Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir. 1974)*. **[*15]** After a close reading of the statute, the court agrees with the cited authorities and does not recognize a private right of action under *§ 1343*. Accordingly, this court will dismiss Patel's wire fraud claim with prejudice. *See* *Cowell v. Palmer Twp., 263 F.3d 286, 296 (3d Cir. 2001)* ("[L]eave to amend need not be granted when amending the complaint would clearly be futile.").

5. State Law Claims

Patel urges this court to exercise supplemental jurisdiction over his four state law claims because they arise from the same nucleus of operative facts. Because Patel's federal claims will be dismissed, this court declines to exercise jurisdiction over Patel's state law claims. *See* *28 U.S.C. § 1367(c)* ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . [if] the district court has dismissed all claims over which it has original jurisdiction[.]").

III. [*16] Conclusion

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[8] Patel does not allege that anything else the defendants did constituted an instance of "false or fraudulent pretenses, representations, or promises." *18 U.S.C. §§ 1341*, *1343*.

[9] Patel also cites *15 U.S.C. § 771* (describing the Comptroller General's supervision of the Federal Energy Administration) and *70 P.S. § 1-401* (Pennsylvania fraud provision). Compl. at ¶ 92. Even correcting the first citation to *15 U.S.C. § 771(b)(1)* (defining "security"), neither statute creates a federal private right of action.

Patel invokes this court's jurisdiction on diversity of citizenship and federal question grounds. For the foregoing reasons, he has failed to properly plead either ground. Pursuant to *28 U.S.C. § 1653*, Patel will be given 15 days to amend his complaint to allege the presence of diversity. An appropriate order accompanies this memorandum.

ORDER

AND NOW, this 11th day of July, 2011, upon consideration of plaintiff's complaint, defendants' motion to dismiss, defendants' memorandum in support of that motion, and plaintiff's memorandum in opposition to that motion, and for the reasons provided in the accompanying memorandum, it is hereby **ORDERED** that:

1. Defendants' motion to dismiss (Docket No. 4) is **GRANTED**;

2. Count 3 of the complaint, to the extent it relies upon *18 U.S.C. § 1343*, is **DISMISSED** with prejudice;

3. All other Counts are **DISMISSED**; and
4. Plaintiff may amend the complaint to allege the presence of diversity jurisdiction not later than 15 days from the date of this order.

BY THE COURT

/s/ Louis H. Pollak

Pollak, J.

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Cal. ex rel. Harris

United States Court of Appeals for the Ninth Circuit

March 22, 2011, Argued and Submitted, San Francisco, California; July 12, 2011, Filed

No. 08-55671

Reporter

651 F.3d 1118 *; 2011 U.S. App. LEXIS 14259 **; 191 L.R.R.M. 2038; 161 Lab. Cas. (CCH) P10,396; 2011-1 Trade Cas. (CCH) P77,522; 76 A.L.R. Fed. 2d 773

STATE OF CALIFORNIA, ex rel. Kamala D. Harris,* Plaintiff-Appellee, v. SAFEWAY, INC., a Safeway Company doing business as Vons; ALBERTSONS, INC.; RALPHS GROCERY COMPANY, a division of the Kroger Company; FOOD 4 LESS FOOD COMPANY, a division of the Kroger Company; VONS COMPANIES INC., an indirect, wholly owned subsidiary of Safeway, Inc., Defendants-Appellants.STATE OF CALIFORNIA, ex rel. Kamala D. Harris, Plaintiff-Appellee, v. SAFEWAY INC. a Safeway Company doing business as Vons; ALBERTSONS, INC.; RALPHS GROCERY COMPANY, a division of the Kroger Company; FOOD 4 LESS FOOD COMPANY, a division of the Kroger Company; VONS COMPANIES INC. an indirect, wholly owned subsidiary of Safeway, Inc., Defendants-Appellants.

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California. D.C. No. 2:04-cv-00687-AG-SS. D.C. No. 2:04-cv-00687-AG-SS. Andrew J. Guilford, District Judge, Presiding.

Cal. ex rel. Brown v. Safeway, Inc., 615 F.3d 1171, 2010 U.S. App. LEXIS 17131 (9th Cir. Cal., 2010)
California v. Safeway, 2008 U.S. Dist. LEXIS 120337 (C.D. Cal., Mar. 6, 2008)

Core Terms

exemption, anticompetitive, effects, grocers, profit sharing agreement, customers, defendants', antitrust, bargaining, anti trust law, rule of reason, profits, labor dispute, Sherman Act, collective-bargaining, compete, terms, procompetitive, circumstances, non-statutory, competitors, profit sharing, wages, consumers, courts, prices, negotiations, confident, parties, Food

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

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

HN1[] **Labor, Nonstatutory Exemptions**

* Kamala D. Harris is substituted for her predecessor, Edmund G. Brown, as Attorney General of the State of California, pursuant to Federal Rule of Appellate Procedure 43(c)(2).

An appellate court reviews de novo a district court's denial of summary judgment on the basis of a non-statutory labor exemption from antitrust laws.

Antitrust & Trade Law > General Overview

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

HN2[] **Antitrust & Trade Law**

The selection of the proper mode of antitrust analysis is a question of law, which an appellate court reviews de novo.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN3[] **Labor, Nonstatutory Exemptions**

Court have recognized both statutory and non-statutory labor exemptions from the antitrust laws. The statutory exemption establishes that labor unions are not combinations or conspiracies in restraint of trade and exempts certain union activities from scrutiny under the antitrust laws. However, the statutory exemption does not exempt concerted action or agreements between unions and nonlabor parties. The non-statutory labor exemption has been inferred from federal labor statutes. These set forth a national labor policy favoring free and private collective bargaining, require good-faith bargaining over wages, hours, and working conditions, and delegate related rulemaking and interpretive authority to the National Labor Relations Board. The implicit exemption interprets the labor statutes as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a reasonable practice and substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations in that area. Some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions to give effect to federal labor policy and to allow meaningful collective bargaining to occur.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN4[] **Labor, Nonstatutory Exemptions**

The U.S. Supreme Court has never delineated the precise boundaries of the non-statutory labor exemption from the antitrust laws, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market. The Court has explained that Congress did not intend to bestow on unions complete and unreviewable authority to aid business groups to frustrate antitrust legislation's primary objective.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN5[] **Labor, Nonstatutory Exemptions**

The U.S. Supreme Court has rejected the argument that, simply because an agreement relates to wages—a subject at the heart of bargaining—rather than prices, the non-statutory labor exemption from the antitrust laws should apply. Though a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws, there are limits to what a union or an employer may offer or extract in the name of wages. A union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN6[] **Labor, Statutory Exemptions**

While the statutory labor exemption from the antitrust laws allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market. The exemption does not shield an agreement from the antitrust laws because such a direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN7[] **Labor, Nonstatutory Exemptions**

The U.S. Supreme Court interprets the labor statutes in accordance with the intent of Congress to prevent judicial use of ***antitrust law*** to resolve labor disputes and limits antitrust courts' authority to determine what qualifies as a reasonable practice in industrial conflict. With citation to the leading cases, the Court has explained that the non-statutory labor exemption from antitrust laws is essential to give effect to federal labor policy and allow meaningful collective bargaining because it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition- restricting agreements potentially necessary to make the process work. The question presented is one of scope: whether the exemption applies to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN8[] **Exemptions & Immunities, Labor**

Labor law regulates directly, and considerably, the post-impasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Labor regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process, and case law demonstrates that implementation of terms after impasse is a familiar practice in multi-employer bargaining. Under these circumstances, to subject the practice to ***antitrust law*** is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN9[] **Labor, Nonstatutory Exemptions**

The U.S. Supreme Court has addressed and rejected several proposed limitations or boundaries to the non-statutory labor exemption from the antitrust laws that were suggested by the parties and amici. The Court first rejected the argument that the exemption should be limited to existing labor-management agreements. The Court has emphasized that, for the immunity to be effective, it must apply not just to the completed bargain but also to the process by which the bargain is made, including the process before an initial collective-bargaining agreement is approved and the period after the agreement has expired. The Court has rejected the suggestion that the exemption should terminate when collective-bargaining negotiations reach impasse or a reasonable time thereafter and another suggestion that the exemption permit employers to make post-impasse agreements about bargaining tactics but not the terms of any policy directed at employees. The Court also has declined to hold that the arena of professional sports is special and should be viewed differently than other industries with respect to the antitrust exemption.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN10[] **Labor, Nonstatutory Exemptions**

The United States Supreme Court's Brown holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN11[] **Exemptions & Immunities, Labor**

Employers might undertake any number of activities to strengthen their bargaining posture and force unions to accept their terms, but the law does not necessarily exempt all such activities from ***antitrust law***.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN12[] **Labor, Nonstatutory Exemptions**

The case for the applicability of the non-statutory labor exemption from antitrust laws is strongest where the alleged restraint operates primarily in the labor market and has only tangential effects on the business market. Stated another way, and relying on the insights of a perceptive ***antitrust law*** commentator, in general, an agreement among employers restraining a product or nonlabor service market enjoys no labor immunity.

Antitrust & Trade Law > Sherman Act > Claims

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

HN13[] **Sherman Act, Claims**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. Congress designed the Sherman Act as a consumer welfare prescription. Consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality. A trade restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of ***antitrust law***. Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate. The touchstone is consumer good. Agreements of competitors, whether express or implicit, whether by formal agreement or otherwise, in restraint of trade are outlawed.

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

HN14[] Per Se Rule & Rule of Reason, Sherman Act

The U.S. Supreme Court has repeatedly recognized that by the language of the Sherman Act, Congress intended to out-law only unreasonable trade restraints. Most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors. The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.

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

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

The rule of reason weighs legitimate justifications for a trade restraint against any anticompetitive effects. An appellate court reviews all the facts, including the precise harms alleged to the competitive markets, and the legitimate justifications provided for the challenged practice, and determines whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects. The rule of reason is responsible for a sensible application of the antitrust laws that has guided courts for almost a century. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

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

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

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

Some types of trade restraints have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se.Such restraints are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Per se treatment is proper only once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it. A departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing. To justify per se condemnation, a challenged practice must have manifestly anticompetitive effects and lack any redeeming virtue. The U.S. Supreme Court has expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.

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

HN17[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Practices that have been held per se illegal include geographic division of markets and horizontal price fixing.

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

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

HN18[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A certain class of trade restraints, while not unambiguously in the per se category, may require no more than cursory examination to establish that their principal or only effect is anticompetitive. Stated another way, the rule of reason analysis can sometimes be applied "in the twinkling of an eye." The U.S. Supreme Court has explained that this truncated rule of reason or quick look antitrust analysis may be appropriately used where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. Full rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis. But if an arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition, then a "quick look" form of analysis is inappropriate.

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

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

HN19[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

There is generally no categorical line to be drawn between trade restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. Instead, there should be an enquiry meet for the case that looks to the circumstances, details, and logic of a restraint. In any rule of reason case the amount and type of evidence necessary to prove illegality varies with the amount of power that is apparent, with the nature and plausibility of proffered defenses, and with the judge's evaluation of the degree of harm posed by the restraint.

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

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

HN20[] Per Se Rule & Rule of Reason, Per Se Violations

It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.

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

HN21[] Per Se Rule & Rule of Reason, Per Se Violations

Profit-pooling arrangements have long been condemned as per se illegal.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

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

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

HN22[] Exemptions & Immunities, Labor

The fundamental economics of the firms and the public interest do not require per se prohibitory treatment of the challenged practice during a labor dispute.

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

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

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

HN23[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Market-allocation agreements among competitors at the same market level are per se antitrust violations. Classic horizontal market division agreements are ones in which competitors at the same level agree to divide up the market for a given product. But where the conduct at issue is not a garden-variety horizontal division of a market, the United States Court of Appeals for the Ninth Circuit has eschewed a per se rule and instead has utilized rule of reason analysis.

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

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

HN24[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Because empirical analysis is required to determine a challenged trade restraint's net competitive effect, neither a per se nor a quick-look approach is appropriate because those methods of analysis are reserved for practices that facially appear to be ones that would always or almost always tend to restrict competition and decrease output.

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

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

HN25[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

To use the quick look approach to determine a challenged restraint's net competitive effect, the court must first determine whether an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. Once it is established that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, then the burden shifts to the grocers to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry.

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

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

HN26[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Where the circumstances of a trade restriction are somewhat complex, assumption alone will not do to determine the challenged restraint's net competitive effect.

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Nicholas W. Clark, Washington, District of Columbia, for amicus curiae United Food and Commercial Workers International Union.

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Andrew D. Roth, Washington, District of Columbia, for amici curiae United Food and Commercial Workers International Union, UFCW Local Unions 135, 324, 770, 1036, 1167, 1428, and 1442, Change to Win, and AFL-CIO.

Richard M. Brunell, Washington, **[**3]** District of Columbia, for amicus curiae American Antitrust Institute.

Judges: Before: Alex Kozinski, Chief Judge, Mary M. Schroeder, Stephen Reinhardt, Susan P. Graber, M. Margaret McKeown, Raymond C. Fisher, Ronald M. Gould, Richard C. Tallman, Johnnie B. Rawlinson, Richard R. Clifton, and N. Randy Smith, Circuit Judges. Opinion by Judge Gould; Concurrence by Judge Fisher; Partial Dissent by Chief Judge Kozinski; Partial Concurrence and Partial Dissent by Judge Reinhardt.

Opinion by: Ronald M. Gould

Opinion

[*1122] GOULD, Circuit Judge:

We must decide whether an agreement among competitors to share revenues during the term of a labor dispute is exempt from the antitrust laws under the non-statutory labor exemption, and if not, whether the agreement should be condemned as a per se violation of the antitrust laws or on a truncated "quick look," or whether more detailed scrutiny is required. We conclude that the agreement is not immune from the antitrust laws, but that summary condemnation, whether as a per se violation or on a "quick look," is improper. We affirm the district court.

I. Factual and Procedural History

In the fall of 2003, the collective-bargaining agreement between several local chapters of the United Food and **[**4]** Commercial **[*1123]** Workers ("UFCW") and three large supermarket chains operating in Southern California (Albertson's, Ralphs, and Vons, a subsidiary of Safeway, Inc.) was set to expire. Another grocery chain, Food 4 Less,[1] had a separate contract with UFCW that was set to expire several months later, in February 2004. Before the contracts expired and with the consent of the union, Albertson's, Ralphs, and Vons formed a multi-employer bargaining unit in the summer of 2003 for negotiation of a successor labor contract.

Albertson's, Ralphs, Vons, and Food 4 Less ("Defendants" or "grocers") entered into a Mutual Strike Assistance Agreement[2] ("MSAA") in September 2003, in anticipation of the potential use of "whipsaw" tactics, where unions exert pressure on one employer within a multi-employer bargaining unit through, for example, selective strikes or

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[1] Food 4 Less is an unincorporated operating division of Ralphs; it is a fictitious name under which Ralphs does business in Southern California.

[2] There were in fact two agreements with identical terms, one pertaining to UFCW Local No. 770 and the other to UFCW Locals No. 135, 324, 1036, 1167, 1428, and 1442. We will refer to them as one agreement for simplicity.

picketing. Among other things, the MSAA provided that if one party to the agreement was struck by the union, the other grocers (with the exception of Food 4 Less) would lock out all their union employees within **[**5]** 48 hours.

Pertinent to the antitrust claims that we assess, the MSAA also included a revenue-sharing provision ("RSP"), providing that in the event of a strike/lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares.[3] The MSAA specified that the strike/lockout period would begin at the start of the week in which the strike/lockout commenced and continue for two weeks following the end of the strike/lockout.[4] According to a responsible grocer executive, the 15% figure was designed to estimate the incremental profit the grocers earned on each additional dollar of revenue.

On October 11, 2003, after union contract negotiations broke down, the unions began a strike against Vons stores in the region. Albertson's and Ralphs locked out their union employees the next day pursuant to the terms of the MSAA. The unions at first picketed Albertson's, Ralphs, and Vons stores, but soon elected to pull their pickets from Ralphs stores and focus their picketing efforts on Albertson's and Vons only. About four-and-a-half months after the strike began, at the end of February 2004, the grocers and the unions reached an agreement and the strike/lockout ended. **[**7]** In accord with the revenue-sharing provision of the MSAA, Ralphs paid about $83.5 million to Vons, and it paid about $62.5 million to Albertson's.

[*1124] While the strike was in progress, the State of California brought an action against the grocers alleging that the RSP violated *Section 1* of the Sherman Act, which prohibits any contract, combination, or conspiracy in restraint of trade or commerce.[5] *15 U.S.C. § 1*. After limited discovery, the grocers moved for summary judgment on the ground that the RSP was immune from antitrust scrutiny under the non-statutory labor exemption. The district court denied the motion, holding that the exemption was inapplicable. California then moved for summary judgment, contending that the RSP was a per se violation of *§ 1*, or in the alternative that it was unlawful under an abbreviated rule of reason or "quick look" antitrust analysis. The district court denied that motion as well. The grocers renewed their motion for summary judgment on the non-statutory labor exemption, and the district court again denied their motion.

While preserving their right to appeal the district court's rulings, the parties **[**8]** stipulated to the entry of final judgment for the grocers after California agreed not to pursue the theory that the RSP violated *§ 1* of the Sherman Act under a full rule of reason analysis, and the grocers agreed not to pursue the various affirmative defenses they had pleaded, with the exception of the non-statutory labor exemption. The district court entered judgment in accordance with the parties' stipulations.

California timely appealed the final judgment, arguing that the RSP should be condemned as a per se violation or on a "quick look," and the grocers timely cross-appealed, arguing that the non-statutory labor exemption should apply. We issued an opinion affirming in part, reversing in part, and remanding. *California ex rel. Brown v. Safeway, Inc., 615 F.3d 1171 (9th Cir. 2010)*. A majority of non-recused active judges voted to rehear this case en banc pursuant to Circuit Rule 35-3. *California ex rel. Brown v. Safeway, Inc., 633 F.3d 1210 (9th Cir. 2011)*.

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[3] To implement this arrangement, the grocers agreed to submit their weekly sales data for an eight-week period before the strike and for the strike period to a certified public accountant. The CPA would use the data to determine **[**6]** the grocers' historical percentage shares of the market (relative to one another) prior to the strike, and to calculate the aggregate increase or decrease in each grocer's average weekly sales during the strike. The CPA would then multiply the total amount of disparity for each grocer by 15% and those grocers earning revenues above their historical share would pay that amount in compensation to the lower performing grocer to return all grocers to their relative pre-strike positions. Food 4 Less and Ralphs were treated as one unit for purposes of this calculation.

[4] The parties refer to this as the "two-week tail."

[5] California sought a permanent injunction and attorneys' fees.

II. Jurisdiction and Standard of Review

We have jurisdiction under *28 U.S.C. § 1291*. ***HN1***[] We review de novo a district court's denial of summary judgment on the basis of the non-statutory labor exemption. *Clarett v. Nat'l Football League, 369 F.3d 124, 130 (2d Cir. 2004)*. **[**9]** ***HN2***[] The selection of the proper mode of antitrust analysis is a question of law, which we review de novo. *United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)*; *see also* *Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 772 (8th Cir. 2004)*; XI Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1909b, at 279 (2d ed. 2005) (hereinafter Areeda & Hovenkamp).

III. Non-Statutory Labor Exemption

On cross-appeal, the grocers contend that the district court erred in holding that the RSP is not immune from the Sherman Act under the non-statutory labor exemption, and they urge that summary judgment should have been entered in their favor on the basis of the exemption.

A. Background

HN3[] Court have recognized both "statutory" and "non-statutory" labor exemptions to the antitrust laws. *Phoenix Elec. Co. v. Nat'l Electric Contractors Ass'n, 81 F.3d 858, 860 (9th Cir. 1996)*. The statutory exemption, which is not invoked here, establishes that labor unions are not combinations or conspiracies in restraint of trade and exempts certain union activities from scrutiny under the antitrust laws. **[*1125]** *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. However, **[**10]** the statutory exemption does "not exempt concerted action or agreements between unions and nonlabor parties." *Id. at 622*.

The non-statutory labor exemption, invoked by the grocers as a defense in this case, has been inferred from federal labor statutes. These "set forth a national labor policy favoring free and private collective bargaining," "require good-faith bargaining over wages, hours, and working conditions," and "delegate related rulemaking and interpretive authority to the National Labor Relations Board." *Brown v. Pro Football, Inc., 518 U.S. 231, 236, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*. The implicit exemption "interprets the labor statutes . . . as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice" and "substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations" in that area. *Id. at 236-37*. "[S]ome restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions" to give effect to federal labor policy and to allow meaningful collective bargaining to occur. *Id. at 237*.

HN4[] "The Supreme Court has never delineated the precise boundaries **[**11]** of the [non-statutory labor] exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market." *Clarett, 369 F.3d at 131*. The Court first elaborated on the reach of the non-statutory labor exemption in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, involving a series of agreements between an electrical workers union and several manufacturers and contractors in which the manufacturers and contractors agreed to do business exclusively with other companies that employed union workers. *325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*. Those agreements were part of "a far larger program . . . to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level" and created a "situation . . . not included within the [relevant] exemptions." *Id. at 809*. The Court explained that Congress did not intend to bestow on unions "complete and unreviewable authority to aid business groups to frustrate [antitrust legislation's] **[**12]** primary objective." *Id. at 810*.

In *United Mine Workers of America v. Pennington*, the Supreme Court similarly declined to apply the exemption to insulate a wage agreement between a union of mine workers and large coal companies. 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). The union and the large companies, to eliminate smaller coal companies and permit the larger companies to control the market, agreed to a series of terms, including increased wages for union workers. *Id. at 660*. A smaller coal mine operator, unable to pay the increased wages demanded by the union under the terms of their agreement with the larger companies, filed suit claiming that the agreement violated the Sherman Act. *Id. at 659*. In exploring the boundaries of the exemption, the Court observed that, had the union and employers entered into an agreement in which they collectively set prices for coal, they could not defend that agreement from antitrust attack, because "the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable **[*1126]** under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come." *Id. at 663*. ***HN5***[] The Court rejected the argument **[**13]** that, simply because the agreement related to wages—a subject at the heart of bargaining—rather than prices, the exemption should apply. *Id. at 664-69*. Though "a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws," the Court explained, "there are limits to what a union or an employer may offer or extract in the name of wages." *Id. at 664-65*. "[A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on *other* bargaining units." *Id. at 665* (emphasis added). The Court held that the wage agreement was not exempt from the antitrust laws. *Id. at 669*.

The exemption was applied in a fractured decision in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*, which the Supreme Court issued together with its opinion in *Pennington*. The union representing butchers in Chicago reached a collective-bargaining agreement with a multi-employer bargaining unit of food retailers that included a marketing hours restriction, which prohibited the sale of meat before 9:00 a.m. and after **[**14]** 6:00 p.m., and on Sundays. *Id. at 679-80*. One member of the bargaining unit, Jewel Tea, initially rejected the provision limiting hours, but eventually decided to sign a contract including such a provision under threat of a strike. *Id. at 680-81*. Jewel Tea brought suit against the union, claiming that the marketing hours restriction in the contract violated the Sherman Act as it was the product of a conspiracy to prevent the retail sale of fresh meat during the evening hours. *Id. at 681-82*. The plurality opinion explained that "the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision . . . falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id. at 689-90*. Three other justices, concurring in the judgment (but dissenting in *Pennington*) viewed the exemption more broadly, and would have held that all "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." *Id. at 710* (Goldberg, J., concurring).

The Court declined to apply the non-statutory **[**15]** exemption to a labor-employer agreement in *Connell Construction Co., 421 U.S. at 621*. A union representing workers in the plumbing and mechanical trades in Dallas entered into a multi-employer bargaining agreement with a large group of mechanical contractors. *Id. at 619*. The union asked Connell Construction— a general building contractor that was outside the bargaining agreement and whose workers were not represented by the union—to agree to subcontract mechanical work only to firms that had a contract with the union. *Id*. Connell initially refused to sign the agreement but acquiesced when the unions picketed one of its construction sites. *Id. at 620*. The Court recognized the importance of the non-statutory exemption for labor policy, but cautioned that***HN6***[] "while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when **[*1127]** a union and a nonlabor party agree to restrain competition in a business market." *Id. at 622-23* (citation omitted). The exemption did not shield the agreement from the antitrust laws because such a "direct restraint on the business market has substantial anticompetitive effects, **[**16]** both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id. at 625*.

Most recently, in *Brown v. Pro Football, Inc.*, the Supreme Court for the first time extended the non-statutory labor exemption to an agreement that was solely among employers. *518 U.S. at 238*; *see also* IB Areeda & Hovenkamp ¶ 257b2, at 141 (3d ed. 2006) (explaining that "historically the courts were reluctant to extend the exemption . . . to an agreement among employers that did not involve any employee group as a participant" but that the Supreme Court did extend the exemption to that situation in *Brown*); *id*. at 151-52.

Brown involved an agreement among National Football League teams to restrain the salaries of certain classes of players. *Brown, 518 U.S. at 234-35*. The collective-bargaining agreement between the players' union and the league expired, and bargaining began for a new contract. *Id. at 234*. During the negotiations, the NFL adopted a plan that would permit each team to create a developmental squad of rookies who would play in practice games with the team and sometimes in regular games as substitutes for injured players, and provided **[**17]** that the developmental squad players would be paid $1000 per week. *Id*. The players' union disagreed with these terms and insisted that developmental squad players get benefits and protections similar to those offered to regular players and that they be free to negotiate their own salaries rather than be paid the fixed rate. *Id*. Two months later, bargaining reached an impasse, and the NFL unilaterally implemented the developmental squad program under its proposed terms. *Id. at 235*. The developmental squad players brought an antitrust action against the league and the individual teams, claiming that the agreement to pay them $1000 per week violated the Sherman Act. *Id*.

The Court began by examining the "history and logic" of the exemption, observing that***HN7***[] it "interprets the labor statutes in accordance with" the intent of Congress to prevent "judicial use of ***antitrust law*** to resolve labor disputes" and limits antitrust courts' authority to determine what qualifies as a reasonable practice in industrial conflict. *Id. at 236-37*. With citation to the leading cases *Connell, Jewel Tea*, and *Pennington*, the Court explained that the exemption is essential to give effect to federal labor policy **[**18]** and allow meaningful collective bargaining because "it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work." *Id. at 237*.

The Court then identified the question presented as one of scope: whether the exemption applies to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer. *Id. at 238*. The Court recognized at the outset that ***HN8***[] labor law "regulates directly, and considerably, the kind of behavior here at issue—the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining." *Id*. Labor regulations "reflect the fact that **[*1128]** impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process," and case law demonstrates that implementation of terms after impasse is a familiar practice in multi-employer bargaining. *Id. at 239-40*. Under these circumstances, "to subject the practice to ***antitrust law*** is to require antitrust **[**19]** courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid." *Id. at 240-41*.

HN9[] The Court addressed and rejected several proposed limitations or boundaries to the exemption that were suggested by the parties and amici. *Id. at 243-50*. The Court first rejected the argument that the exemption should be limited to existing labor-management agreements. *Id. at 243-44*. The Court emphasized that, for the immunity to be effective, it must apply not just to the completed bargain but also to the process by which the bargain is made, including the process before an initial collective-bargaining agreement is approved and the period after the agreement has expired. *Id*.; *see also* IB Areeda & Hovenkamp ¶ 257b2. The Court rejected the suggestion that the exemption should terminate when collective-bargaining negotiations reach impasse or a reasonable time thereafter and another suggestion that the exemption permit employers to make post-impasse agreements about bargaining tactics but not the terms of any policy directed at employees. *Brown, 518 U.S. at 244-48*. **[**20]** The Court also declined to hold that the arena of professional sports is "special" and should be viewed differently than other industries with respect to the antitrust exemption. *Id. at 248-49*.

The Court described its decision to apply the exemption to the football teams' conduct in this way:

> That conduct took place during and immediately after a collective- bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.

Id. at 250. The Court then clarified that its "holding is ***HN10***[] not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." *Id*.

B. Positions of the Parties

The grocers contend that *Brown* immunizes employer agreements related in time and circumstance to the collective-bargaining process, and that the economic weapons **[**21]** parties use to advance their positions in a labor dispute—like an agreement to share revenue to weaken the effects of a whipsaw strike—are "as much a part of the collective bargaining process as are negotiations over terms." The grocers stress that labor policy approves the use of economic weapons, and that economic weapons are "part and parcel" of the collective-bargaining process that should be exercised free from governmental regulation. *NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 489, 80 S. Ct. 419, 4 L. Ed. 2d 454 (1960)*.

By contrast, California urges a narrower reading of *Brown*, one that would permit an exemption for agreements among employers only where "needed to make the **[*1129]** collective bargaining process work," relying on the Court's words in *Brown*. California contends that *Brown* imposes a multi-factor analysis that takes into account whether the alleged anticompetitive conduct is anchored in the collective-bargaining process, concerns only the parties to the collective-bargaining process, and relates to wages, hours, and conditions of employment or other mandatory subjects of collective bargaining. In California's view, the RSP was not necessary to allow meaningful collective bargaining to take place and **[**22]** collective bargaining should not be defined so broadly as to include financial weapons like the RSP. The RSP helped the employers to gain advantage in negotiations, but was not integral to the bargaining process. Further, California argues, the RSP does not relate to the core subjects of collective bargaining (wages, hours, and working conditions) and primarily affects a "product market" not a "labor market." California also notes, as did the district court, that the RSP included an entity that was not a party to the collective-bargaining agreement (Food 4 Less), and that the RSP remained in effect for two weeks after bargaining ended.

C. Exemption Inapplicable

We reject the grocers' broad reading of the exemption and hold that, under the totality of circumstances here, and in light of the history and logic of the exemption as well as the Supreme Court's guidance in *Brown*, application of the exemption to shield the RSP from antitrust scrutiny is not warranted.

The Court in *Brown* stated, as a premise of its reasoning, that the practice under examination—the unilateral imposition of terms by employers after impasse—was "unobjectionable as a matter of labor law and policy" and that it was **[**23]** regulated "directly, and considerably," by labor laws. *Brown, 518 U.S. at 238*. In other words, post-impasse imposition of terms is not only an accepted practice in labor negotiation, but one that has been extensively regulated and "carefully circumscribed." *Id*. By contrast, the use of revenue sharing as an economic weapon during a labor dispute does not enjoy any such endorsement, much less a history of careful regulation, from the realm of labor law and policy. Neither party points to a body of regulatory or judicial decisions that establishes revenue sharing among employers in a bargaining unit as an accepted economic weapon during a labor dispute.[6] From the

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[6] The grocers rely on a decision from the Denver region of the NLRB, suggesting that a similar revenue sharing provision was a permissible practice, *see* Supp. Excerpts of Record (Vol. 3) 429-32, and on two courts of appeals decisions, *Air Line Pilots Ass'n International v. Civil Aeronautics Board, 502 F.2d 453, 456-57, 163 U.S. App. D.C. 451 (D.C. Cir. 1974)* (holding that revenue sharing among airline employers did not violate the **[**24]** Railway Labor Act) and *Kennedy v. Long Island Rail Road Co., 319 F.2d 366, 368 (2d Cir. 1963)* (holding that a joint strike insurance plan among leading railroads did not violate the Railway Labor Act, the Interstate Commerce Act, or the Sherman Act), for the proposition that revenue sharing is an accepted economic weapon. But a decision of a regional NLRB tribunal and the two appellate cases implicating, respectively, a different statutory

outset of our analysis, therefore, the RSP is on different footing than the agreement between the NFL club owners in *Brown*.

Addressing the practice of revenue sharing in the context of multi-employer bargaining, we conclude that the salient concerns **[*1130]** underlying *Brown* and central to the history and logic of the exemption are not present here. The agreement to share revenues during and shortly after a labor dispute does not play a significant role in collective bargaining, nor is it necessary to permit meaningful collective bargaining to take place. The RSP does not **[**25]** relate to any core subject matter of bargaining, namely wages, hours, and working conditions, but rather relates principally to the relative revenues of the grocers in the market and the temporary, artificial maintenance of those revenues.

Although it is not an easy question, in our view the grocers cannot succeed in exempting their agreement merely by asserting its value to them and purpose as an economic weapon in the labor dispute over core bargaining subjects. If this were so, a group of employers could claim that fixing prices made them stronger and was useful as an economic weapon in a strike. Quite obviously, that could not be sufficient to gain exemption. It would be like saying "anything goes in a strike context," and we cannot read *Brown* so broadly. The RSP was designed to strengthen the grocers' position in negotiations with the union, but that fact alone does not entitle the agreement to antitrust immunity. ***HN11***[] Employers might undertake any number of activities to strengthen their bargaining posture and force unions to accept their terms, but the law does not necessarily exempt all such activities.

Our decision not to expand the law of non-statutory labor exemption to shield **[**26]** the grocers from antitrust liability in these circumstances does not place them in an untenable position or "introduce instability and uncertainty into the collective-bargaining process." *Brown, 518 U.S. at 242*. The inability of grocers to enter into an RSP for fear of possible antitrust liability does not hinder the functioning of the collective-bargaining process. Grocers may continue to negotiate terms with the union without an RSP in place and may bring other potent and well-established forms of economic pressure to bear to enhance their bargaining position, including lockouts and the use of replacement workers.

Further, the RSP concerned the "business" or "product" market, rather than the labor market. ***HN12***[] "The case for the applicability of the non-statutory exemption is strongest where the alleged restraint operates primarily in the labor market and has only tangential effects on the business market." *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 79 (1st Cir. 2008)* (citing *Clarett, 369 F.3d at 134 n.14*). Stated another way, and relying on the insights of a perceptive ***antitrust law*** commentator, **[**27]** in general, "an agreement among employers restraining a product or nonlabor service market enjoys no labor immunity."[7] IB Areeda & Hovenkamp **[*1131]** ¶ 257a, at 131; *see also* *Barnett Pontiac-Datsun, Inc. v. FTC (In re Detroit Auto Dealers Ass'n), 955 F.2d 457, 468 (6th Cir. 1992)*. The RSP, although intended to strengthen the grocers' position in bargaining for terms related to wages, hours, and working conditions, does not primarily affect the labor market. The fact that the grocers were sharing profits did not have direct consequences for

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regime and a different type of arrangement, are not sufficiently prevalent authority to demonstrate the acceptability of the practice. To the contrary, these few cases show that revenue sharing in this context is sufficiently rare that it has not been widely examined by agencies and courts as a labor practice.

[7] The grocers argue that the distinction between agreements affecting business or product markets and those affecting labor markets is no longer relevant to the non-statutory labor exemption **[**28]** analysis following *Brown*. The Court did not expressly address the significance of the distinction in deciding *Brown*. The D.C. Circuit below had held that the exemption waives antitrust liability for restraints on competition that "operate primarily in a labor market characterized by collective bargaining," but the Supreme Court chose to interpret the exemption more narrowly. *Brown, 518 U.S. at 235* (quoting ***Brown v. Pro Football, Inc., 50 F.3d 1041, 1056, 311 U.S. App. D.C. 89 (D.C. Cir. 1995))***. At no point did it explicitly reject the product market/ labor market distinction or question its earlier cases that relied in part on the distinction. *Id. at 236, 237* (citing *Pennington, 381 U.S. at 657*). *Brown* suggests that the distinction may not be central to the analysis in all cases, but we conclude that it remains a relevant consideration in determining whether a restraint "plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system." *Brown, 518 U.S. at 240*. Other circuits are in accord. *E.g., Am. Steel Erectors, 536 F.3d at 79*; *Clarett, 369 F.3d at 134 n.14*.

the labor market. This aspect of the RSP lends further support to the view that application of the antitrust laws would not interfere with the bargaining process. While we stop short of endorsing the concept that as a strict rule the non-statutory labor exemption can only arise in a case involving restraint of terms directly relating to labor, that the restraint here is primarily a product market restraint does not encourage application of the non-statutory labor exemption.

Finally, the inclusion of a non-member of the collective-bargaining **[**29]** unit, Food 4 Less, in the agreement to share revenue during the terms of the strike counsels against application of the exemption. The fact that the unilateral post-impasse imposition of terms in *Brown* "concerned only the parties to the collective-bargaining relationship" appears to have been a significant factor supporting the application of the exemption in that case. *Brown, 518 U.S. at 250*. This is logical in light of the purposes of the exemption: the inclusion of non-bargaining employers in an agreement suggests that the conduct is not anchored in the collective-bargaining process and should instead be subject to scrutiny by antitrust laws designed to prevent unreasonable restraints. Here, the grocers offer us the explanation that, as an unincorporated division of Ralphs that was doing business under another name, Food 4 Less needed to be bound by the RSP to make its terms effective. While it may be true that the inclusion of Food 4 Less helped to effectuate the purposes of the agreement, Food 4 Less had a separate contract with the unions that was set to expire at a later date; negotiations for a new agreement were months away. Food 4 Less was not part of the collective bargaining **[**30]** unit, and its inclusion in the RSP, even if helpful to the grocers, suggests that the revenue sharing was not integral to the collective-bargaining process.

The restraint here differs from that in *Brown* along virtually every dimension that the Court there found significant in addressing the applicability of the exemption: The revenue-sharing provision has not been approved or regulated by labor law, it was not directly related to the collective-bargaining process, it did not concern a matter that the parties were required to negotiate collectively, and it involved a party that was not a member of the collective-bargaining relationship. The RSP is sufficiently "distant . . . in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." *Brown, 518 U.S. at 250*. We decline to read the Supreme Court's rejection of various limiting principles for the exemption in *Brown* as an invitation to apply the exemption broadly to any agreement loosely associated in time with bargaining, as the grocers advocate. To protect the employer agreement from antitrust scrutiny in this case would represent a major extension **[**31]** of the non-statutory labor exemption **[*1132]** as described in *Brown* and, in our view, would run contrary to the history and logic of the exemption. An agreement among employers (some of which are members of a multi-employer bargaining unit and one of which is not) to re-allocate their revenues on a temporary basis to maintain market share while their workers are striking or locked out is not within the core concerns of labor law. Although the arguments advanced by the grocers may be relevant to their position that there was no unreasonable restraint of trade, they are not sufficient to require application of a non-statutory labor exemption.[8] The district court correctly concluded that the grocers' revenue-sharing agreement is not immune from antitrust scrutiny, and we affirm that conclusion.

We proceed **[**32]** to consider the merits of California's claim under the Sherman Act.[9]

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[8] We are reluctant to expand the non-statutory exemption beyond the scope of *Brown* without further guidance from the Supreme Court. *See* *Brown, 518 U.S. at 250* (noting that its holding was "not intended to insulate from antitrust review every joint imposition of terms by employers," but that it "need not decide in this case whether, or where, within these extreme outer boundaries to draw that line").

[9] Chief Judge Kozinski's partial dissent contends that, in light of the stipulations of the parties, our ruling on the non-statutory labor exemption is "very likely" an advisory opinion and beyond the scope of our jurisdiction. That position does not present a correct view of our Article III jurisdiction, and would seem to foreclose ruling on many issues squarely presented. The issue of whether the RSP is exempt from antitrust scrutiny —which was expressly ruled on by the district court and preserved for appeal by the parties—is a threshold question that logically precedes our examination of the antitrust issues. If in addressing the exemption we determined that the RSP should be insulated from antitrust review, there would be no need to consider whether the RSP could be condemned with a per se rule or under "quick look" analysis. We properly may determine whether the antitrust regime applies at all before we rule on the merits of the antitrust claim.

IV. Antitrust Liability

A. Methods of Antitrust Analysis

HN13[] Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, **[**33]** in restraint of trade or commerce among the several States." 15 U.S.C. § 1. "Congress designed the Sherman Act as a consumer welfare prescription." Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979) (internal quotation marks omitted). "Consumer welfare is maximized when economic resources are allocated to their best use" and when "consumers are assured competitive price and quality." Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995). "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of ***antitrust law***." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). **[**34]** Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate. The touchstone is consumer good. Agreements of competitors, whether express or implicit, whether by formal agreement or otherwise, in restraint of trade are outlawed.

HN14[] The Supreme Court has repeatedly recognized that by the language **[*1133]** of the Sherman Act, "'Congress intended to outlaw only *unreasonable* restraints.'" Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)). "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors . . . ." State Oil, 522 U.S. at 10. The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive." Dagher, 547 U.S. at 5.[10]

HN16[] "Some **[**36]** types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se."* State Oil, 522 U.S. at 10. Such restraints "'are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" Nw. Wholesale Stationers, 472 U.S. at 289 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Per se treatment is proper only "[o]nce experience with a particular kind of restraint enables the [c]ourt to predict with confidence that the rule of reason will condemn it."[11] Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982). "[A] 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.'" Leegin Creative Leather Prods., Inc. v.

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[10] As **[**35]** we have previously explained, **HN15**[] "[t]he rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects. We review all the facts, including the precise harms alleged to the competitive markets, and the legitimate justifications provided for the challenged practice, and we determine whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects." Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003) (citing Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290-93, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985) (footnote omitted)). The rule of reason is responsible for a sensible application of the antitrust laws that has guided courts for almost a century. *See* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918) (providing the classic formulation of the rule of reason by Justice Brandeis: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); *see also* Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. 679, 687-91, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

[11] **HN17**[] Practices that have been held per se illegal include geographic division of markets and horizontal price fixing. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 315 (2d Cir. 2008) (collecting cases).

PSKS, Inc., 551 U.S. 877, 887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (second alteration in original) (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)). To justify per se condemnation, a challenged practice must have "manifestly anticompetitive" effects and lack "any **[**37]** redeeming virtue." *Id. at 886* (internal quotation marks omitted). The Supreme Court has "'expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.'" Dagher, 547 U.S. at 5 (quotation marks and ellipses omitted) (quoting State Oil, 522 U.S. at 10).

[*1134] ***HN18***[] "[A] certain class of restraints, while not unambiguously in the per se category, may require no more than cursory examination to establish that their principal or only effect is anticompetitive.' XI Areeda & Hovenkamp ¶ 1911a, at 295-96. Stated another way, the rule of reason analysis can sometimes be applied '"in the twinkling of an eye." NCAA, 468 U.S. at 109 n.39 (quoting Phillip Areeda, *The "Rule of Reason' in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)). The Supreme Court explained in *California Dental Ass'n v. FTC* that this truncated rule of reason or "quick look" antitrust analysis may be appropriately used where "an observer **[**38]** with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.' *526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.' *Id. at 781*. Full rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis. *See* NCAA, 468 U.S. at 110. But if an arrangement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' then a "quick look' form of analysis is inappropriate. Cal. Dental Ass'n, 526 U.S. at 771.

HN19[] "[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *Id. at 780-81*. Instead, to borrow Justice Souter's phrase, there should be "an enquiry meet for the case" that looks to "the circumstances, details, **[**39]** and logic of a restraint." *Id. at 781*. "[I]n any rule of reason case the amount and type of evidence necessary to prove illegality varies with the amount of power that is apparent, with the nature and plausibility of proffered defenses, and with the judge's evaluation of the degree of harm posed by the restraint." XI Areeda & Hovenkamp ¶ 1911a, at 296.

B. Per Se Treatment

California characterizes the RSP as (1) a profit-pooling agreement and (2) a market-allocation agreement, and urges that prior judicial experience with these categories of restraints requires per se condemnation of the RSP. We disagree. Given its distinguishing attributes, the RSP cannot be placed in either category of per se illegal restraints.

1. Profit-Pooling

California first argues that the RSP is "nearly identical" to the profit-pooling arrangement invalidated in *Citizen Publishing Co. v. United States, 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969)*. In that case, the two daily newspapers operating in Tucson, Arizona, entered into an agreement designed to "end any business or commercial competition" between them. *Id. at 134*. The newspapers agreed to consolidate their production, distribution, advertising, and most management operations in **[**40]** a jointly-held entity, to fix prices, and to refrain from engaging in any competing businesses. *Id*. The agreement also provided that all profits realized by the papers would be pooled and distributed pursuant to an agreed ratio. *Id*. The agreement was to continue in force for twenty-five years and was later extended to fifty years. *Id. at 133*. The Court held that the **[*1135]** § 1 violations of the agreement were "plain beyond peradventure," and that "[p]ooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act." *Id. at 135*.

Contrary to California's assertions, the RSP differs from the profit-pooling arrangement condemned in *Citizen Publishing* in significant ways, precluding per se treatment of the RSP. First, the agreement among the grocers stated that sharing of revenues would occur during the period of the labor dispute and for two weeks thereafter. The RSP, by its design, was of both limited and unknown duration. The revenue sharing would terminate two weeks after the resolution of any labor dispute, and this "triggering" event for the expiration of the agreement could occur at any time. **[**41]** While the agreement in *Citizen Publishing* was scheduled to last for fifty years and could be terminated only by mutual consent of the parties, *id. at 133*, the RSP could end at any time—as soon as the labor dispute was resolved.[12] Indeed, the parties to the agreement could not know in advance how long the labor dispute would continue. The RSP lasted about five months.

This temporary and short-term feature of the RSP distinguishes the grocers' agreement from the profit-pooling condemned in *Citizen Publishing* in a way that is relevant to the key question of whether the RSP is a per se unreasonable restraint on trade, with a "predictable and pernicious anticompetitive effect." *State Oil, 522 U.S. at 10*; *see also* *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1150-51 (9th Cir. 2003)* (observing that per se rules are inappropriate in novel contexts and rejecting an argument against application of a per se rule because alleged novelty in the restraint was not relevant **[**42]** to issue of competitiveness). Because the RSP was of indefinite but temporary duration, the grocers retained incentives to compete during the labor dispute period. *See* XI Areeda & Hovenkamp ¶ 1906a, at 236, 238-39 (observing that, in most cases, courts assess "likely" effects to determine if a restraint is "naked" and subject to per se condemnation). Unlike the *Citizen Publishing* arrangement, which insulated the newspapers from competition by pooling profits for decades and left no reason to compete for customers, the unknown duration of the RSP, the strike-induced nature of the agreement, and the fact that it could end at any moment suggest that the grocers had a continued interest in maintaining and growing their customer bases. Temporary revenue sharing likely did not blunt the grocers' incentives to advertise, discount, and provide quality service. Grocers retained incentives to prevent the loss of customers during the strike, who might not return after switching to a competitor, and they also had incentive to win new customers that might return as regular customers after the strike ended.[13] Because the RSP was of a necessarily limited duration, the grocers' interest in preserving **[**43]** customer loyalty and maintaining or expanding market share likely persisted during the revenue-sharing period.[14]

[*1136] Second, the RSP differs from the profit-pooling arrangement condemned in *Citizen Publishing* in that it did not include all of the grocers operating in the region. In *Citizen Publishing*, the only two daily newspapers in Tucson agreed to pool profits pursuant to an inflexible ratio. *394 U.S. at 134-35*. As California concedes, the combined sales of the grocers that were party to the RSP accounted for between 54.4% and 65.1% of the grocery market in the Los Angeles- Long **[**44]** Beach metropolitan area, and between 67.1% and 76.0% of the grocery market in the San Diego metropolitan area. While their collective market share was significant, the grocers still faced competition from other retailers such as Stater Brothers, Trader Joe's, Costco, and Whole Foods. Given the presence of these competitors in the market, there is a significant probability that the grocers retained incentives to continue—or even to increase—discounting and advertising of grocery products to prevent the loss of customers and profits during the strike period, to gain new customers if possible, and to maximize profitability and market share after the strike.

Because the RSP was an agreement among some, but not all, of the competitors in the relevant market, and because by its terms the RSP had a limited and indefinite duration, it evades any "easy label" of "profit-pooling" and

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[12] While labor disputes are capable of dragging on for months or years, it does not appear that anyone realistically expected the RSP to continue for anywhere near the extended period of time at issue in *Citizen Publishing*.

[13] The Supreme Court has recognized that "[t]he retail food industry is very competitive and repetitive patronage is highly important." *NLRB v. Brown, 380 U.S. 278, 284, 85 S. Ct. 980, 13 L. Ed. 2d 839 (1965)*.

[14] An agreement of limited and/or indefinite duration could have obvious anticompetitive effects and violate *Section 1*, for example, an agreement of competitors controlling most of the market to fix prices for a month to the detriment of consumers. But here, the limited and unknown length of the RSP separates it from a category of restraints with which we are sufficiently experienced to condemn without inquiry into actual competitive harms.

cannot sensibly be grouped together with or analogized to the very different arrangement condemned in *Citizen Publishing*.[15] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-10, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); United States v. Topco Assocs., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972) (**HN20**[] "It is only after considerable experience with certain **[**45]** business relationships that courts classify them as per se violations of the Sherman Act."). A restraint of this nature has not undergone the kind of careful judicial scrutiny that would support the application of a per se rule. *See* Topco Assocs., Inc., 405 U.S. at 607-08; Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 844 (9th Cir. 1996). Quite apart from the lack of judicial experience with a restraint of this nature, we conclude that the application **[*1137]** of a per se rule is not warranted in this case because the practice of temporary revenue sharing during the duration of a labor dispute among some competitors within a market does not "facially appear[ ] to be one that would always or almost always tend to restrict competition and decrease output." Broad. Music, 441 U.S. at 19-20. In light of its particular features and context, the RSP is "'not a naked restraint of trade with no purpose except stifling of competition.'" Id. at 20 (brackets omitted) (quoting White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)).

2. Market Allocation

We also reject California's attempt to characterize the RSP as a market-allocation agreement. California correctly notes that **HN23**[] market-allocation agreements among competitors at the same market level are per se antitrust violations. *See* United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991). "Classic" horizontal market division agreements are ones in which "competitors at the same level agree to divide up the market for a given product." Metro Indus., 82 F.3d at 844. But where, as here, "the conduct at issue is not a garden-variety horizontal division of a market, we have eschewed a *per se* rule and instead have utilized rule of reason analysis." *Id*. California argues that the RSP "mirrors" market-allocation agreements because it divides up the Southern California market according to the participants' relative market shares. But California concedes that the RSP did not "prevent any Defendant from actually making sales" to consumers. California does not assert that the RSP restricted customers from patronizing certain grocers. Moreover, the agreement did not prevent the grocers from selling any particular **[**48]** products, or limit the grocers to a particular set of customers or geographic regions. The RSP cannot be characterized as a per se illegal market-allocation agreement.

C. "Quick Look"

We next address whether summary condemnation of the RSP on a truncated rule of reason or "quick look" is or is not correct. We conclude that a "quick look" conclusion of antitrust illegality is here inappropriate. This is so for many of the same reasons that per se treatment is not correct. The unique features of the arrangement among the grocers—its limited duration and the existence of other significant external competitors in the market—and the uncertain effect these features had on the grocers' competitive behavior and incentives during the revenue-sharing period render any anticompetitive effects of the RSP not obvious.

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[15] California offers a series of cases in addition to *Citizen Publishing* in an effort to demonstrate that **HN21**[] profit-pooling arrangements have long been condemned as per se **[**46]** illegal. *See, e.g.,* United States v. Paramount Pictures, Inc., 334 U.S. 131, 149, 68 S. Ct. 915, 92 L. Ed. 1260 (1948) (holding that an agreement among five producers of motion pictures and their affiliates to share profits according to prearranged percentages was anticompetitive); N. Sec. Co. v. United States, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904) (invalidating an agreement among stockholders in competing interstate railway companies to form one corporation with a controlling interest in the stock of each railway); Chi., M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 61 F. 993 (8th Cir. 1894) (invalidating an agreement among seven competing railroad companies to, among other things, pool gross earnings for a period of twenty-five years); Anderson v. Jett, 89 Ky. 375, 12 S.W. 670, 11 Ky. L. Rptr. 570 (Ky. 1889) (voiding a multi-year arrangement between rival steamboat owners to end their rivalry by sharing profits according to fixed percentages). None of these cases, alone or in combination, establishes sufficient judicial experience with a revenue sharing agreement of limited duration, among some competitors in a market, so as to permit per se treatment of the RSP. **HN22**[] The fundamental economics of the firms and the public interest do not require *per se* prohibitory **[**47]** treatment of the challenged practice during a labor dispute.

To reach a confident conclusion on the anticompetitive effects of the RSP, further development of the record is required. One might want to permit expert testimony and examine facts about the degree to which the challenged revenue-sharing agreement may have suppressed incentives of the grocers to discount and otherwise compete for customers. One might want to have an understanding of **[**49]** the market impact of other competitors, not in the defendant group, whose pricing and terms of sale would have to be taken into account in a competitive market. It might be helpful to have an understanding whether other competitors were waiting in the wings to exploit any anticompetitive market by their entry, whether these potential new competitors were overseas, or in other regions of the United States, or were skilled in the developing concept of internet marketing of groceries or other novel techniques that might impose market **[*1138]** pressures. Any of these inquiries might inform an evaluation whether, during the relevant period of its operation, the revenue-sharing provision had any anticompetitive effect. On a "quick look," none of this can be ascertained with reliability.[16]

The features of the RSP described in connection with the per se mode of analysis not only separate it from traditional per se illegal categories of restraints and prevent characterization as a "naked" restraint on price or output, but they also raise sufficient **[**50]** doubt about the anticompetitive nature of the agreement such that detailed scrutiny is required to understand its effects. ***HN24***[] Because "empirical analysis is required to determine [the] challenged restraint's net competitive effect, neither a *per se* nor a quick-look approach is appropriate because those methods of analysis are reserved for practices that facially appear to be ones that would always or almost always tend to restrict competition and decrease output." *Salvino, Inc., 542 F.3d at 340 n.10*. (Sotomayor, J., concurring) (internal quotation marks and brackets omitted).

HN25[] To use the "quick look" approach, we must first determine whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n, 526 U.S. at 770*. Once it is established that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, *id*., then the burden shifts to the grocers to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry, *id. at 775*; *see also* XI Areeda & Hovenkamp ¶ 1914d, **[**51]** at 354-55. The features of the RSP— its limited, indefinite duration and the presence of other competitive firms in the market—strongly suggest that the agreement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[17] *Cal. Dental Ass'n, 526 U.S. at 771*.

HN26[] "Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do." *Id. at 775 n.12*. The particular features and context of the RSP are more than mere idiosyncracies: they warrant further development of evidence and more rigorous review. *See* XI Areeda & Hovenkamp ¶ 1911a, at 295. Because we cannot reach a confident conclusion that the principal tendency of the RSP is to restrict competition, truncated review is inappropriate.

Can it be successfully argued, to the contrary, that because the RSP reduces **[**52]** the monetary risks of lost sales to participating grocers during a whipsaw strike, it is irretrievably anticompetitive in effect? We conclude that such an argument fails. If a competitor finds itself the target of a strike, which would cause it to lose sales to other competitors, then revenue sharing provides some cushion from the damaging monetary impact of the strike. But it is by no means "obvious" that the grocers that entered into the RSP would be motivated to reduce their competition on price. **[*1139]** Although the immediate monetary risk of losing sales to competitors during a labor strike is reduced by revenue sharing, the remaining risks are still such that a rational competitor would be expected to continue to compete vigorously. While it is true that the arrangement provides a cushion that may arguably affect

[16] Also, if experts gave conflicting views on these subjects, and they were material to resolution, then the decision of the trier of fact might control the outcome.

[17] The grocers argue that the RSP has procompetitive benefits in the form of lower prices for consumers as a result of the grocers' ability to negotiate a more favorable contract on labor costs. Because California has not met its burden to show that the RSP is obviously anticompetitive, we need not address the grocers' procompetitive justifications.

incentives to compete, that alone, absent evidence of actual anticompetitive impact on pricing, is not sufficient for us to resolve the RSP issue on a "per se" or "quick look" or any other abbreviated basis.

In light of the novel circumstances and uncertain economic effects of the RSP, we conclude that the district court correctly determined that it should follow the presumptive **[**53]** rule of reason. *See* *Cal. Dental Ass'n, 526 U.S. at 781*. Before the challenged revenue-sharing agreement technique is outlawed for use during a labor dispute, there should be open discovery and fair consideration of all factors relevant under the traditional rule of reason test, so as to determine if there are significant anticompetitive impacts and if so whether they outweigh any legitimate justifications. Application of the traditional rule of reason is not a simple matter, but it does permit the type of fundamental analysis appropriate for ***antitrust law*** evaluation, and it has stood the test of time.

V. Conclusion

We hold that the agreement between the grocers to share revenues for the duration of the strike period is not exempt from scrutiny under the Sherman Act, and that more than a "quick look" is required to ascertain its impact on competition in the Southern California grocery market. Given the limited judicial experience with revenue sharing for several months pending a labor dispute, we cannot say that the restraint's anticompetitive effects are "obvious" under a per se or quick-look approach. Although we conclude that summary condemnation is improper, we express no opinion **[**54]** on the legality of the arrangement under the rule of reason.[18] **AFFIRMED**.

Concur by: Raymond C. Fisher; Stephen Reinhardt (In Part)

Concur

FISHER, Circuit Judge, specially concurring:

I join Parts I-IV.A and V of the majority opinion, and concur in the outcome of Parts IV.B-C. I have strong doubts that the grocers' profit sharing agreement left them with an *undiminished* incentive to compete. Judge Reinhardt's dissent raises serious economic concerns about the effects of even a limited profit sharing agreement that the majority has not entirely refuted. Nonetheless, I am not confident that under the novel circumstances here an "enquiry meet for the case" can be something less than the presumptive standard — the rule of reason. *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*; *see* *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Because I do not find that a "great likelihood of anticompetitive **[**55]** effects can easily be ascertained" on a quick look at the record before us, *Cal. Dental, 526 U.S. at 770* (emphasis added), and because we lack the "considerable experience" necessary for per se analysis to say the economic impact of the grocers' agreement is "*immediately* obvious," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87, 127 S. Ct. 2705, 168* ***[*1140]*** *L. Ed. 2d 623 (2007)* (emphasis added) (quotation marks omitted), I align myself with the rule of reason outcome of the majority opinion.

Dissent by: Alex Kozinski (In Part); Stephen Reinhardt (In Part)

Dissent

Chief Judge KOZINSKI, with whom Judges TALLMAN and RAWLINSON join, dissenting in part:

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[18] The ultimate competitive question may not be determined in this case because the State of California, to gain a final judgment that could be appealed at this time, has stipulated to foregoing its challenge to the RSP under the traditional rule of reason, contending instead that the RSP is invalid per se or on a "quick look."

By going out of its way to rule on the non-statutory labor exemption, the majority decides an important legal question that will have absolutely no effect on anyone involved in this case. We hold that there's no categorical antitrust violation under the quick look doctrine; nor can such a violation be established on remand, because California stipulated to dismissal if it didn't prevail under quick look. Since no antitrust violation can ever be established in this case, we have no occasion to decide whether any exemption from antitrust liability would apply. The majority's groundbreaking **[**56]** ruling on the labor exemption is thus very likely an advisory opinion and beyond the scope of our Article III jurisdiction. *See* *Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000)* (en banc). Such dicta are particularly unwise when they are effectively insulated from Supreme Court review, as the grocers probably will have neither incentive nor standing to petition for certiorari.

Worse, I seriously doubt the majority decides the labor exemption issue correctly because it fails to grapple with the complex dynamics of this case. Had it done so, it would have realized that each and every factor the Supreme Court found relevant in *Brown v. Pro Football, Inc., 518 U.S. 231, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*, supports finding the revenue-sharing provision (RSP) protected by the labor exemption. *Contra* maj. op. at 9302.

First, the RSP was inextricably intertwined with the collective bargaining process. *See* *Brown, 518 U.S. at 250*. *Contra* maj. op. at 9301-02. The grocers' agreement was a direct response to the union's anticipated use of whipsaw tactics. As courts have long recognized, whipsaw tactics are particularly devastating for employers, because

> the union strikes against one member of a multiemployer **[**57]** bargaining unit, but allows the other employers to continue operating in order to maximize the competitive pressure brought to bear upon the struck member . . . ; the idea is thereby to force each employer individually to capitulate through a series of such strikes, thus defeating their attempt to stand together.

Int'l Bhd. of Boilermakers v. NLRB, 858 F.2d 756, 760, 273 U.S. App. D.C. 161 (D.C. Cir. 1988).

The grocers here were legitimately concerned that the union would selectively strike and picket only one chain, diverting their customers to the others. The unions would thereby upset the prevailing competitive balance, crippling the target and ruining any chance of bargaining as a group. The grocers sought to blunt the disproportionate losses borne by the targeted chain by redistributing some of the windfall profits reaped by the others as a result of the union's tactics. The agreement was limited to the duration of the strike plus two weeks and became operative only if, and only to the extent, the union succeeded in redirecting consumers from the targeted store to other stores in the bargaining group. The RSP was thus narrowly tailored to counter the union's divide-and-conquer strategy. Its effect, moreover, **[**58]** was entirely pro-competitive: It helped keep all competitors in the market rather than letting one be wiped out by the strike.

As it turns out, the grocers were right to be concerned. Less than a week after **[*1141]** their contracts expired, the unions struck, and Vons was the exclusive target. Per the grocers' Mutual Strike Assurance Agreement, Albertson's and Ralphs locked out their workers. The unions then picketed all three stores, but soon pulled pickets from Ralphs to zero in on the other chains. The unions' strategy was highly effective: Vons and Albertson's lost market share to Ralphs, as customers switched stores to avoid the picket lines. Some of these losses were offset by payments from Ralphs under the RSP, but many—such as the loss of long-time customers—were permanent. The RSP was thus a limited, defensive tool that was directly related to the collective bargaining process.

The second *Brown* factor—that the practice is "unobjectionable as a matter of labor law and policy"—also points in favor of exemption. *Brown, 518 U.S. at 238*. *Contra* maj. op. at 9297-98. Although the NLRB has not had occasion to rule on the specific RSP at issue here, both the Supreme Court and the NLRB have generally **[**59]** sanctioned the use of economic weapons to combat whipsaw tactics. *See, e.g.,* *NLRB v. Brown (Brown Food), 380 U.S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839 (1965)*. The Supreme Court has recognized a particularly strong interest in "preserving the integrity of the multiemployer bargaining unit" against targeted attacks. *Brown, 518 U.S. at 245* (quoting *Brown Food, 380 U.S. at 289*) (internal quotation mark omitted). Accordingly, the Court has approved many practices employers use to maintain a common front: They may, for example, agree to lock out all workers if any one of them is struck, *see* *NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 89, 97, 77 S. Ct. 643, 1 L.*

Ed. 2d 676 (1957), or hire temporary replacement workers, *see* Brown Food, 380 U.S. at 279-80. Revenue-sharing provisions that are designed to maintain cohesiveness in the teeth of union efforts to disrupt the bargaining group fit squarely within this category of accepted labor practices.

On the handful of occasions that courts have evaluated the legitimacy of revenue-sharing provisions, they have been upheld. In *Kennedy v. Long Island R.R., 319 F.2d 366 (2d Cir. 1963)*, the Second Circuit upheld the use of a strike insurance plan. Like the grocers here, the railroads were concerned that **[**60]** the union would engage in whipsaw tactics and wanted to spread the losses among employers. *Id. at 368-69*. The railroads contributed to an insurance fund that would pay out in the event of a strike. *Id*. As the proceeds were distributed, the fund was supplemented by further deposits from non-struck railroads. *Id*. The union sued, claiming the strike insurance fund violated both ***antitrust law*** and the railroad's duty to bargain in good faith. *Id. at 368*. The Second Circuit rejected both claims, reasoning that "the strike insurance plan, far from constituting a violation of the railroad's duty to bargain in good faith, was an instrument of self-help properly employed in the process of collective bargaining." *Id. at 371*.

The D.C. Circuit reached a similar conclusion in *Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd., 502 F.2d 453, 163 U.S. App. D.C. 451 (D.C. Cir. 1974)*. There, six airlines entered into a "Mutual Aid Pact" to "soften the impact of strikes against individual companies." *Id. at 455*. The Mutual Aid Pact contained a provision, almost identical to the RSP, under which a "strikebound company received payments from other Pact members equal to their increase in revenues resulting from the strike." *Id*. **[**61]** As in *Kennedy*, the union claimed the revenue-sharing provision violated ***antitrust law*** and national labor policy. *Id*. The D.C. Circuit likewise rejected these claims, explaining that "[t]he national labor policy **[*1142]** rests on the principle that parties should be free to marshall [sic] the economic resources at their disposal in the resolution of a labor dispute." *Id. at 456*. Although both of these cases were decided under the Railway Labor Act, their analysis was based on national labor policy and relied heavily on National Labor Relations Act cases. *See, e.g., id. at 456 n.3* (relying on *NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 490, 80 S. Ct. 419, 4 L. Ed. 2d 454 (1960))*; *Kennedy, 319 F.2d at 371 n.4* (relying on *Truck Drivers, 353 U.S. 87, 77 S. Ct. 643, 1 L. Ed. 2d 676*). The majority dismisses these cases in a footnote, but they fatally undermine the majority's claim that the precaution adopted by the employers here is too novel and exotic to fall within the labor exemption.

Courts have also approved other strategies that redistribute the financial pain wrought by a strike. When unions engage in selective striking, for example, striking employees are often paid benefits to compensate for lost wages. *See* *Kennedy, 319 F.2d at 372*. Unions do this **[**62]** because it would be unfair to force one set of employees to bear the entire burden when the eventual benefit will inure to everyone. Strike benefits also strengthen the union's bargaining position by ensuring all employees share the same incentives, and none will be driven by personal hardship to undermine the strike. Strike benefits are thus considered a legitimate economic weapon. *See* *Int'l Bhd. of Boilermakers, 858 F.2d at 767*. RSPs serve precisely the same purposes for employers bargaining as a group: Why should one employer alone bear the heavy cost of selective striking or picketing, when the eventual contract will bind the entire group? And why should unions be able to spread the burdens of a strike to reinforce their bargaining position, while employers can't?

When unions pay benefits to striking workers, their collusive actions are protected by statute. *See* *H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 713-14, 101 S. Ct. 2102, 68 L. Ed. 2d 558 (1981)*. To protect the collective bargaining process, employers too must be allowed to share losses without fear of antitrust liability, which is the very point of the non-statutory labor exemption. *See* *Brown, 518 U.S. at 237*.

My colleagues reach **[**63]** the wrong conclusion because they misread *Brown*. The majority looks for some affirmative approval in labor law for the RSP, maj. op. at 9297-98, but that is far more than *Brown* calls for. *Brown* requires only that the conduct be "*unobjectionable* as a matter of labor law and policy." *518 U.S. at 238* (emphasis added). The very fact that the union did not challenge the RSP as an unfair labor practice, despite having raised a procedural dispute before the NLRB, itself is proof that the RSP is unobjectionable as a matter of labor policy. The second *Brown* factor is clearly satisfied.

The third *Brown* factor similarly favors exemption because the RSP concerned only parties with a direct stake in the outcome of the collective bargaining agreement. *See* *Brown, 518 U.S. at 250*. *Contra* maj. op. at 9301. Vons, Albertson's and Ralphs were part of the same multi-employer bargaining unit, and Food 4 Less's own contracts were set to expire just months later. Food 4 Less, standing alone, had no hope of doing better against the union than Vons, Ralphs and Albertson's had done by working together. In all likelihood, the contract the union wrung from them would set the bar for Food 4 Less's own negotiations. **[**64]** Food 4 Less thus had a strong labor-related interest in standing shoulder-to-shoulder with the three other chains.

[*1143] Equally important, Food 4 Less was required by its existing contract to contribute to employee benefits at a rate tied to that of Ralphs. As Ralphs's Vice President of Human Resources and Labor Relations explained, "the rate . . . for Food 4 Less employees' health and welfare [was] directly connected to the contract we . . . bargained." If the unions managed to extract more favorable benefits from Ralphs and the other chains as a result of the strike, Food 4 Less would be forced to provide more benefits for its own workers. It thus had a direct and immediate financial stake in the contract negotiations. The majority's claim that "the inclusion of [Food 4 Less] suggests that the conduct is not anchored in the collective-bargaining process," *id*. at 9301, is belied by the record.

The fourth factor—whether the conduct involved subject matter that the parties were required to negotiate collectively —simply doesn't apply to this case. *See* *Brown at 250*. In *Brown*, the Court had to decide whether the NFL's unilateral imposition of its last good faith salary offer was exempt from antitrust **[**65]** review. In such a case, it's relevant whether these substantive terms relate to "wages, hours, and working conditions," or whether the terms are unrelated to collective bargaining. *Id. at 241*; *compare* *id. at 234* (agreement to set salaries is exempt), *with* *United Mine Workers v. Pennington, 381 U.S. 657, 663, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* (agreement to set prices of goods is not exempt). Where the employer action at issue involves a procedural bargaining tactic, rather than a substantive term of the contract, it makes no sense to ask whether the tactic relates to "wages, hours, and working conditions." It never does. Yet procedural tactics go to the heart of the exemption's purpose—to free from antitrust scrutiny employer actions that are "needed to make the collective-bargaining *process* work." *Brown, 518 U.S. at 234* (emphasis added); *see also* *id. at 247*. A lockout, for example, is a bargaining tactic that has nothing to do with "wages, hours, and working conditions" yet is exempt from antitrust review. *See* *id. at 245*; *see also* *id. at 254* (Stevens, J., dissenting); maj. op. at 9300. That the revenue-sharing provision—which is **[**66]** a procedural tactic designed to put pressure on the union during the course of negotiations—doesn't relate to a mandatory subject of collective bargaining is simply beside the point and cannot count against application of the labor exemption. *Contra* maj. op. at 9298-99.

Fifth, and finally, the conduct indisputably "took place during and immediately after a collective-bargaining negotiation." *Brown, 518 U.S. at 250*. The revenue-sharing provision clearly centered on the time period of the labor dispute, as it lasted only for the duration of the strike plus an additional two weeks. In its haste to condemn the RSP, the majority omits this factor from its discussion.

A fair reading of the RSP can leave no doubt that all the relevant *Brown* factors weigh heavily in favor of exempting the RSP from antitrust review. We are not dealing with employers who were using a labor dispute as a pretext to engage in price-fixing; it's perfectly clear that the employers were responding to union tactics in the course of a strike, and only to the degree the tactics were effectively deployed by the union. The majority's contrary dicta have no basis in the record, common sense or precedent.

Worst of all, we may **[**67]** never be able to correct this error. Strikes are costly endeavors **[*1144]** for everyone involved, and introducing the additional threat of antitrust liability—with its protracted litigation, unpredictable rule of reason analysis and treble damages—will no doubt force employers to think twice before entering into a revenue-sharing agreement in the future. Today's gratuitous decision thus has the unfortunate consequence of "forcing [employers] to choose their collective-bargaining responses in light of what they predict or fear antitrust courts, not labor law administrators, will eventually decide." *Brown, 518 U.S. at 247*. Should this fear prevent employers from entering into an RSP, we will have effectively usurped the role of the NLRB by dictating the tools that can and cannot be used in labor disputes. Because I find this result irreconcilable with *Brown*, inimical to sound labor policy, completely unnecessary to the resolution of this case and outside the scope of our constitutional authority, I dissent from Part III of the majority opinion.

REINHARDT, Circuit Judge, dissenting in part and concurring in part, joined by Judges SCHROEDER and GRABER:

Our ***antitrust law*** reflects Congress's judgment **[**68]** that, with rare and specific exceptions, free competition for customers among firms protects and benefits the public by increasing efficiency and output, lowering prices, and improving the quality of the products and services available.[1] No court has ever upheld an agreement among multiple employers to set prices or share profits.

In this case, the four largest supermarket chains in Southern California, controlling 60-70% of the market, entered into a profit sharing agreement according to a predetermined formula for the indeterminate period of an anticipated labor dispute and for a short period afterwards. The supermarkets contend that it is lawful for them to do so because, although profit sharing agreements are by their nature anticompetitive and thus constitute a restraint of trade, their particular profit sharing agreement differs in two respects from profit sharing agreements that have been held to violate the antitrust laws: first, the agreement was to last for only the limited duration of the strike, however long that might be; and, second, the four supermarkets control only a substantial majority but not 100% of the market.

The majority agrees with the supermarkets that these two factors make their profit sharing agreement sufficiently different **[**70]** from those in all the previously decided cases that, in order to determine whether their agreement has an anticompetitive effect, it is necessary to apply not just the fact-sensitive intermediate test **[*1145]** that the Supreme Court has endorsed for assessing less complex restraints of trade, but the most rigorous and exhaustive "rule of reason" analysis that requires a full-scale duel of economic experts over complicated and sophisticated market issues. I disagree.

The profit sharing agreement's indeterminate duration and less-than-total domination of the market are immaterial to an analysis of an agreement that inherently violates the antitrust laws. The correct method of analysis of a profit sharing agreement is either the simple per se rule or another intermediate standard such as quick look, by which we examine the anticompetitive effects of an agreement according to its particular circumstances, details, and logic, in light of the generally applicable ***antitrust law***, fundamental principles of economics, and clear experience of the market. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780-81, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). Because a battle royale of economic experts in the courts is unnecessary and because defendants' **[**71]** profit sharing agreement can readily be determined to violate the antitrust laws under the intermediate standard, I would reverse the district court's denial of summary judgment to plaintiff and hold that the profit sharing agreement violates section 1 of the Sherman Act. Accordingly, I dissent in part.[2]

I.

Section 1 of the Sherman Act bans agreements or combinations that act as unreasonable restraints on interstate commerce. *See* State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). Defendants

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[1] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 60 S. Ct. 982, 84 L. Ed. 1311 (1940) ("The end sought [by Congress in passing the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns **[**69]** but out of concern for the public interest."); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (In passing the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country.").

[2] Defendants also contend that their profit sharing agreement is exempt from the antitrust laws because they employ it as a bargaining tactic in an anticipated labor dispute. The majority concludes that the profit sharing agreement does not qualify for the nonstatutory labor exemption and I agree. *See* Maj. Op. at 9289-9302.

entered into an agreement to share profits. Such agreements have traditionally been held to be anticompetitive because they remove the incentive to engage in competitive behavior. Defendants have two principal contentions as to why their profit sharing agreement is different: first, that their profit sharing is for a limited, if indefinite period; and, second, that their agreement does **[**72]** not include 100% of the participants in the market. They also contend, by way of response to plaintiff's prima facie case, that their profit sharing agreement helps them to prevail in the labor dispute and thereby to achieve their goal of lowering wages and benefits paid to their employees. Doing so, defendants allege, aids competition in the Southern California market.

It is evident from a rudimentary knowledge of economics, as well as from a reading of the case law, that neither the agreement's limited duration nor its failure to include the fragmented group of other firms operating in the market could do more than *reduce* the ordinary anticompetitive effects of such agreements. Certainly these factors would not *eliminate* such effects. An analysis of the details, logic, and circumstances of the particular profit sharing agreement, including its relationship to the anticipated strike, confirms that conclusion. The agreement's effect is necessarily anticompetitive and, like any other profit sharing agreement of limited duration among firms that control well over a majority, but less than 100% of the market, the anticompetitive effects might be reduced to some extent but they certainly **[**73]** would not be eliminated.

A.

The "presumptive or default," Maj. Op. at 9304, method of analysis for determining **[*1146]** whether an agreement is an unreasonable restraint on trade such as violates *section 1* of the Sherman Act is rule of reason review. In conducting that review, courts fully examine factors such as "specific information about the relevant business," "the restraint's history, nature, and effect," and "[w]hether the businesses involved have market power," with the purpose of "distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc, 551 U.S. 877, 885-86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (internal quotation marks omitted).

Rule of reason review is data-intensive and, consequently, expensive for litigants; also, it consumes large amounts of court time and other resources. *See Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343-44, 102 S. Ct. 2466, 73 L. Ed. 2d 48 & n.14 (1982)*. For these reasons, as well as to provide guidance to the business community, *see Cont'l T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, courts have developed summary methods of identifying **[**74]** section 1 violations in circumstances in which such violations are discernible without a full rule of reason analysis: namely, per se review and quick look review. Per se analysis examines whether prior judicial experience with the type of restraint at issue is sufficient to allow a determination that it would always or almost always tend to restrict competition and decrease output. *See Leegin, 551 U.S. at 886*. The focus of the inquiry is on accumulated data from prior decisions: an agreement may be declared unlawful with no further analysis, simply by virtue of its being of a type that courts have previously determined to have "manifestly anticompetitive effects," but no "redeeming virtue." *Id*. (internal quotation marks omitted).

In contrast, an arrangement violates *section 1* under a quick look approach when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC, 526 U.S. at 770*. Quick look review is not necessarily based on a history of rule of reason adjudications; rather, it asks whether a "great likelihood of anticompetitive effects **[**75]** can easily be ascertained" by examining the restraint and considering the defendants' justifications for it. *See id*.; *see also* XI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1911a, at 296-97 (2d. ed. 2004 Supp.) (Quick look review "is usually best reserved for circumstances where the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications." (footnote omitted)).[3]

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[3] Inherent in the summary nature of quick look and per se analysis is the possibility that a restraint that would survive a full rule of reason analysis in a particular case will nonetheless be invalidated: "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Maricopa*

[*1147] California contends that defendants' profit sharing arrangement violates section 1 under either the per se rule or quick look review. Its assertion that the agreement strongly resembles arrangements that prior cases have found violative of section 1 is correct, although the particular circumstances of the restraint in question do differ from the circumstances relating to the profit sharing arrangements examined in those earlier cases. It is unnecessary, however, to determine whether such differences are sufficiently material that we should refrain from concluding that defendants' profit sharing agreement was illegal under a strict per se analysis, because the agreement was plainly illegal under a quick look or, more accurately, a combined **[**77]** or mixed form of intermediate review. "[A] great likelihood" that defendants' profit sharing arrangement produced "anticompetitive effects" is manifest, Cal. Dental Ass'n, 526 U.S. at 770, and defendants offer no plausible procompetitive benefits that would overcome or neutralize those effects so as to require full rule of reason analysis.

Although the parties briefed the case on the traditional view that the two summary forms of review are separate and unrelated, and the questions they posed are here discussed separately to some extent, the lawfulness of the agreement is best analyzed in light of the Supreme Court's recent explanation that "our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." Id. at 779. According to Justice Souter, writing for the Court, "[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the object of determining "whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion" can be drawn that the "principal tendency" of an agreement is anticompetitive. **[**78]** Id. at 780. I would follow the Court's suggestion and would apply a mixed or blended approach, engaging in an analysis "meet for the case" — here, an analysis that compels the confident conclusion that the principal tendency of defendants' agreement is anticompetitive and that the agreement thus violates section 1 of the Sherman Act. On the basis of that intermediate analysis, I would reverse the district court and hold that defendants' profit sharing arrangement is unlawful.

B.

I first discuss the applicability of strict per se analysis. "The rationale of the rule of per se illegality depends on the premise[] that . . . judicial experience with a particular class of restraints shows that virtually all restraints in that class operate so as to reduce output or increase price." XI Areeda & Hovenkamp ¶ 1911a, at 295. Accordingly, application of the per se rule is limited to restraints of a type that courts' "considerable experience" has revealed to have "manifestly anticompetitive effects," and no "redeeming virtue," such that judges can "predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." Leegin, 551 U.S. at 886-87. Thus, the **[**79]** question for per se analysis is whether defendants' agreement is of a type that courts have previously determined to have such pernicious **[*1148]** effects. California argues that defendants' profit sharing arrangement was both a profit pooling agreement and a market allocation agreement, each of which courts have determined to be subject to per se invalidation. As I explain below, the contention that defendants' agreement was a market allocation agreement is without merit. The question whether it was a profit sharing agreement sufficiently similar to the profit sharing agreements that courts have previously examined and invalidated is much closer. Below, I discuss the relationship between defendants' profit sharing agreement and profit sharing agreements invalidated in prior cases but, ultimately, do not determine whether defendants' agreement constituted a per se violation of the Sherman Act. Rather, as I explain below, in determining that it was unlawful, I would apply a per se-plus or a quick look-minus analysis, a combined or mixed approach, somewhere between pure per se and pure quick look, along the meet-for-the- case lines suggested by the Court in *California Dental Association*.

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Cnty. Med., 457 U.S. at 344. The ultimate inquiry in both analyses is establishing a sufficiently high likelihood of anticompetitive effect to justify foreclosing, in the name of certainty and efficiency goals, the possibility that a more in depth review would reveal that a restraint was on balance **[**76]** benign or even beneficial. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 340 n.10 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) (quick look and per se "methods of analysis are reserved for practices that 'facially appear [ ] to be one[s] that would always or almost always tend to restrict competition and decrease output.'" (alterations in original) (quoting Broad. Music, Inc. v. CBS, 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)).

California **[**80]** contends that defendants' profit sharing agreement is essentially identical to those profit pooling and sharing schemes that the Supreme Court has found to be per se violations of section 1. *See* *Citizen Publ'g Co. v. United States, 394 U.S. 131, 135, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969)* ("Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act."); *see also* *United States v. Paramount Pictures Inc., 334 U.S. 131, 149, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)* (profit sharing agreement a "bald effort[ ] to substitute monopoly for competition"); *N. Sec. Co. v. United States, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904)*; *Chicago, M & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 61 F. 993 (8th Cir. 1894)*; *Anderson v. Jett, 89 Ky. 375, 12 S.W. 670, 11 Ky. L. Rptr. 570 (Ky. 1889)*.

Profit pooling or profit sharing arrangements eliminate incentives to compete for customers along every dimension: there is little purpose in attempting to attract another firm's customers by lowering prices, improving quality, or taking any other measure if the profits earned from those new customers would be placed in a common pool in which the other firm is a participant, and the proceeds distributed in the same way no matter **[**81]** which participant in the profit pool generated the underlying sales, or if transfer payments are made between firms to achieve the same effect. *See* *N. Sec. Co., 193 U.S. at 328* (pooling profits "destroy[s] every motive for com-petition between . . . natural competitors."); *Chicago, M. & St. P. Ry. Co., 61 F. at 997* (a profit sharing agreement by which railroads that carried less than a predetermined share of freight were compensated by other railroads such that their share of total revenues remained constant had "[t]he necessary and inevitable result of . . . foster[ing] and creat[ing] poorer service and higher rates"). The Sherman Act was intended to curb just such restraints on competition.

Defendants contend that there are three ways in which their scheme differs from the profit pooling or sharing that was held unlawful in prior cases. The first of these contentions is meritless. Defendants argue that, unlike the agreements in prior cases, which provided that the parties would share all profits, their agreement provides that any party that experiences an increase in relative market share would share with the others only 15% of its increase in relative revenue, and that the sums to **[**82]** be redistributed are less than all of the profits earned on those increased **[*1149]** revenues. There is no question, however, that the 15% figure was defendants' estimate of the total additional profits to be earned as a result of any increase in relative market share while the profit sharing agreement was in effect. This plan to share all the additional profits earned is what is relevant. Richard Cox, a vice president of Safeway who helped to draft the agreement, stated in his deposition that the 15% was meant to represent accurately the *profit* that a chain would collect on increased revenues that were earned without an increase in fixed costs. Defendants do not dispute the accuracy of his testimony. Their proffer is the statement of their expert witness, who conjectured that it was "plausible" and "likely" that incremental profits were greater than 15% of revenues, but admitted that he had done no analysis of incremental profitability from the data.[4] Defendants cannot force the expense of full rule-of-reason litigation on courts and opposing parties simply by speculating that they may have gotten their arithmetic wrong when they were setting up their scheme to share profits; their plan to **[**83]** share profits is sufficient, whether or not the scheme as implemented achieved that objective to perfection.

Defendants' other two contentions, however, raise sufficient question as to whether their profit sharing scheme should be invalidated under a strict per se approach or whether additional analysis of the agreement and its likely effects would be beneficial, and whether the court should proceed to a quick look approach or, more accurately, to a mixture or combination of the two approaches.

First, while profit sharing agreements in previous cases were to last for decades or permanently, defendants' scheme is scheduled to last only for the period of the labor dispute, plus two additional weeks. *See* *Citizen Publ'g, 394 U.S. at 133* (fifty-year agreement); *Paramount Pictures, 334 U.S. at 131* (considering apparently **[**84]** permanent profit sharing agreements); *N. Sec. Co., 193 U.S. at 197* (finding illegal an apparently permanent profit pooling arrangement); *Chicago, M. & St. P. Ry. Co., 61 F. at 996* ("The contract was to continue for 25 years."). That the term of the scheme could expire in a relatively short period — anywhere from a few weeks to a

[4] I note that the district court should not have accorded the expert's statement any weight given its explicitly speculative nature. "An expert's opinions that are without factual basis and are based on speculation or conjecture" are inadmissible at trial and are "inappropriate material for consideration on a motion for summary judgment." *Major League Baseball, 542 F.3d at 311*.

year or more, depending on the length of the strike — is no defense if the scheme is anticompetitive. *Section 1* of the Sherman Act proscribes all anticompetitive agreements, regardless of their duration: neither the text of the statute nor the case law contains an exception for anticompetitive agreements that last for less than a fixed period of substantial length. However, defendants' contention is that no anticompetitive effects could result from their arrangement, because the potentially short term of the profit sharing leaves them with sufficient incentive to compete for customers, whose allegiance might be retained after the end of the strike. Because courts have not previously considered profit sharing arrangements of a potentially very short duration, the court probably should not simply apply a pure per se analysis to defendants' arrangement.

Second, **[**85]** unlike firms in most of the prior profit sharing cases, which were the only firms of their kind operating in the relevant market, defendants were not the only **[*1150]** supermarkets in the affected areas. *See, e.g., Citizen Publ'g, 394 U.S. at 133* (the defendants were the only general distribution newspapers in Tucson). California is correct that a profit sharing plan need not cover the entire market in order to affect competition. However, it is incorrect that the distinction between a profit sharing plan that covers the entire market and one that does not is unworthy of *any* consideration before we make a determination whether anticompetitive effects will result from an agreement. As with the previous distinction, courts have not explored the question sufficiently to allow certitude with the application of a strict per se approach here.

2.

California next contends that the profit sharing agreement was a market allocation agreement that allocated the Southern California grocery market according to defendants' historic shares of that market. Market allocation agreements are "classic per se antitrust violation[s]." *See United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)*. Courts have treated **[**86]** as unlawful market allocation agreements assigning particular territories to particular vendors, *see Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam); *United States v. Topco Assocs., Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, assigning certain customers to certain vendors, *see White Motor Co. v. United States., 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*, and capping total sales volume of the market and assigning participants fixed shares of that total volume, *see United States v. Andreas, 216 F.3d 645, 666-68 (7th Cir. 2000)*. The common thread to these decisions is that in allocating the market, firms ensure that customers attempting to purchase products in the relevant market will have fewer firms competing for their business.

In contrast to the agreements at issue in the market allocation cases, however, defendants' agreement is not alleged to have decreased the number of supermarkets available to customers. Rather, California alleged that the agreement simply reduced the competition for customers among the defendant businesses. Thus, it does not allege a market allocation claim appropriate for either strict per se analysis or a mixed or blended approach, and we need proceed no further with that question. **[**87]** In view of the above, I would decline to hold that California prevails on a strict per se theory.

C.

Turning from a strict per se to a quick look, or rather, in this case, to a combined or mixed approach, fair analysis requires careful inquiry. An agreement violates *section 1* of the Sherman Act under a quick look analysis when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n, 526 U.S. at 770*. If so, the burden of proof shifts to the defendant "to show empirical evidence of procompetitive effects." *See id. at 775 n.12*; XI Areeda & Hovenkamp ¶ 1914d(1) at 355. Accordingly, a court seeking to determine on a "quick look" whether an arrangement violates *section 1* must first determine whether it can "easily . . . ascertain[ ]" a "great likelihood of anticompetitive effects," *Cal. Dental Ass'n, 526 U.S. at 770*, and, if so, whether any such effects are neutralized or outweighed by procompetitive benefits.

Taking into account the Supreme Court's recent explanation that the "categories **[*1151]** of analysis of anticompetitive effect are less fixed than terms like **[**88]** '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear," and that rather than drawing "categorical line[s]" between restraints, a court reviewing an agreement that is alleged to violate section 1 must conduct "an enquiry meet for the case," *see* id. at 779-81, a court in a case like that before us should look to the history of judicial experience with profit sharing agreements, apply rudimentary economic principles to the meaning and effects of the particular agreement in question, and carefully analyze the circumstances, details, and logic of the agreement in order to determine the likelihood of anticompetitive effects. Then it must consider the purported procompetitive effects that the defendants suggest are sufficient to overcome any anticompetitive effects of the agreement. The question, then, under the combined or mixed approach is whether, after conducting the requisite review and analysis the court can reach a "confident conclusion [that] the principal tendency" of the agreement is to restrict competition. *See* id. at 781.

Significantly, a "confident conclusion" does not always prove ultimately correct. *See supra* note 3. Rather, it represents a tool of judicial economy **[**89]** designed to save the litigants and the courts a considerable investment of time and money, which in the balance is to the benefit of all. That occasionally we might be wrong is a price that it is long established that society is willing to pay. In fact, some of the conclusions of which our leading economic experts have been confident have turned out to be incorrect. For example, Alan Greenspan, appointed and then reappointed Chairman of the Federal Reserve for five terms by four different Presidents, recently admitted to a significant flaw in the ideology that caused him to support and implement policies of financial deregulation: "We made a mistake in presuming that the self-interest of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders." *See* Paul M. Barrett, *While Regulators Slept, N.Y*. Times, Aug. 6, 2009, at BR 10. And Judge Richard Posner, a highly respected jurist and a leading economics expert, has recently expressed his admiration for Keynesian economics, reversing a lifetime of reliance on the Chicago School's approach. *See* John Cassidy, *Letter from Chicago*, The New Yorker, Jan. 11, 2010, at 28. Thus, a "confident **[**90]** conclusion" for purposes of quick look and other limited approaches means, at most, a reasonably confident conclusion a court may reach that, on some occasions, may prove to be incorrect. Equally incorrect, however, may be a conclusion reached by a body of economics experts after years of study or even a verdict reached by a jury following a full-scale trial with the most careful and thorough development of a full evidentiary record with the aid of the most experienced antitrust lawyers and expert witnesses.

Here, I am confident in my conclusion that defendants' profit sharing agreement creates a "great likelihood of anticompetitive effects," and that such effects are not outweighed or neutralized by any plausible procompetitive benefits. I am confident that neither the duration of the agreement nor the fact that defendants have less than a 100% share of the market significantly affects the anticompetitive "principal tendency" of the profit sharing agreement. In reaching this conclusion, I have considered whether, because the objective of the agreement was to affect the outcome of a labor dispute and to bring about a reduction in labor costs, my conclusion should be altered. My answer **[**91]** is a definite and unqualified "No." Finally, although the parties introduced some evidence to support **[*1152]** their respective positions, I do not rely on such empirical proof in reaching this conclusion; I note, however, that to the extent that it is relevant, the evidence appears either to support the conclusion that I would reach or, alternatively, to add little or nothing of any significance to my analysis. Finally, although some confident conclusions may ultimately prove to be incorrect, I am confident that this one will not.

1.

a.

Defendants entered into an agreement under which they shared profits with one another according to their historic shares of the market. As discussed above, the only factors distinguishing defendants' arrangement from a profit sharing agreement that would have constituted a per se violation of section 1 of the Sherman Act are (1) the presence in Southern California of a fragmented cluster of smaller markets with a residual minority of the market share, and (2) the indefinite, if limited, term of the agreement. Absent those features, defendants' scheme would simply constitute a profit pooling or sharing arrangement akin to the ones held violative of section 1 in **[**92]** earlier cases, and there would be no question that the agreement creates a "great likelihood of anticompetitive effects." This is apparent from the fact that when firms sharing profits are the only firms in a market, each will receive the same portion of the total profits whether it cuts prices, invests in improving its products or services, or does nothing to win customers from the other firms; the result of this lack of competitive pressure is the high likelihood that prices rise towards monopoly levels or fail to fall with the same effect. It is for these reasons that the Supreme Court has said that "[p]ooling of profits pursuant to an inflexible ratio" is a "§ 1 violation[ ]" that is "plain beyond peradventure." *Citizen Publ'g, 394 U.S. at 135-36*.[5]

The well-recognized effects of profit sharing set forth above help to guide the discussion in the case before us: that discussion starts from the premise that the sharing of profits among competitors ordinarily **[*1153]** has substantial adverse effects on competition. Next is the consideration whether either of the aspects of the agreement before us that defendants assert materially distinguish it from ordinary profit sharing arrangements would, in light of the "circumstances, logic, and details of the restraint," preclude that agreement from having the anticompetitive effect that would otherwise occur.

In an ordinary period in which no profit sharing arrangement is in effect, defendants compete with one another, and with a smaller set of other unrelated grocers, for customers and sales. The fruits of successful competition might accrue both in the present, as a supermarket makes sales in the current period, and in the future, as customers won or retained through such competition return **[**95]** to the store to make more purchases. Defendants contend that a profit sharing agreement of limited duration, restricted to the dominant market participants, does nothing to alter the ordinary incentive structure, and that the competitive pressure while such a profit sharing agreement is in effect is no less than the competitive pressure that would occur in the absence of such an agreement. Having reviewed their contentions and analyzed all the plausible effects of the agreement, I disagree. I am confident in the conclusion that defendants' profit sharing arrangement removes, or at the least significantly reduces, a key source of competitive pressure—competition among defendants for sales to be made during the agreement period—without there being any countervailing pressure sufficient to neutralize or overcome the overwhelming likelihood of anticompetitive effects. Although it is plausible that the two differences on which defendants rely will serve to reduce the competitive pressures to a lesser extent than would a long-term agreement among competitors who control 100% of the market, it is evident that the lessening of the reduction in competitive pressure will be one of degree only, **[**96]** and that there is no likelihood whatsoever that the anticompetitive effects of a profit sharing agreement will be eliminated.

As already stated, when an arrangement redistributes all profits on current sales among a group of competitors according to a predetermined ratio, as defendants' arrangement does, there is little reason for the individual firms within the group to compete with one another for those sales. Thus, the analysis begins with the determination that there is a high likelihood that defendants' agreement has a substantial negative effect on their incentive to compete with one another for customers in order to make sales during the period in which the agreement is in effect. Defendants nonetheless contend that there is an incentive to compete with one another for customers during the profit sharing period, pointing to the indefinite duration of the agreement and to the possibility that customers who

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[5] This effect has been well understood for many years, and was ably explained well over a hundred years ago by the Kentucky Court of Appeal, then the highest court in that state, in the following discussion of a profit sharing arrangement between two steamboat companies:

> There was a strong stimulation to increase the net profits by means other than that of popular favor springing out of efficient steamboat facilities and close attention **[**93]** to the business of shipping for reasonable charges and courteous attention to passengers at reasonable fare. . . . It is the competition, or fear of competition, that makes these carriers efficient, attentive, polite, and reasonable in charges. Remove competition, or the fear of it, and they become extortionate, inattentive, impolite, and negligent. . . . It is said that neither was bound to charge the same as the other. That is true; but either could extort with impunity, and the other would be an equal recipient of the fruit of the extortion. . . . It is true that their contract did not, in so many words, bind them to any given charges; but it made it to the interest of each, not only to charge, but to encourage and sustain the other in charges that would amount to confiscation. . . . This combination was more than that of a combination not to take freight or passengers at less than certain prices. In such case, the combiners have to furnish adequate means of transportation, and efficient and polite officers, and confine themselves as nearly as possible to the sum agreed upon, in order to secure the trade, or a reasonable portion of it; but here, by reason of the agreement, . . . **[**94]** . [i]nefficient means of transportation [and] unskilled or inattentive officials[ ] are no drawback to either boat. Its share of the profits come[s] notwithstanding.

Anderson v. Jett, 89 Ky. 375, 12 S.W. 670, 671, 11 Ky. L. Rptr. 570 (Ky. 1889).

are won or retained through competition during that period will remain as customers after the agreement ends. Additionally, they contend that the other firms in the market will exert competitive pressure on them sufficient to make up for any loss of competitive pressure among **[**97]** themselves. These contentions must be examined for their validity during the period of limited duration in general, and then in light of whether the particular circumstance of the agreement — an impending labor strike — alters that general analysis.

First, for a profit sharing agreement of limited but indefinite duration, the incentive to compete for sales and profits that would occur at some future time would necessarily be less than the ordinary incentive to compete by seeking to attract customers who will patronize the stores **[*1154]** starting immediately and will continue to patronize them in the future as well. The supermarkets assert that the profit sharing arrangement does not reduce their incentive to engage in competitive behavior because customers might buy goods at some indefinite point in the future in which profits would not be shared. Any such future incentives are at best speculative and must be heavily discounted. The sales that would produce those future profits might not be made for six months, or a year, or more. By paying money now for sales that would occur, if at all, only in the indefinite future, the defendants would incur the ordinary costs of obtaining customers without **[**98]** receiving the ordinary benefits that would accrue. Whatever incentive might remain, with the agreement in place, for the supermarkets to compete for customer purchases in the future is considerably outweighed by the incentives that the agreement reduces to compete for purchases today. Viewing matters most favorably to defendants, the anticompetitive effects resulting from an agreement of limited, if indefinite, duration might be diminished, but certainly would not be eliminated. There can be no question whatsoever that the profit sharing agreement of indefinite duration would at least to some degree reduce defendants' incentive to compete.

With defendants exerting reduced competitive pressure on one another during the profit sharing period, competition from firms not included in the profit sharing agreement would have to result in an extraordinary amount of increased competitive pressure to make up for the loss of the paramount pressure that defendants ordinarily exert on each other. This too is highly unlikely.[6] During the profit sharing period, defendants controlled at least 60% of the Los Angeles-Long Beach portion of the Southern California market and at least 70% of the San Diego **[**99]** portion, and between them operated more than 950 stores in the areas affected by the agreement, a combined presence sufficient to suggest an ability to significantly affect prices and other outcomes in the Southern California market.[7] Defendants would be **[*1155]** at least partially insulated from competition from other vendors by virtue of the many

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[6] IIA Areeda & Hovenkamp ¶ 391b(1) at 323 ("[W]hether a price-fixing conspiracy among sellers involves everyone or only a dominant group, this business practice leads to overcharges that constitute antitrust injury. The same can be said for business practices that are economically equivalent — for example, agreements on market division, product quality, credit terms, and the like.").

[7] No precise **[**101]** standard exists for determining when a firm or a group of firms controls enough of a market that its actions might cause anticompetitive effects. However, the uncontested facts about defendants' share of the market and the fragmented nature of the rest of the market together appear to be sufficient to establish the monopoly power over the market required for a violation of *section 2* of the Sherman Act, a higher standard than is required to find that a firm or firms had sufficient power in the market that their actions could violate *section 1*. *See* *Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (a firm with over two-thirds of the market is a monopoly); *Syufy Enters. v. Am. Multicinema, Inc., 793 F.2d 990, 995-1000 (9th Cir. 1986)* (60-69% market share accompanied by a fragmentation of competition sufficient to show "monopoly power" over a market as required for violations of *section 2* of the Sherman Act); *Pac. Coast Agric. Exp. Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975)* (45-70% share of the market sufficient to show monopoly power where no other competitor had more than a 12% share); *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* **[**102]** ("Monopoly power under *§ 2* requires, of course, something greater than market power under *§ 1*."); *cf.* *FTC v. Staples, 970 F. Supp 1066 (1997)* (applying 1982 Merger Guidelines); *Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 896 (9th Cir. 2008)* ("When firms in a market are able to coordinate their pricing and production activities, they can increase their collective profits and reduce consumer welfare by raising price and reducing output.") (citing George Stigler, A Theory of Oligopoly, 72 J. Pol. Econ. 44 (1964) (arguing that successful collusion requires firms to overcome particular market uncertainties; one of the key uncertainties is whether another firm will "cheat" its rivals by offering a lower price)); United States Energy Information Administration, World Crude Oil *Production*, 1960-2008, *http://www.eia.doe.gov/aer/txt/ptb1105.html* (last visited June 13, 2009) (during the 1970s OPEC never controlled more than 56% of the world oil market).

and varied locations of their stores, which for numerous customers would be far more convenient to patronize than the markets operated by the other vendors. Defendants also would be partially insulated from such competition by the inability of the other vendors to compete effectively as a result of brand recognition (and, indeed, customer awareness of their existence), limited facilities, contracts with suppliers and staffing commensurate with their limited historical role in the market; factors that would substantially curtail the ability of the other vendors to serve additional customers.[8] Those other vendors would no more be able to increase their capacity, staff, supplies, and brand recognition overnight than they could immediately open new locations convenient for defendants' customers. Nor would they be inclined to spend money to do so, knowing **[**100]** that the profit sharing agreement was of limited duration and, in fact, could end at any time. Finally, those other vendors are mainly independent of each other, consist of various types of markets, and would have neither the inclination nor the ability to agree on a uniform marketing policy that would significantly increase whatever competitive pressure the totality of those vendors ordinarily exerts on defendants. The overwhelming likelihood appears to be that, on the whole, smaller vendors would do little if anything to alter their marketing practices but rather would continue on their ordinary course, which would not serve to increase their economic pressure on defendants beyond what they ordinarily exert, or attract any large number of the customers that ordinarily patronize defendants.[9]

[*1156] No one would dispute that the supermarkets' agreement had anticompetitive effects if they had simply agreed to fix equal prices and wages in order to eliminate competitive risk. The agreement in this case generated no less irreducibly anticompetitive effects, because the supermarkets' arrangement, like any other naked restraint on trade, reduced incentives to compete and yielded no **[**105]** plausible off-setting procompetitive or competition-neutralizing effects. A rudimentary knowledge of ***antitrust law*** dictates the conclusion that, if defendants in this case agreed to share profits for a limited period for their mutual economic benefit, there would be a violation of *section 1* of the Sherman Act — at least in the absence of some extraordinary circumstance.

This brings us to defendants' contention that the threat of a strike, or a strike itself, constitutes such a circumstance. First, then, we must consider whether the profit sharing agreement loses its anticompetitive effects when it becomes operative during the course of a strike or labor dispute. There should be little difficulty in answering that question: the fact that defendants' agreement provides for profits to be shared only during a labor dispute and a brief ensuing period does not alter its inherently anticompetitive nature. Even during a strike period, a profit sharing agreement generates a "great likelihood of anticompetitive effects." For a vendor, the principal features of an employee strike are diminished consumer demand, as some customers choose not to cross the picket lines; a reduced workforce, because **[**106]** some workers at least are on strike; and a more urgent financial condition, as

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[8] Another consideration is that many alleged competitors' product offerings differ substantially from those of defendants, including box stores selling goods in bulk, such as Costco; retailers selling a limited selection of products and brands, **[**103]** such as Trader Joe's; and stores specializing in organic foods, such as Whole Foods. These markets are by their nature incapable of competing for much of the business of traditional supermarkets such as those operated by defendants. Notwithstanding these obvious facts, Costco, Trader Joe's, and Whole Foods were each alleged by defendants to have placed competitive pressure on them during the labor dispute.

[9] Interestingly, economic theory suggests an even stronger negative effect on competition: it would appear to predict that, at least in the short run, in a market in which large, dominant firms have an agreement limiting competition amongst themselves, such an agreement will tend to increase the prices charged by those large firms, and that smaller firms, rather than increasing whatever economic pressure they ordinarily exert on those larger firms by charging the lower prices that would obtain under competitive conditions in order to attract the larger firms' customers, but will instead charge higher prices close to those being charged by the larger firms. *See* Herbert Hovenkamp, Federal Antitrust Policy § 4.1b (1994). Firms that pool profits are acting as a kind of cartel, and cartels **[**104]** that do not contain all the firms in the market are still able to raise prices above the prices that would be observed in a competitive marketplace, especially in a short term situation like that present here, in which the fixed costs of starting a supermarket (leases, employment and product purchasing contracts, signage, etc.) make it unlikely that new firms would enter the market to take advantage of the prices that are artificially high due to the cartel's collusive behavior. *See* Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 107-15, 122 (3d ed. 2000). Additionally, fixing market shares at precartel levels, as defendants essentially did here, is an "effective technique" for preventing cheating (in the form of competitive behavior) among members of the cartel. *See id. at 139-40*.

fixed costs remain at nonstrike levels, and revenues go down. While diminished demand, a reduced workforce, and a more urgent financial condition might affect defendants' competitive behavior during the strike, these potential effects would occur independent of the existence of a profit sharing agreement. None of these effects changes the basic impact of the agreement: defendants had little incentive to compete with one another while it was in effect because any profits earned on sales to another defendant's former customers would simply be redistributed back to the other defendants.[10]

The profit sharing agreement itself would have an additional effect; it would cause defendants to compete even less during the strike period than they would were there no profit sharing agreement in effect at that time. Whatever the baseline circumstance as to competition in any given period, including a strike period, the existence of the profit sharing agreement results in a greater likelihood of reduced competition than there would otherwise be. That is the simple lesson that is apparent from a rudimentary knowledge of economics. **[*1157]** Profit sharing necessarily serves to diminish the incentives to compete below whatever the level of competition would be in the absence of such an agreement; it is inherently, or as some courts have said, intuitively, anticompetitive and has the same, or a similar, effect on competition during a strike as it **[**108]** would have before the strike and after it ends. *See Cal. Dental Ass'n, 526 U.S. at 780-81*. The ultimate impact that the agreement has on pricing or output might be lower or higher depending on other circumstances, such as the existence of the anticipated labor dispute; however, whether greater or lesser, the net effect in all circumstances would be anticompetitive.

For the reasons explained above, I conclude that a "great likelihood of anticompetitive effects can easily be ascertained" by examining the agreement in light of prior cases, in light of its circumstances and details, as well as in light of logic and rudimentary principles of economics. Here, those anticompetitive effects are not only substantial, but they result from an agreement that removes fundamental incentives to engage in competition for an indefinite period. In short, neither the fact that there are a number of smaller companies in the market, the fact that the agreement is of an indefinite though limited duration, nor the fact that the agreement takes effect during a strike, warrants a departure from the well-established rule that profit sharing agreements are anticompetitive and violate *section 1* of the Sherman **[**109]** Act.

b.

Defendants' fallback position is that the state lacks empirical evidence to demonstrate that the effects of the agreement were anticompetitive in practice. However, neither per se nor quick look review ordinarily requires empirical evidence of anticompetitive effects, nor is it required for the combined or mixed per se/quick look approach that should be applied here. As Professors Areeda and Hovenkamp explain, "[t]he main difference between . . . the 'quick look' approach and the rule of reason is that under the former the plaintiff's case does not ordinarily include proof of [market] power or anticompetitive effects." XI Areeda & Hovenkamp ¶ 1914d(1), at 355; *see also Cal. Dental Ass'n, 526 U.S. at 779-80* (explaining that the "quality of proof required should vary with the circumstances;" that "naked restraint[s] on price and output need not be supported by a detailed market analysis in order to" move to the second step of the quick look analysis and "require" defendants to produce "some competitive justification"; and that not "every case attacking a less obviously anticompetitive restraint . . . is a candidate for plenary market examination") (internal quotation marks omitted)). **[**110]** So long as the anticompetitive nature of the likely effects of an agreement is, as a theoretical matter, "obvious," it is not necessary for a plaintiff to provide empirical evidence demonstrating anticompetitive consequences. *See Cal. Dental Ass'n, 526 U.S. at 770-71*; *see also NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 109-10, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Such a rule is necessary in antitrust cases, where "reliable proof" of such effects might be "impossible to produce."

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[10] A more urgent financial condition would appear, if anything, to make it less likely that defendants would commit resources to competing with each other for customers from whom they would receive profits, if at all, only at some future date. To any extent that lower demand, lower supply, or strike-caused financial woes would prompt a defendant to try to win customers from vendors external to the agreement, the profit sharing agreement would, as in a nonstrike period, reduce its incentive for doing so: while the defendant would **[**107]** pay the entire cost (in advertising, improved quality, or discounting) of luring such customers, it would retain only a fraction of the benefit generated equal to its prestrike share of the market, and a substantial number of the new customers might well, for reasons discussed earlier, be lost by the time the labor dispute and profit sharing ended.

XI Areeda & Hovenkamp ¶ 1901d at 207 (also noting that "in most [antitrust] cases . . . the impact on output," which in this case would be diminished sales at higher prices, "is assessed by inference from the nature of the agreement and surrounding circumstances rather than by actual empirical measurement").

This is a case in which reliable proof of anticompetitive effects or their absence through empirical evidence might be difficult **[*1158]** to obtain. Defendants' own expert explained that, because the profit sharing agreement took effect only during the labor dispute and both the agreement and the labor dispute might affect defendants' pricing decisions, the data required to best distinguish between the effects of the strike and **[**111]** those of the agreement and determine whether and how the agreement affected competition between defendants do not exist. *See* Declaration of Thomas R. McCarthy ¶ 47.

This is, more important, a case in which the anticompetitive nature of the restraint is obvious. As discussed above, by the terms of the agreement any defendant that earns profits above its historic market share is required to give those additional profits to the other defendants. Because a defendant may not retain any profits that it made from competing with the other defendants and receives a proportionate share of whatever profits those other defendants make from competing with it, the profit sharing agreement plainly reduces the competitive pressure among defendants for sales whenever it is in effect, during the strike or otherwise. To justify their conduct, defendants rely not on the neutral or positive effect on competition arising out of their agreement, but on other sources of competitive pressure—increased competition from other vendors and competition with one another for post-strike business. As explained above, it is wholly implausible that those factors would be sufficient to overcome the reduction in competitive **[**112]** pressure that necessarily results from the profit sharing agreement. Defendants' agreement plainly removes a significant source of competitive pressure without giving rise to any comparable counter-source to replace it.[11] Accordingly, California has carried its burden by **[*1159]** demonstrating the existence of a great likelihood of anticompetitive effects.

Although California was not required to adduce empirical evidence of anticompetitive effects, given the nature of the restraint at issue in the case, the empirical evidence before us supports its contentions or is, at the least, of no substantial consequence. Defendants acknowledge diminished competitive behavior, such as discounting and advertising, during the period in which the profit sharing agreement was in effect. This, in all likelihood, resulted in at least some increase in, or some failure to reduce, the prices charged to the consumers. *See* Declaration of Thomas R. McCarthy, Backup to ex. 7A; Declaration of Steven Lawler at ¶ 8; Declaration of Carla Simpson ¶¶ 6-7; Declaration **[**115]** of Charles Ackerman ¶¶ 15-19. Defendants explain this change in behavior by attributing it to

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[11] The obviously anticompetitive nature of defendants' profit sharing agreement in a traditional market setting distinguishes it from the restraint in *California Dental Association*. Here, there is a long history of adjudging profit sharing agreements to be anticompetitive and of demonstrating the validity of that conclusion. The unique limits on price and quality advertising by dentists that were at issue in *California Dental Association* might have been thought by some to reduce incentives to compete over price or quality, because without such advertising it would be difficult for a dentist to inform potential customers about his advantages over his competitors and, thus, lowering his prices or expending resources to improve his quality might simply have reduced his profits from existing customers. However, the Court reasoned that the nature **[**113]** of the market for "professional services" such as dental care was unique and that the circumstances made it difficult to compare services across providers and to verify price and service information, meaning that price and quality advertising might have been misleading, and misleading advertising itself poses dangers to competition. *See* Cal. Dental Ass'n, 526 U.S. at 771-72. Accordingly, the Court concluded, that because of the "professional context," it was not implausible that, as a theoretical matter, the restriction on price advertising had either a positive effect or no effect on competition. *See* id. at 774-75. The Court emphasized that theoretical claims of anticompetitive effects that are not evident or established in ***antitrust law*** must be carefully considered and clearly explained in order to justify shifting the burden to defendants to show some procompetitive effect. *See* id. at 775 n.12. Here, the subjective factors that the Court found were critical to the sale of professional services do not exist. Economic theory as well as a practical analysis of the factual circumstances make it clear that there is a high likelihood that the profit sharing agreement had anticompetitive **[**114]** effects. Unlike *California Dental Association*, there is a clear theoretical basis for concluding that a profit sharing agreement would have anticompetitive effects, and, again unlike *California Dental Association*, there is no plausible basis, theoretical or otherwise, for concluding that the profit sharing agreement had procompetitive effects, *see infra* section IV.2. Accordingly, the burden to demonstrate evidence of the restraints' procompetitive effects falls on defendants, who do not meet it in any way.

the lack of personnel created by the strike, rather than to the profit sharing agreement. However, their expert, who relied on this explanation, performed no regression or other statistical analyses, which are typical means of determining the effects of multiple variables, such as the labor dispute and the profit sharing agreement, on a single dependent variable, such as competitive behavior by defendants. *See, e.g., Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1183-84 & n. 9 (9th Cir. 2002)*. Instead, he simply looked at limited data from Albertsons and declared that Albertsons "did a lot of discounting during the strike" and that it increased its use of certain discounting methods. *See* Declaration of Thomas R. McCarthy ¶¶ 51-53. Because his analysis lacks a discussion of how much discounting Albertsons would have done absent the profit sharing agreement, it is beside the point. California's expert, who did perform regressions, asserted in his deposition that those regressions revealed that competition between defendants during the strike was harmed by the profit sharing agreement. He further **[**116]** noted that Vons raised its prices despite suffering a dramatic drop in demand for its products, exactly the opposite of the lower prices that are expected when demand drops in a competitive marketplace.[12]

[*1160] Given the obviously anticompetitive nature of defendants' profit sharing agreement, no empirical data about the effects of the agreement are necessary for "an enquiry meet for [this] case." Nonetheless, a review of the empirical evidence in the record only increases the certainty that defendants' agreement generated a great likelihood of anticompetitive effects, that it is implausible that such effects could be overcome or neutralized by the conduct of defendants or others during the term of the agreement, and that requiring a full rule of reason inquiry would be contrary to the efficient and effective implementation of our antitrust laws.

2.

Where, as here, a "great likelihood of anticompetitive effects can easily be ascertained," the burden of proof is shifted to the defendant to "to show empirical evidence of procompetitive effects." *Cal. Dental Ass'n, 526 U.S. at 770, 775 n.12*; XI Areeda & Hovenkamp ¶ 1914d(1) at 355 (when "the restraint is of such a character that an anticompetitive effect may be presumed," then "the only tolerance permitted to the defendant **[**119]** is to show" procompetitive effects). Procompetitive effects include efficiency gains, the development or improvement of products, and other benefits to consumers and society. *See* XI Areeda & Hovenkamp ¶ 1912c(2) at 320. In *California Dental Association*, for instance, the Supreme Court saw a plausible procompetitive justification for the dentist association's restrictions limiting price and quality advertising in the potential of such restrictions to improve consumer information by eliminating false and misleading advertising. *See 526 U.S. at 771-72*.

At this point comes defendants' actual and least justifiable contention. The supermarkets assert that conduct that serves to reduce the cost of labor serves a procompetitive purpose, such as may excuse otherwise anticompetitive

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[12] Defendants' evidence purporting to show that employees charged with pricing during the dispute did not know about the profit sharing agreement and took no action because of it, which was relied upon by the district court, also fails to provide support for their contentions. Their evidence on this point is both skeletal and somewhat dubious. Defendants do not come close to demonstrating that all employees with power over pricing were ignorant of the agreement or took no action because of it. *See, e.g.*, Declaration of Bryan Davis ¶ 3 (Albertsons employee describing himself as responsible only for the prices in a discreet category of groceries); Declaration of Carla Simpson ¶ 2 (Safeway employee describing herself as having responsibility only for implementing pricing established by another department). Moreover, early in the strike the Los Angeles Times published a front-page article revealing that the chains had agreed to share the financial burden of the strike. *See* Nancy Cleeland **[**117]** & Melinda Fulmer, *In Tactical Move, Union Pulls Pickets From Ralphs*, L.A. Times, Nov. 1, 2003, at A1. More important, it would defeat entirely the efficiency goals underlying the existence of per se, quick look, and "meet for the case" analysis if defendants could preclude a summary finding, and proceed to full rule of reason analysis, simply by asserting that the employees in charge of pricing did not know about the profit sharing. Such assertions are easy to make, while proving or disproving who knew what, and whether the knowledge of a particular individual had any effect on whether the company acted in a competitive manner, would require exactly the sort of onerous and costly production of evidence that summary review is meant to avoid. In any case, as noted above, the quick look inquiry is a probabilistic one: in order to place the burden on defendants to demonstrate that the agreement had a procompetitive effect, California need prove only that defendants' agreement to share profits created a great likelihood of anticompetitive effects. Accordingly, even if the anticompetitive effects had not come to pass because certain employees did not learn of the agreement or did not correctly **[**118]** calculate where the company's interests lay in light of the agreement, that fact would be immaterial to the result of our inquiry.

behavior. They contend that the procompetitive benefit of their agreement is that it increased their chances of winning the labor dispute and reducing the wages and benefits they would be required to pay to their employees, which in turn would increase their ability to lower prices and compete more effectively with other companies. *See* Declaration of Thomas R. McCarthy ¶ 10. Defendants' proffered justification for **[**120]** their profit sharing arrangement is, in essence, a countervailing power defense that the restraint of trade is necessary in order to give them sufficient bargaining power to counteract the market power exercised by their striking workers and thereby to allow them to purchase their workers' labor at a lower price.

As California points out, however, the chain of contingencies linking defendants' exercise of bargaining power to reduced prices for consumer purchases renders any such procompetitive benefits of their profit sharing agreement purely speculative. Rule of reason examination of defendants' countervailing power defense is accordingly unnecessary. "Suffice it to say that the theoretical literature suggests that countervailing cartels seldom improve the welfare of consumers." XII Hovencamp, ***Antitrust Law***: *An Analysis of Antitrust Principles and Their Application*, ¶ 2015b at 158 (2d ed. 2000).

[*1161] More important, driving down compensation to workers in this way is not a benefit to consumers cognizable under our laws as a "procompetitive" benefit. Defendants do not pretend that they agreed to bargain in such a way that there will be a greater overall amount of labor purchased, for example **[**121]** because the transaction costs to purchase each unit of labor are lower when the supermarkets work together. Defendants' argument for why their profit sharing agreement is procompetitive is instead, essentially, that it increases their bargaining power relative to striking workers in order to buy their labor at a lower price. In this way, the profit sharing arrangement resembles a cartel on the buyer side of the market.

The Supreme Court has made clear, however, that because ***antitrust law*** operates to correct all distortions of competition, it condemns market actors who distort competition, whether on the buyer side or seller side. *See* *Weyerhaeuser Co. v. Ross-Simmons Hardwood, 549 U.S. 312, 322, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* ("Predatory-pricing and predatory-bidding claims are analytically similar. . . . This similarity results from the close theoretical connection between monopoly and monopsony."). Accordingly, the Court has long understood the Sherman Act to condemn buyer side cartels. *See, e.g., American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*; *Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*; and certain exercises of single-firm buyer power. *See* *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. **[**122]** A central problem with allowing a countervailing power defense to justify buyer collusion is that such defense would be raised "in almost any case where the selling market is not perfectly competitive," such that all "[n]on-immune employers would claim the right to collude on wages because their employees are organized into unions and thus have significant power." XII Hovencamp ¶ 2015b at 156.

In any event, defendants' argument is wholly unpersuasive in light of our nation's labor laws and policies. It is a primary objective of these laws to protect the rights and interests of working persons, and to enable them to obtain a fair and decent wage through collective action.[13] Reducing workers' wages and benefits is hardly an objective that would justify a violation of our antitrust laws or constitute a benefit to the public so substantial as to overcome

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[13] "One of the important social advantages of competition mandated by the antitrust laws is that it rewards the most efficient producer and thus ensures the optimum use of our economic resources. This result, as Congress [has] recognized, is not achieved by creating a situation in which manufacturers compete on the basis of who pays the lowest wages." *United Mine Workers of Am. v. Pennington, 381 U.S. 676, 724, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)* (Goldberg, J., dissenting and concurring); *see also* *15 U.S.C. § 17* ("The labor of a human being is not a commodity or article of commerce."); *Polygram Holding, Inc. v. FTC, 416 F.3d 29, 38, 367 U.S. App. D.C. 367 (D.C. Cir. 2005)* ("A restraint cannot be justified solely on the ground that it increases the **[**124]** profitability of the enterprise . . . ."); *Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998)* ("[M]ere profitability or cost savings have not qualified as a defense under the antitrust laws."). Depressing wages is not of societal benefit; it simply harms working people and their families, a significant part of the group that has come to be known as "the middle class," and which is experiencing enough economic travail without the added unlawful actions of those conspiring to violate the antitrust laws.

the deleterious consequences of anticompetitive conduct. There is no reason, even if we had the authority to do so, to set aside the ordinary principles governing ***antitrust law*** in order to unbalance the carefully developed legal structures relating to our laws governing collective **[*1162]** bargaining; nor is there any reason or justification for **[**123]** assuming the function of increasing the economic power of employers to the disadvantage of their employees. To the extent that anticompetitive conduct is exempted from the application of our antitrust laws in order to facilitate the operation of labor/management processes, even the majority holds that it does not provide an escape device for the employers' conduct in this case. Defendants have not offered, much less demonstrated, any way in which their agreement generates procompetitive effects.

It is little wonder that the majority expressly declines to address the "grocers['] argu[ment] that the RSP has procompetitive benefits in the form of lower prices for consumers as a result of the grocers' ability to negotiate a more favorable contract on labor costs." Maj. Op. at 9313 n.17. Were defendants' proffered justification accepted as a ground for requiring full-blown rule of reason inquiry, colluding firms could evade quick look condemnation, without in any way increasing real efficiency or reducing costs to the consumer. Firms like the supermarkets that participate in markets for both buying (labor) and selling (groceries), and engage in a restraint of trade that has distorting **[**125]** effects in both, cannot avoid quick look review of anticompetitive conduct simply by positing that they could conceivably pass on to consumers in the selling market any private gains such firms may achieve by restraining competition in the buying market. Allowing them to do so would lead to the absurd result that conduct which restrains *more* competition, in the sense that it distorts competition in both the buying and selling markets, would be subject to less demanding scrutiny than would be a comparable restraint that distorted just one market.

3.

Defendants have put forward no plausible procompetitive effects to overcome or neutralize the great likelihood of anticompetitive effects that would result from the implementation of their profit sharing agreement. That likelihood is evident from a plain reading of the agreement's terms, an examination of the ample case law regarding profit sharing agreements, a rudimentary knowledge of economics, and an analysis of the "circumstances, details, and logic" of the agreement. In the absence of a procompetitive justification that outweighs the likelihood of substantial anticompetitive effects, I conclude with confidence and even with certainty **[**126]** that the profit sharing agreement violates *§ 1* of the Sherman Act. I also conclude with the same measure of confidence and certainty that denying California the injunction to which it is entitled, simply because the parties did not engage in an extremely costly, burdensome, and utterly unnecessary battle of economic experts under rule of reason review, is contrary to the fundamental policies underlying our ***antitrust law***, and encourages future antitrust violations by these defendants and others who may seek to suppress the rights of their employees.

Accordingly, I dissent in part.

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Windstar Holdings LLC v. Range Res. Corp.

United States District Court for the Northern District of West Virginia

July 12, 2011, Decided

CIVIL ACTION NO. 1:10CV204

Reporter

2011 U.S. Dist. LEXIS 75208 *; 2011-1 Trade Cas. (CCH) P77,526; 2011 WL 2709849

WINDSTAR HOLDINGS LLC, Plaintiff, v. RANGE RESOURCES CORPORATION, RANGE RESOURCES - APPALACHIA, LLC, M.W. GARY & ASSOCIATES, LLC, and ADAM G. YOUNG, Defendants.

Core Terms

lease, motion to dismiss, cause of action, antitrust, offers, bonus, signing, rights, pled, civil conspiracy, representations, alleges, matter of law, binding

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For M.W. Gary & Associates, LLC, Defendant: Kevin C. Abbott, LEAD ATTORNEY, Reed Smith LLP, Pittsburgh, PA.

Judges: IRENE M. KEELEY, UNITED STATES DISTRICT JUDGE.

Opinion by: IRENE M. KEELEY

Opinion

MEMORANDUM OPINION AND ORDER GRANTING-IN-PART AND DENYING-IN-PART MOTIONS TO DISMISS (DKTS. 17, 19)

Related defendants Range Resources Corporation and Range Resources - Appalachia, LLC (collectively, "Range"), and defendant M.W. Gary & Associates, LLC ("Gary"), each have moved to dismiss the complaint filed by the plaintiff, Windstar Holdings LLC ("Windstar"). The motions allege that Windstar's complaint **[*2]** fails to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. For the reasons that follow, the Court **GRANTS-IN-PART** and **DENIES-IN-PART** both motions.

I. FACTUAL BACKGROUND

The factual and legal issues raised in this case closely mirror those discussed in the Court's recent opinion in *Backwater Properties v. Range Resources Appalachia, Civ. Action No. 1:10CV103, 2011 U.S. Dist. LEXIS 48496 (N.D.W. Va. May 5, 2011)*(Memorandum Opinion and Order, dkt. 71).[1] In Backwater, the Court held that language in lease documents provided to the plaintiffs in that case, in combination with alleged oral statements by Range's agents, precluded dismissal of claims for breach of contract, fraud, tortious interference, and unjust enrichment. The Court, however, did grant Range's motion to dismiss claims based on violations of federal and state antitrust laws. Some, but not all, of the claims asserted in this case parallel those in Backwater.[2]

As in Backwater, the plaintiff here alleges that, pursuant to an "Exclusionary Scheme" (the so-called "Bid Rigging Plan" in Backwater), Range enticed owners of natural gas rights in the Marcellus shale formation to sign lucrative, above-market-value leases of their gas reserves. According to Windstar, Range and its agents led it to believe it had binding contracts, subject only to confirmation of title. On information and belief, it alleges that Range in fact never intended to honor the agreements unless subsequent market conditions made doing so profitable. Windstar surmises that Range sought to prevent other gas companies from signing contracts with it, and succeeded by causing Windstar to turn down other offers to lease its gas rights at rates lower than those offered by Range.

Windstar originally filed this case in the Circuit Court of Monongalia County, West Virginia. Range filed a timely notice of removal based on diversity. The complaint sets forth the following narrative with regard to Windstar's dealings with Range and its agents:

• In early 2008, Range, **[*4]** along with its land company, Gary, began soliciting leases in northern West Virginia as well as in Pennsylvania. Defendant Adam Young[3] served as a "landman" or leasing agent for Range and Gary;

• The defendants formulated a scheme whereby they would entice gas owners into signing leases at above-market rates, with the intent only to honor the leases if future market conditions made them profitable. This had the effect of "locking up" the gas rights, essentially giving Range an option to buy. These proposals offered large per-acre signing bonuses, and production royalties significantly above the industry standard 1/8 (12.5%);

• In August and September of 2008, Young contacted Windstar, through its sole member R. Scott Summers ("Summers"), to solicit a gas lease. Young represented himself to be a Range employee. He also made the following representations, among others, to Summers: Range would pay Windstar a royalty rate of 18.5% of the value of all gas produced, plus $2,500 per acre as a signing bonus; the lease was pre-approved, only contingent upon certification of title; and "time was of the essence." He later increased the signing bonus to $2,850 per acre and stated that Range would **[*5]** lease the rights on those terms if Windstar signed within a month.

Along with the lease, Young presented Windstar with a "Dear Property Owner" letter ("DPO letter")(Windstar calls this the "Bonus Contract"), which stated that Windstar would receive an additional bonus payment as consideration for signing the lease. Young represented that the lease contract was binding as soon as Summers signed, that the lease language requiring Range's management approval process was a mere formality, and that Windstar would receive the bonus payment once a title check was completed;

• Summers, on behalf of Windstar, signed the lease on September 11, 2008, and returned it to Young. Summers then signed the DPO letter;

• Both before and after signing the Range lease and DPO letter, Windstar turned down other offers from competing potential lessees, with signing bonuses and royalties less than Range offered;

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[1] Unlike Backwater, this case is not a putative class action.

[2] Additionally, the Court recently granted Range's motion to dismiss in *Kerns v. Range Resources, Civ. Action No. 1:10CV23, 2011 U.S. Dist. LEXIS 4473 (N.D.W. Va., Jan. 18, 2011)*, (Memorandum Opinion and Order, dkt. 34). The causes of action in Kerns **[*3]** differed significantly from those set forth in Backwater and this case, although the factual allegations were somewhat similar.

[3] Windstar has not perfected service on Young, nor has he entered an appearance in this case.

• On November 11, 2008, Range sent the lease back to Windstar, unsigned and stamped "VOID." Attached was a letter stating that the lease was not approved by Range management, but offering an alternative on slightly **[*6]** less favorable terms to Windstar (providing for the same total compensation, but the bonus would be spaced out over five years instead of paid immediately). The letter stated that the proposal would remain open until December 31, 2008;

• Summers contacted Young, who made further representations, including that the lease was contingent only on a title search and that the first installment of the bonus payment would be made in early January of 2009 if Windstar agreed to the new proposal;

• Summers agreed, and signed the new proposal. Young confirmed that Windstar had been "marked down" for a "2009 lease." He also stated in person that "the money is coming;"

• Windstar never received any payment, and, after several inquiries, Range informed Summers in May 2009 that the lease was "under management review." In June 2009, Range stated that it had stopped leasing in West Virginia and would not pursue a lease with Windstar; and

• Because of the drop in gas prices during the time it believed it had a binding contract with Range, Windstar was unable to lease its gas rights to another company at any price.

II. ANALYSIS

Windstar asserts seven causes of action, all of which Range and Gary argue fail **[*7]** to state a claim. In the context of a motion to dismiss under *Rule 12(b)(6)*, the Court must accept the factual allegations of the complaint as true, but need not accept the plaintiff's legal conclusions. *Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)*. With this standard in mind, the Court addresses in turn each cause of action as pled in the complaint.

A. Count One - Breach of Contract

This count is alleged only against the Range defendants, who argue that the proposed lease and DPO letter were not offers but merely an invitation to bargain. In Range's view, Summers's signature merely constituted an offer by Windstar, which Range could accept or reject at its discretion. The lease itself stated that it was subject to approval by Range's management.

As this Court ruled in Backwater, however, Range's argument fails on a motion to dismiss because, at a minimum, when combined with the written documents, Young's statement that management approval was a mere formality creates a plausible claim that Windstar and Range had enforceable contracts for both the bonus payment set forth in the DPO letter and compensation due under the lease. Also, as discussed below, because the plaintiff **[*8]** has adequately pleaded a case for fraud, these oral representations place the contract outside the statute of frauds. The Court therefore **DENIES** Range's motion to dismiss with respect to Count One.

B. Count Two - Specific Performance

Although pled as a separate count, the relief sought in Count Two – compelling Range to perform under the lease – is not an independent cause of action, but merely a possible remedy should Windstar ultimately establish the existence of a contract and a breach by Range. Contrary to the argument advanced by Range both in Backwater and here, the West Virginia Supreme Court of Appeals has recognized the possibility of ordering specific performance under a mineral lease. See *Blair v. Dickinson, 133 W. Va. 38, 54 S.E.2d 828 (1949)*. Thus, although the count does not state a separate cause of action, it would be inappropriate to prematurely limit the possibility of the plaintiff's recovery of this remedy. Accordingly, the Court **DENIES** the defendants' motions to dismiss with respect to Count Two.

C. Count Three - W. Va. Antitrust Act

Windstar alleges a cause of action for illegal restraint of trade under *W. Va. Code § 47-18-3*. As a matter of law, however, its claim fails because **[*9]** Range, Gary and Young were not competitors, but rather members of the same enterprise, and thus, as a matter of law, cannot combine or conspire in manner giving rise to antitrust liability.

In *Princeton Ins. Agency, Inc. v. Erie Ins. Co., 225 W. Va. 178, 690 S.E.2d 587, 593 (W. Va. 2009)*, the West Virginia Supreme Court of Appeals explicitly stated that, as directed by *W. Va. Code § 47-18-16*, it would "look to federal [***antitrust] law*** to define what constitutes an unlawful restraint of trade." In that same case, the Court also held that the "legally distinct entities" requirement of federal law, which requires at least two separate economic actors to sustain an illegal combination or conspiracy, is applicable under the West Virginia Antitrust Act. *Id. at 593* (quoting *Oksanen v. Page Memorial Hospital, 945 F.2d 696, 702 (4th Cir. 1991)*.

Thus, because it is undisputed that M.W. Gary was an agent of Range, and Adam Young an agent of either or both of them, there can be no contract, conspiracy, or combination between any of them that would support a cause of action under the West Virginia Antitrust Act. Accordingly, the Court **GRANTS** the defendants' motions to dismiss Count Three.

D. Count Four - Sherman Antitrust [*10] Act

Federal ***antitrust law*** also does not prohibit the concerted action of persons or entities engaged in the same overall enterprise. *Oksanen, 945 F.2d at 703* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. Thus, Windstar's Sherman Act allegations fail to state a claim as a matter of law, and the Court **GRANTS** the defendants' motions to dismiss Count Four of the complaint.

E. Count Five - Fraud and Civil Conspiracy

Count Five contains two separate causes of action, one for fraud and one for civil conspiracy. While the former is adequately pled, the conspiracy claim fails as a matter of law for reasons similar to those that warranted dismissal of the state and federal antitrust allegations in Counts Three and Four.

The facts alleged in the complaint support an allegation of fraud under *Rule 9 of the Federal Rules of Civil Procedure*. "[T]he 'circumstances' required to be pled with particularity under *Rule 9(b)* are 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999)*(quoting 5 Charles **[*11]** Alan Wright and Arthur R. Miller, Federal Practice and Procedure: Civil § 1297, at 590 (2d ed. 1990)).

It is not implausible to infer from the allegedly inflated offers, and the obfuscatory contract language in combination with Young's alleged statements, that Range and its agents intentionally misled Windstar into believing that a binding contract had been formed, although it never intended to carry out the contract unless later developments made doing so profitable.

The false statements element is satisfied by the various representations allegedly made by Mr. Young in late 2008 and early 2009, including that the lease would be valid depending only on a title search, and that the money was "on the way," or would be paid in early January 2009. Windstar states unequivocally that it relied on these statements to its detriment by not entertaining other offers both before and after it signed with Range.

Accepting the complaint's version of Mr. Young's statements as true, as the Court must on a motion to dismiss under *Rule 12(b)(6)*, it was not unreasonable for Windstar to rely on those representations. Finally, Range allegedly gained a valuable option to lease the plaintiff's gas rights by **[*12]** virtue of its misleading statements. Thus, the Court **DENIES** the motion to dismiss with respect to the fraud claim set forth in Count Five.

Range and Gary correctly assert, however, that a corporation cannot conspire with its agents or employees. See *Ridgeway Coal Co., Inc. v. FMC Corp., 616 F.Supp. 404 (S.D.W. Va. 1985)*. As previously noted, at all relevant times, Gary and Young were agents or sub-agents of Range. Thus, the Court **GRANTS** the defendants' motion to dismiss the civil conspiracy cause of action contained in Count Five.

F. Count Six - Negligent Misrepresentation

This claim survives because Windstar plausibly alleges that, when Young stated the lease was subject only to a title search, he knew or should have known that statement was false – that, in fact, Range intended to repudiate the lease unless it later determined that lease to be in its best interests. Alternatively, Range would have known its true intentions and should have made them clear to its landmen to enable them to fairly deal with potential lessors.

The facts pled support a cause of action in tort. If Range did in fact intend to review each lease on an economic basis, it would be wrong for it to allow its agent, **[*13]** Young, to represent otherwise in negotiations with gas owners. If Young knew of the scheme, his failure to disclose it would, at a minimum, be negligent. Finally, as already stated, Windstar has adequately alleged that it relied on this misinformation and declined offers from other gas companies, to its economic detriment. Thus, the Court **DENIES** the motion to dismiss Count Six of the complaint.

G. Count Seven - Tortious Interference with Prospective Contract

Again, Windstar has sufficiently alleged that it received bona fide offers to lease its gas rights after signing with Range. Range argues that it did not commit any affirmative act to interfere with these offers, even if they were legitimately an expectancy. Windstar, however, convincingly argues that the "exclusionary scheme," and specifically the continuing misrepresentations of Range, Young, and Gary, interfered with its prospective contracts with other gas companies.

Had Range, sometime before the spring of 2009, unequivocally represented to Windstar that in fact there was no contract until management approved the lease (that is, that Windstar's signature constituted only an offer, as Range now argues), Windstar would have been **[*14]** free to abandon that arrangement at any time and sign with another company. The facts as pled suggest that Range knew otherwise - that other companies would be making offers to owners of the Marcellus shale reserves, and, in an effort to prevent its competitors from doing business with the plaintiff, it intentionally misled Windstar into believing that the parties had a binding contract. Given the finding earlier in this opinion that Windstar has stated a claim for fraud based on Mr. Young's repeated reassurances, this claim survives as well, and the Court therefore **DENIES** the motions with respect to Count Seven.

CONCLUSION

Windstar's claims of civil conspiracy and violations of state and federal antitrust statutes fail to state a claim as a matter of law, and must be dismissed under *Rule 12(b)(6)*. Its remaining causes of action, however, are adequately pled and survive the defendant's motions at this time. In summary, the Court **GRANTS-IN-PART** and **DENIES-IN-PART** the motions to dismiss filed by Gary (dkt. 17) and by Range (dkt. 19), with respect to each count of the complaint as follows:

• Count One: **DENIED.**

• Count Two: **DENIED.**

• Count Three: **GRANTED,** and Count Three of the complaint is **[*15] DISMISSED WITH PREJUDICE.**

• Count Four: **GRANTED,** and Count Four of the complaint is **DISMISSED WITH PREJUDICE.**

• Count Five: **DENIED** with respect to the claim of fraud; **GRANTED** with respect to civil conspiracy, and the claim of civil conspiracy is **DISMISSED WITH PREJUDICE.**

• Count Six: **DENIED.**

• Count Seven: **DENIED.**

It is so **ORDERED.**

The Court directs the Clerk to transmit copies of this Order to counsel of record.

DATED: July 12, 2011.

/s/ Irene M. Keeley

IRENE M. KEELEY

UNITED STATES DISTRICT JUDGE

End of Document

E-Z Roll Off, LLC v. County of Oneida

Supreme Court of Wisconsin

February 2, 2011, Argued; July 13, 2011, Filed

No. 2009AP775

Reporter

2011 WI 71 *; 335 Wis. 2d 720 **; 800 N.W.2d 421 ***; 2011 Wisc. LEXIS 356 ****

E-Z Roll Off, LLC, Plaintiff-Appellant, v. County of Oneida, Defendant-Respondent-Petitioner.

Prior History: [**1]** REVIEW of a decision of the Court of Appeals. (L.C. No. 2006CV124). COURT: Circuit. COUNTY: Oneida. JUDGE: Patrick F. O'Melia.

E-Z Roll Off, LLC v. County of Oneida, 2010 WI App 76, 325 Wis. 2d 423, 785 N.W.2d 645, 2010 Wisc. App. LEXIS 346 (2010)

Disposition: Reversed.

Core Terms

notice of claim, tipping, notice, circuit court, government entity, antitrust action, solid waste, exempt, court of appeals, claimant, statutory scheme, per ton, prompt resolution, landfill, purposes, injunctive relief, actual notice, hinder, damages, restraint of trade, summary judgment, violations, municipal, accrue, specific statute, give rise, antitrust, subdivision, discovery, cause of action

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

HN1[] **Private Actions, State Regulation**

Antitrust actions brought pursuant to *Wis. Stat. § 133.18* (2005-06) are not exempt from the notice of claim requirements found in *Wis. Stat. § 893.80(1)* (2005-06).

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

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

HN2[] **Standards of Review, De Novo Review**

An appellate court review the grant of a motion for summary judgment de novo and applies the methodology specified in *Wis. Stat. § 802.08* (2005-06). That is, the appellate court determines whether there is any genuine issue as to any material fact and, if not, which party is entitled to judgment as a matter of law.

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

Governments > Legislation > Interpretation

HN3[] **Standards of Review, De Novo Review**

The interpretation of a statute is a question of law that is reviewed de novo.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4[] **Standards of Review, Clearly Erroneous Review**

Whether a governmental entity had actual notice of a plaintiff's claim presents a mixed question of fact and law. What the governmental entity knew about the plaintiff's claim is a factual finding and may not be overturned unless clearly erroneous. Whether the governmental entity's knowledge constituted actual notice under the law is a legal conclusion that an appellate court reviews de novo. The plaintiff bears the burden of proving actual notice. Whether a governmental entity suffered prejudice is also a mixed question of fact and law. The appellate court will uphold the circuit court's factual findings unless clearly erroneous. How these facts fit the statutory concept of prejudice is a question of law that the appellate court reviews de novo. The plaintiff bears the burden of proving lack of prejudice.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN5[] **Complaints, Prelitigation Notices**

In order to commence a lawsuit against a governmental entity, a claimant must, as a precursor to actually filing suit, serve written notice of the circumstances of the claim within 120 days after the happening of the event. *Wis. Stat. § 893.80(1)* (2005-06). Additionally, a claimant must present a written claim to an appropriate official. *Wis. Stat. § 893.80(1)(b)* (2005-06). When such a claim is disallowed, a claimant has six months to bring suit. *Wis. Stat. § 893.80(1g)* (2005-06).

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN6[] **Complaints, Prelitigation Notices**

See *Wis. Stat. § 893.80(1)* (2005-06).

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN7[] **Complaints, Prelitigation Notices**

Three factors should be considered when determining whether to exempt a specific statute from the notice of claim requirements: (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of the notice of claim requirements found in *Wis. Stat. § 893.80* (2005-06) would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which *Wis. Stat. § 893.80* (2005-06) was enacted would be furthered by requiring that a notice of claim be filed.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN8[] **Complaints, Prelitigation Notices**

In determining whether to exempt a specific statute from the notice of claim requirements, the first factor a court considers is whether there is a specific statutory scheme for which the plaintiff seeks exemption from the notice of claim requirements found in *Wis. Stat. § 893.80* (2005-06). If a statute provides a specific statutory scheme that conflicts with the general intent behind the 120-day time limit provided in *Wis. Stat. § 893.80* (2005-06), then the specific statutory scheme will take precedence.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN9[] **Complaints, Prelitigation Notices**

A specific statutory scheme conflicts with the notice of claim requirements found in *Wis. Stat. § 893.80* (2005-06) when the specific statute contains a more restrictive limitations period than the 120-day notice of claim requirements.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Civil Procedure > Remedies > Injunctions > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN10[] **Declaratory Judgments, State Declaratory Judgments**

Unlike immediate injunctive relief, which is designed to prevent injury, declaratory relief is not, by its nature, in conflict with providing governmental entities a 120-day period to review a claim.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN11[] **Private Actions, State Regulation**

Wis. Stat. § 133.18(5) (2005-06) requires that each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date. This language demonstrates the legislature's preference for the prompt resolution of antitrust claims brought pursuant to *Wis. Stat. § 133.18*.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN12[] **Complaints, Prelitigation Notices**

The notice of claim statute, *Wis. Stat. § 893.80* (2005-06), serves two purposes: (1) to give governmental entities the opportunity to investigate and evaluate potential claims and (2) to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN13[] **Complaints, Prelitigation Notices**

See *Wis. Stat. § 893.80(1)* (2005-06).

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN14[] **Begins to Run, Continuing Violations**

The continuing violation doctrine holds that, each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN15[] **Complaints, Prelitigation Notices**

An exception to the general 120-day rule exists when a claimant demonstrates that two conditions are met: (1) the governmental entity had actual notice of the claim and (2) the governmental entity has not been prejudiced by the delay or failure to give notice. *Wis. Stat. § 893.80(1)(a)* (2005-06).

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

HN16[] **Summary Judgment, Burdens of Proof**

The ultimate burden of demonstrating that there is sufficient evidence to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion.

Counsel: For the defendant-respondent-petitioner the cause was argued by Michele M. Ford, Crivello Carlson, S.C., Milwaukee, with whom on the brief was John T. Juettner.

For the plaintiff-appellant there were briefs and oral argument by James B. Connell, Crooks, Low & Connell, S.C., Wausau.

Judges: MICHAEL J. GABLEMAN, J. PATIENCE DRAKE ROGGENSACK, J. (dissenting). Chief Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Opinion by: MICHAEL J. GABLEMAN

Opinion

[*P1] [725] [***424]** MICHAEL J. GABLEMAN, J. This is a review of a published decision of the court of appeals reversing the circuit court order granting summary judgment in favor of Oneida County.[1] This case concerns an agreement between Oneida County and Waste Management, Inc., (Waste Management) for the disposal of municipal solid waste. The agreement allowed Oneida County to charge Waste Management a $5.25 fee for each ton of municipal solid waste that Waste Management delivered to the Oneida County Solid Waste Facility (the Facility). The agreement in turn allowed Waste Management to charge Oneida County $24.50 per ton to remove all loaded transfer trailers **[****2]** from the Facility and transport them to an approved landfill.

[1] *E-Z Roll Off, LLC v. Cnty. of Oneida, 2010 WI App 76, 325 Wis. 2d 423, 785 N.W.2d 645*.

[*P2] [726]** E-Z Roll Off, LLC (E-Z), which was paying a fee of $54.00 to Oneida County for each ton of municipal solid waste it delivered to the Facility, brought suit against Oneida County alleging that the agreement created an illegal restraint of trade in violation of *Wis. Stat. § 133.03(1)* (2005-06).[2] The circuit court, the Honorable Patrick F. O'Melia presiding, held that E-Z could not bring suit because E-Z had not filed a timely notice of claim in accordance with *Wis. Stat. § 893.80(1)(a)*. **[***425]** The court of appeals reversed, holding that antitrust actions brought pursuant to *Wis. Stat. § 133.18* are exempt from the notice of claim requirements found in *§ 893.80(1)*. The question before us therefore is whether the notice of claim requirements found in *§ 893.80(1)* apply to antitrust actions brought pursuant to *§ 133.18*. If the notice of claim requirements apply, we must next consider whether E-Z satisfied these requirements.

[*P3] We hold that ***HN1***[] antitrust **[****3]** actions brought pursuant to *Wis. Stat. § 133.18* are not exempt from the notice of claim requirements found in *Wis. Stat. § 893.80(1)*. Additionally, we hold that E-Z did not meet the requirements of *§ 893.80(1)(a)* when it failed to give Oneida County notice of its claim within the 120-day limitations period. Accordingly, we reverse the court of appeals and conclude that the circuit court properly granted summary judgment in favor of Oneida County.

I. BACKGROUND

[*P4] E-Z was founded in 1996 by its owners Todd and Paula Laddusire. E-Z was in the business of collecting solid waste from residential and commercial customers. **[**727]** From 1996 to 2003, E-Z was one of several companies that hauled solid waste to the Facility. During this time, Oneida County charged all haulers a $54.00 tipping fee for each ton of municipal solid waste that was delivered to the Facility.[3] A hauler who delivered at least 100 tons of municipal solid waste to the Facility could qualify for a $10 per ton rebate each year. E-Z regularly qualified for this rebate.

[*P5] On June 25, 2003, Oneida County executed an agreement with Waste Management. Pursuant to this agreement, Oneida County charged Waste Management a $5.25 tipping fee for each ton of municipal solid waste that it delivered to the Facility. All other haulers (including E-Z) continued to pay a $54.00 tipping fee. The agreement also required Waste Management to remove all loaded transfer trailers from the Facility and transport them to an approved landfill. Under the agreement, Oneida County paid Waste Management $24.50 for each ton of municipal solid waste that was loaded onto Waste Management trucks for transportation to such a landfill.

[*P6] The parties dispute the point in time when E-Z learned of Oneida County's agreement with Waste Management. E-Z contends that it first learned of the agreement in February 2004 when one of its employees was present at the Facility and saw a scale ticket that showed the lower tipping fee charged to Waste Management. Oneida County claims that E-Z received notice of the agreement via a public request for proposals **[****5]** that **[**728]** was published in April 2003. In addition, Oneida County claims that Todd Laddusire attended a meeting in June 2003 in which Oneida County Solid Waste Director Bart Sexton advised interested haulers of the proposed $5.25 tipping fee as well as the other terms which were eventually incorporated into Oneida County's contract with Waste Management.

[*P7] It is undisputed that on February 17, 2004, the Laddusires met with Sexton to present their concerns regarding Oneida County's agreement with Waste Management. The focus of the Laddusires' concern was the $5.25 tipping fee Waste Management paid to Oneida County under the **[***426]** agreement. The Laddusires were upset that Waste Management's tipping fee was dramatically less than the $54.00 tipping fee E-Z paid to Oneida County. At the February 17, 2004 meeting, the Laddusires told Sexton that they believed the agreement created a "monopoly." They demanded that E-Z's tipping fee be reduced to $24.50 per ton. Sexton refused to reduce E-Z's tipping fee.

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[2] All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

[3] "Tipping fees are disposal charges levied against collectors who drop off waste at a processing facility. They are called 'tipping' fees because garbage trucks literally **[****4]** tip their back end to dump out the carried waste." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 336 n.1, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007)*.

[*P8] In April 2004, E-Z filed a written complaint with the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). The complaint alleged that the agreement between Oneida County and Waste **[****6]** Management constituted a monopoly, and that E-Z should be "reimbursed" for the tipping fees it had paid to Oneida County in excess of $5.25 per ton since that agreement was executed. The complaint alleged that this "reimbursement" totaled "about $98,000."

[*P9] On May 4, 2004, the DATCP forwarded the complaint to Sexton, who responded by letter on May 20. In his response letter, Sexton disputed each of E-Z's charges and went on to state that the contract bidding process had been conducted in accordance with appropriate state statutes. Additionally, Sexton stated that **[**729]** E-Z, along with any other business entity, would have had the right to submit a bid during the bidding process.

[*P10] On September 28, 2005, E-Z filed a "Notice of Injury" and "Statement of Claim" with the Oneida County Clerk of Courts. In its Notice of Injury, E-Z asserted that it was injured when Oneida County entered into a conspiracy to restrain trade in violation of *Wis. Stat. § 133.03* by executing the agreement with Waste Management. In its Statement of Claim, E-Z claimed $239,814.69 for loss of past earnings and $959,285.76 for loss of future earnings.[4] Oneida County denied E-Z's claim.

[*P11] On April 20, 2006, E-Z filed suit against Oneida County in the Circuit Court for Oneida County, the Honorable Robert E. Kinney then presiding,[5] seeking (1) a declaratory judgment that Oneida County's agreement with Waste Management constituted an illegal restraint of trade in violation of *Wis. Stat. § 133.03(1)*,[6] and *(2)* treble damages, attorneys fees, and costs pursuant to *Wis. Stat. § 133.18*.

[*P12] **[**730]** On September 29, 2008, Oneida County filed a motion for summary judgment, arguing that E-Z failed to comply with the notice of claim requirements found in *Wis. Stat. § 893.80(1)*. Specifically, Oneida County argued that E-Z served **[***427]** its notice of claim well beyond the 120-day time limit provided in *§ 893.80(1)(a)*. The circuit court agreed with Oneida County and rejected E-Z's argument that antitrust actions brought pursuant to *Wis. Stat. § 133.18* are exempt from the notice of claim requirements found in *§ 893.80(1)*. The circuit court found that the 120-day limitations period began to accrue on June 25, 2003, when the agreement was signed, and that the Laddusires' September 28, 2005 notice of claim was untimely. Additionally, the circuit court found that E-Z had failed to establish that **[****9]** Oneida County had actual knowledge of the claim and further found that E-Z had failed to establish that Oneida County was not prejudiced by the untimely notice. As a result, the circuit court granted summary judgment in favor of Oneida County.

[*P13] E-Z appealed and, in a published decision, the court of appeals reversed the judgment of the circuit court.[7] Applying the three-factor test set forth in *Town of Burke v. City of Madison, 225 Wis. 2d 615, 625, 593 N.W.2d 822 (Ct. App. 1999)*, the court of appeals concluded that (1) *Wis. Stat. § 133.18* contained a specific **[**731]** statutory scheme for antitrust actions,[8] *E-Z Roll Off, 325 Wis. 2d 423, 2010 WI App 76, ¶18, 785 N.W.2d 645*; (2) applying

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[4] As we discuss in ¶20, in order to sue **[****7]** a governmental entity, a plaintiff must file a "notice of the circumstances of the claim" within 120 days of the event giving rise to the claim and must also file a separate "claim containing the claimant's address and relief sought." For the sake of clarity, we use the phrase "notice of claim" to refer to the "notice of the circumstances of the claim" required by *Wis. Stat. § 893.80(1)(a)*. Further, we use the phrase "statement of claim" to refer to the "claim containing the address of the claimant and an itemized statement of the relief sought" found in *Wis. Stat. § 893.80(1)(b)*.

[5] Judge Kinney retired during the pendency of this action and Judge O'Melia presided over the motion for summary judgment.

[6] *Wis. Stat. § 133.03(1)* states that:

> Every contract, combination in the form of trust or otherwise, **[****8]** or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in s. *939.50(3)(h)*, the person may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000.

[7] *E-Z Roll Off, 2010 WI App 76, 325 Wis. 2d 423, 785 N.W.2d 645*.

the notice of claim requirements to antitrust actions brought pursuant to *§ 133.18* would hinder the legislature's preference for prompt resolution of antitrust claims, *Id., ¶24*; and (3) the purposes of providing a notice of claim would not be furthered if the notice of claim requirements were applied to antitrust actions. *Id., ¶27*. The court of appeals held that antitrust actions are exempt from the notice of claim requirements. *Id., ¶32*. Accordingly, the court of appeals reversed the circuit court.

[*P14] Oneida County then petitioned this court for review, which we granted.

II. STANDARD OF REVIEW

[*P15] This case comes before us on summary judgment. ***HN2***[] "We review the grant of a motion for summary judgment de novo, and apply the methodology specified in *Wis. Stat. § 802.08*. That is, we determine whether there is any genuine issue as to any material fact, and if not, which party is entitled to judgment as a matter of law." *Borek Cranberry Marsh, Inc. v. Jackson Cnty., 2010 WI 95, ¶11, 328 Wis. 2d 613, 785 N.W.2d 615*.

[*P16] This case also involves the interpretation of the notice of claim statute, found in *Wis. Stat. § 893.80*, and the interpretation of the antitrust damages statute, found in *Wis. Stat. § 133.18*. ***HN3***[] The interpretation of a **[**732]** statute is a question of law that we review de novo. *Hocking v. City of Dodgeville, 2010 WI 59, ¶17, 326 Wis. 2d 155, 785 N.W.2d 398*.

[*P17] ***HN4***[] Whether a governmental entity had actual notice of a plaintiff's claim presents a mixed question of fact and law. *Olsen v. Twp. of Spooner, 133 Wis. 2d 371, 377, 395 N.W.2d 808 (Ct. App. 1986)*. **[****11]** What the governmental entity knew about the plaintiff's claim is a factual finding and may not be overturned unless clearly erroneous. Id. Whether the governmental entity's knowledge constituted actual notice under the law is a legal conclusion we review de novo. Id. The plaintiff bears the burden of proving actual notice. *Weiss v.* ***[***428]*** *City of Milwaukee, 79 Wis. 2d 213, 227, 255 N.W.2d 496 (1977)*.

[*P18] Whether a governmental entity suffered prejudice is also a mixed question of fact and law. *Olsen, 133 Wis. 2d at 378*. We uphold the circuit court's factual findings unless clearly erroneous. *Id. at 378-79*. How these facts fit the statutory concept of prejudice is a question of law we review de novo. *Id. at 379*. The plaintiff bears the burden of proving lack of prejudice. *Weiss, 79 Wis. 2d at 227*.

III. DISCUSSION

[*P19] This case requires us to examine two issues. First, we consider whether antitrust claims brought pursuant to *Wis. Stat. § 133.18* are exempt from the notice of claim requirements found in *Wis. Stat. § 893.80*. Second, we consider whether E-Z satisfied the notice of claim requirements set forth in *§ 893.80(1)*. We discuss each issue in turn.

[733]** A. Antitrust Claims Brought Pursuant to *Wis. Stat. § 133.18* **[****12]** Are Not Exempt from the Notice of Claim Requirements Found in *Wis. Stat. § 893.80(1)*

[*P20] ***HN5***[] In order to commence a lawsuit against a governmental entity, a claimant must, as a precursor to actually filing suit, serve written notice of the circumstances of the claim within 120 days after the happening of the event.[9] *Wis. Stat. § 893.80(1)*. Additionally, a claimant must present a written claim to an appropriate official. *§ 893.80(1)(b)*. When such a claim is disallowed, **[**734]** a claimant has six months to bring suit. *§ 893.80(1g)*.[10]

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[8] As we explain **[****10]** in Part III.A.1., a "specific statutory scheme" exists when the terms of a specific statute conflict with the general notice of claim requirements found in *Wis. Stat. § 893.80(1)(a)*.

[9] *Wis. Stat. § 893.80(1)* reads in relevant part:

[*P21] We initially recognized in *Department of Natural Resources v. City of Waukesha, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994)*, **[****14]** the plain meaning of *Wis. Stat. § 893.80*: "[t]he language of the statute clearly and unambiguously makes the notice of claim requirements applicable to all actions." However, we subsequently recognized in Auchinleck that our holding in Waukesha had been "too broad." *State ex. rel Auchinleck v. Town of LaGrange, **[***429]** 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996)* (exempting claims for open records violations and open meetings violations from the application of *Wis. Stat. § 893.80*).

[*P22] A number of cases following Auchinleck created additional exceptions to the application of the notice of claim requirements. See *Gillen v. City of Neenah, 219 Wis. 2d 806, 822-23, 580 N.W.2d 628 (1998)* (exempting actions to enjoin violations of the public trust doctrine under *Wis. Stat. § 30.294*); *Little Sissabagama Lake Shore Owners Ass'n, Inc., v. Town of Edgewater, 208 Wis. 2d 259, 265, 559 N.W.2d 914 (Ct. App. 1997)* (exempting actions to appeal a county board's determination regarding the requirements for tax-exempt status under *Wis. Stat. § 70.11(20)(d)*); *Gamroth v. Vill. of Jackson, 215 Wis. 2d 251, 259, 571 N.W.2d 917 (Ct. App. 1997)* (exempting actions to appeal special assessments under Wis. Stat. § 66.60(12)(a)).

[*P23] **[**735]** **[****15]** In *Town of Burke, 225 Wis. 2d 615, 593 N.W.2d 822*, the court of appeals provided a structure for analyzing our notice of claim jurisprudence. After examining our prior notice of claim case law, the court of appeals concluded that ***HN7***[] three factors should be considered when determining whether to exempt a specific statute from the notice of claim requirements: (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of the notice of claim requirements found in *Wis. Stat. § 893.80* would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which *§ 893.80* was enacted would be furthered by requiring that a notice of claim be filed. *Id. at 625*. Applying this framework, the Town of Burke court concluded that the municipal annexation procedures set forth in Wis. Stat. § 66.021 were exempt from the notice of claim requirements. *Id. at 626*.

[*P24] The three factors articulated in Town of Burke have since become the accepted framework by which our appellate courts have considered exceptions to the notice of claim requirements found in *Wis. Stat. § 893.80*. See *Ecker Bros. v. Calumet Cnty., 2009 WI App 112, ¶6, 321 Wis. 2d 51, 772 N.W.2d 240*; **[****16]** *Oak Creek Citizen's Action Comm. v. City of Oak Creek, 2007 WI App 196, ¶7, 304 Wis. 2d 702, 738 N.W.2d 168*; *Nesbitt Farms, LLC v. City of Madison, 2003 WI App 122, ¶9, 265 Wis. 2d 422, 665 N.W.2d 379*. We therefore apply the Town of Burke test to determine whether antitrust actions brought pursuant to *Wis. Stat. § 133.18* are exempt from the notice of claim requirements found in *§ 893.80*.

> ***HN6***[] (1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer **[****13]** fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

We discuss exceptions to this general rule in Part III.B.2.

[10] A claim may be disallowed in two ways. First, the governmental entity may serve a written notice of disallowance on the claimant. *Wis. Stat. § 893.80(1g)*. Second, if the governmental entity fails to act within 120 days, the claim is considered disallowed. Id.

[736]** 1. Specific Statutory Scheme

[*P25] ***HN8***[] The first factor we consider is "whether there is a specific statutory scheme for which the plaintiff seeks exemption" from the notice of claim requirements found in *Wis. Stat. § 893.80*. *Town of Burke, 225 Wis. 2d at 625*. If a statute provides a specific statutory scheme that conflicts with the general intent behind the 120-day time limit provided in *Wis. Stat. § 893.80*, then the specific statutory scheme will take precedence. *City of Racine v. Waste Facility Siting Bd., 216 Wis. 2d 616, 625, 575 N.W.2d 712 (1998)*.

[*P26] In the instant case, the court of appeals relied on our decision in Gillen v. City of Neenah to conclude that the statutory scheme for antitrust actions brought pursuant to *Wis. Stat. § 133.18* takes precedence over the general notice of claim requirements of *§ 893.80(1)*. **[****17]** We disagree. In Gillen, we held that when a statute allows a claimant to seek immediate injunctive relief, that statute irreconcilably conflicts with the general notice of claim **[***430]** provisions of *Wis. Stat. § 893.80*, "which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action." *Gillen, 219 Wis. 2d at 822*. The Gillen court concluded that, because application of the 120-day time limit imposed by *Wis. Stat. § 893.80(1)(b)* clearly frustrated the plaintiffs' specific right to immediate injunctive relief, the procedures setting forth injunctive relief took precedence over the general notice provisions of *§ 893.80*.

[*P27] As illustrated in Gillen, our appellate courts have generally concluded that ***HN9***[] a specific statutory scheme conflicts with the notice of claim requirements **[**737]** found in *Wis. Stat. § 893.80* when the specific statute contains a more restrictive limitations period than the 120-day notice of claim requirements. See *id. at 821-22* (specific statute allowed immediate injunctive relief); *Auchinleck, 200 Wis. 2d at 592* (specific statute allowed an action to be commenced within 20 days); *Town of Burke, 225 Wis. 2d at 625* **[****18]** (specific statute required an action to be commenced within 90 days); *Little Sissabagama, 208 Wis. 2d at 266* (specific statute required an action to be commenced within 90 days); *Oak Creek Citizen's Action Comm., 304 Wis. 2d at 709* (specific statute required clerk to take action within 15 days and common council to take action within 30 days).

[*P28] While we find the reasoning of Gillen to be instructive, we conclude that its holding is inapplicable to the present case. In contrast to the plaintiffs in Gillen, E-Z does not seek immediate injunctive relief under *§ 133.16*. Rather, E-Z seeks declaratory relief and damages under *Wis. Stat. § 133.18*.[11] ***HN10***[] Unlike immediate injunctive relief, which "is designed to prevent injury," *Gillen, 219 Wis. 2d at 821*, declaratory relief is not, by its nature, in conflict with providing governmental **[**738]** entities a 120-day period to review a claim.[12] We note that the Declaratory Judgment Act, found in *Wis. Stat. § 806.04*, provides no statute of limitations. We further note that *§ 133.18* provides a six-year limitations period for actions seeking damages for violations of ***antitrust law***.[13]

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[11] The prayer for relief contained in E-Z's complaint requests only (1) a declaratory judgment that the agreement is in violation of *Wis. Stat. § 133.03(1)*, and *(2)* damages, attorneys fees, and costs pursuant to *Wis. Stat. § 133.18*. E-Z made no request for an injunction under *Wis. Stat. § 133.16*. The circuit court clarified this at the summary judgment hearing:

> [Counsel for E-Z]: . . . We're asking, Your Honor, for injunctive relief so this method of operation stops and stops immediately.
>
> [The Court]: See, I didn't read your complaint as asking for injunctive relief, but perhaps I missed that.
>
> [Counsel for E-Z]: Let me find it. Well, maybe it would be better stated as to—as to declaratory relief, that is declaring the contract by illegal I think is the way I phrased it in my complaint.

[12] "Declaratory relief" is "a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." Black's Law Dictionary 846 (7th ed. 1999). In contrast, "injunctive relief" entitles a party to "a court **[****20]** order commanding or preventing an action," Id. at 788, and "is usually requested simultaneously with, or soon after, commencing an action by a motion for a temporary restraining order and/or a preliminary injunction." *Gillen, 219 Wis. 2d at 821*.

Accordingly, **[***431]** neither E-Z's claim for declaratory relief nor E-Z's claim for damages **[****19]** is brought pursuant to a specific statute whose terms conflict with the general notice of claim requirements found in *Wis. Stat. § 893.80*.

[*P29] **[**739]** We therefore hold that *§ 133.18* does not contain a specific statutory scheme in conflict with the notice of claim requirements found in *§ 893.80*.[14]

2. Legislative Preference for Prompt Resolution

[*P30] The second factor we consider is "whether enforcement of *Wis. Stat. § 893.80* would hinder a legislative preference for a prompt resolution of the type of claim under consideration." *Town of Burke, 225 Wis. 2d at 625*. We therefore examine whether the legislature has expressed a preference for prompt resolution of antitrust damages actions pursuant to *Wis. Stat. § 133.18* and, if so, whether applying the 120-day notice of claim requirements would somehow hinder that preference.

[*P31] ***HN11***[] *Wisconsin Stat. § 133.18(5)* requires that "[e]ach civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date." This language demonstrates the legislature's **[**740]** preference for the prompt resolution of antitrust claims brought pursuant to *Wis. Stat. § 133.18*. E-Z argues that applying the notice of claim requirements found in *Wis. Stat. § 893.80* to antitrust actions brought pursuant to *§ 133.18* hinders prompt resolution of such claims. As the circuit court correctly recognized, applying the notice of claim requirements to antitrust **[****23]** actions brought pursuant to *§ 133.18* promotes, rather than hinders, the legislature's preference for expediency in the adjudication of such claims.

[*P32] This is so because ordinarily a plaintiff has six years to seek damages pursuant to *Wis. Stat. § 133.18*. See *§ 133.18(2)*. However, if a plaintiff advances a claim against a governmental entity, it is subject to the notice of claim requirements. See *Wis. Stat. § 893.80*. In that case, the plaintiff would be required to serve written notice of the claim upon the governmental entity within 120 days after the event giving rise to the claim. See *§ 893.80(1)(a)*. If the claim is disallowed, the plaintiff whose claim has been denied would have only six months, as **[***432]** opposed to the six years otherwise afforded by *Wis. Stat. § 133.18(2)*, to file the complaint. See *§ 893.80(1g)*. It is clear that such timelines encourage, rather than hinder, the prompt resolution of *§ 133.18* actions.

[*P33] Accordingly, we hold that enforcing the general notice of claim requirements found in *Wis. Stat. § 893.80* promotes, rather than hinders, the legislature's preference for prompt resolution of such claims.

3. Furthering the Purposes of the Notice of Claim Statute

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[13] *Wisconsin Stat. § 133.18(1)(b)* states that "[n]o damages, interest on damages, costs or attorney fees may be recovered under this chapter from any local governmental unit or against any official or employee of a local governmental unit who acted in an official capacity." *Subsection (1)(b)* is seemingly in tension with *§ 133.18(6)*, which caps the amount of monetary damages a plaintiff may recover in a suit against a governmental entity. The circuit court, relying on *subsection (1)(b)*, struck E-Z's request for treble damages, costs, and attorney fees under *§ 133.18(1)(a)*. However, the circuit court expressly reserved the question of whether the language of *subsection (1)(b)* "precludes recovery of any monetary damages against [Oneida] County for violations alleged under any provision in Wis. Stat. ch. 133." Neither the circuit court nor the court of appeals further addressed this tension because both courts concluded that the question of whether **[****21]** the notice of claim statute applied was dispositive. This issue was not briefed before this court and we therefore need not address whether E-Z pled a viable claim for damages against Oneida County pursuant to *§ 133.18*.

[14] The court of appeals also relied on Nesbitt in holding that *Wis. Stat. § 133.18* actions constituted a specific statutory scheme. *Nesbitt Farms, LLC v. City of Madison, 2003 WI App 122, 265 Wis. 2d 422, 665 N.W.2d 379*. In Nesbitt, the court of appeals considered whether condemnation appeals brought under *Wis. Stat. § 32.05* were subject to the notice of claim requirements. The Nesbitt court held that *Wis. Stat. § 32.05* provided a detailed "procedure and deadline for commencing [condemnation] actions, as well as specifying other matters, such as how other interested parties may join the appeal and what issues may be tried." *Id., ¶10*. *Wis. Stat. § 133.18* contains no such detailed procedures. Instead, *§ 133.18* merely creates a cause of action, defines the damages, and provides a lengthy six-year statute of limitations. Nesbitt **[****22]** is, therefore, easily distinguishable.

[*P34] The third factor **[****24]** we consider is "whether the purpose for which *§ 893.80(1)* was enacted would be **[**741]** furthered by requiring that a notice of claim be filed." *Town of Burke, 225 Wis. 2d at 625*. We have previously held that ***HN12***[] the notice of claim statute serves two purposes: (1) to give governmental entities the opportunity to investigate and evaluate potential claims, and (2) to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation. *Thorp v. Town of Lebanon, 2000 WI 60, ¶¶23, 28, 235 Wis. 2d 610, 612 N.W.2d 59*.

[*P35] E-Z argues that the legislative purpose of *Wis. Stat. § 893.80(1)* was furthered when Oneida County was given the opportunity to settle and negotiate the dispute. Thus, E-Z argues, applying *§ 893.80(1)* to bar its claim would thwart the very purpose of *§ 893.80(1)* because E-Z would be punished for attempting to negotiate with Oneida County before resorting to the judicial system.

[*P36] We find E-Z's argument unpersuasive. First, applying the notice of claim statute to antitrust actions brought pursuant to *Wis. Stat. § 133.18* clearly allows governmental entities a greater opportunity to investigate and evaluate potential claims by requiring claimants to file **[****25]** their notice of claim within 120 days of the event giving rise to the claim. If the notice of claim statute were not applied to *§ 133.18* antitrust actions, claimants would have six years to file their complaint.

[*P37] The additional sixty-eight months during which claimants could bring their actions would obviously hamper a governmental entity's ability to investigate and evaluate claims. See, e.g., *Olsen, 133 Wis. 2d at 380* (holding in a condemnation action that three years of vegetative growth made a determination of any damages difficult). It is axiomatic that a governmental entity can more effectively investigate the circumstances surrounding a claim that accrued within the **[**742]** 120 days preceding the receipt of notice than it can investigate a claim that accrued up to six years in the past. In a similar vein, it is more likely that with the passage of time such investigation and evaluation will become more problematic as governmental employees leave their posts, memories fade, and witnesses become unavailable.

[*P38] Second, applying the notice of claim statute to antitrust actions brought pursuant to *Wis. Stat. § 133.18* allows governmental entities a greater opportunity to compromise and budget **[****26]** for potential settlement or litigation. If the notice of claim statute were not applied to antitrust actions brought pursuant to *§ 133.18*, governmental entities would no longer be provided with a 120-day period in which to review the claim before the claimant could file suit. We are compelled by the nature of E-Z's argument to note the obvious: it is easier for a governmental entity to compromise with a claimant when the governmental entity has the 120-day period required by the notice of claim statute in which it may review the claim and negotiate with the claimant prior to the commencement of litigation. Further, this period **[***433]** grants governmental entities 120 days in which to adjust budgets to account for potential settlement or litigation. As a result, the purposes for which the notice of claim statute was enacted would be fulfilled if parties filing antitrust actions pursuant to *§ 133.18* were required to follow the general notice of claim requirements.

[*P39] Applying the three-factor *Town of Burke* test, we conclude that *Wis. Stat. § 133.18* antitrust actions are not exempt from the notice of claim requirements set forth in *Wis. Stat. § 893.80*. We therefore next discuss whether E-Z satisfied **[****27]** the notice of claim requirements.

[743]** B. Notice of Claim Requirements

[*P40] Under *Wis. Stat. § 893.80(1)*, no action may be brought against a governmental subdivision unless *paragraphs (a)* and *(b)* are satisfied:

> ***HN13***[] (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision . . . . Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision . . . had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the . . . subdivision . . . ; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision . . . and the claim is disallowed.

[*P41] First, we consider whether the notice of claim was filed within 120 days of the "happening of the event." *Wis. Stat. § 893.80(1)(a)*. This requires us to consider whether the continuing violation doctrine applies **[****28]** in Wisconsin.[15] Second, we consider whether Oneida County had actual notice of the claim and whether it suffered prejudice.

[744]** 1. 120-Day Notice Requirement

[*P42] *Wisconsin Stat. § 893.80(1)* requires that E-Z serve its notice of claim on Oneida County "[w]ithin 120 days after the happening of the event giving rise to the claim . . . ." Oneida County argues that the "event" giving rise to E-Z's claim was the signing of the agreement with Waste Management on June 25, 2003. E-Z contends that its cause of action did not accrue until discovery of the agreement and that such discovery did not occur until February 2004. See *Wis. Stat. § 133.18(4)*.

[*P43] We need not decide when E-Z's cause of action began to accrue because, in either case, E-Z's notice of claim was untimely. E-Z filed its notice of claim with the Oneida County Clerk of Court on September **[****29]** 28, 2005, well over 120 days after both the date on which the agreement was executed (June 25, 2003), as well as the date E-Z contended it learned of the agreement (February 2004).

[*P44] E-Z also argues that each time it paid a higher tipping fee than Waste Management, a new cause of action accrued to E-Z. Consistent with this assertion, E-Z argues that the notice of claim that it filed on September 28, 2005, was timely because the notice was filed within 120 days of E-Z **[***434]** having paid a higher tipping fee than Waste Management.

[*P45] In support of this assertion, E-Z cites *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. In that case, the United States Supreme Court concluded that in the context of a continuing conspiracy to violate the federal antitrust laws, "each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover the damages caused by that act **[**745]** and that, as to those damages, the statute of limitations runs from the commission of the act." *Id. at 338*.

[*P46] E-Z, however, fails to cite any authority applying the continuing violations doctrine to the notice of claim statute under Wisconsin law. More importantly, E-Z also ignores a purpose **[****30]** of the notice of claim statute, which is to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation. See *Thorp, 235 Wis. 2d 610, 2000 WI 60, ¶¶23, 28, 612 N.W.2d 59*. If the continuing violations doctrine were to apply, it would be much more difficult for governmental entities to budget for potential litigation. For example, under E-Z's theory, a cause of action would accrue to E-Z each time it paid a higher tipping fee during the 10-year length of Oneida County's agreement with Waste Management. The legislature did not intend for governmental entities to be exposed to indefinite periods of liability for potential violations of *Wis. Stat. § 133.18*.[16] Such a result would be unreasonable given the purposes of the notice of claim requirements found in *§ 893.80*.[17]

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[15] ***HN14***[] The "continuing violation doctrine" holds that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

[16] *Wisconsin Stat. § 893.80(1)(a)* provides that a claimant must give notice "[w]ithin 120 days after the happening of the event giving rise to the claim . . . ." (Emphasis added.) We recognize that the general rule under *Wis. Stat. § 990.001(1)* is that we are to interpret the singular word "event" to include the plural "events" unless this "would produce a result inconsistent with the manifest intent of **[****31]** the legislature." The manifest intent of the legislature in *Wis. Stat. § 893.80* is not to expose

[*P47] **[**746]** E-Z filed its notice of claim with the Oneida County Clerk of Court on September 28, 2005, well over 120 days after both the date on which the agreement was executed (June 25, 2003), as well as the date E-Z contended it learned of the agreement (February 2004). Having concluded that E-Z did not satisfy the first sentence of *Wis. Stat. § 893.80(1)(a)*, we must next consider whether the actual notice and prejudice exception contained in *Wis. Stat. § 893.80(1)(a)* applies.

2. E-Z Failed to Show That Oneida County Suffered No Prejudice

[*P48] ***HN15***[] An exception to the general 120-day rule exists when a claimant demonstrates that two conditions are met: (1) the governmental entity "had actual notice of the claim," and (2) **[****32]** the governmental entity has not been prejudiced by the delay or failure to give notice. *Wis. Stat. § 893.80(1)(a)*. Because we determine that E-Z failed to show that Oneida County suffered no prejudice, we need not address whether Oneida County received actual notice of E-Z's claim. We therefore address only whether E-Z met its burden to produce evidence that Oneida County suffered no prejudice because of the delayed notice.

[*P49] In Olsen v. Spooner Township we held that prejudice "refers to a **[***435]** delay which results in the inability of claimants to adequately defend their case." *133 Wis. 2d at 379* (internal citations omitted). This holding emphasized that one of the purposes of the notice of claim statute "is to ensure that governmental units have sufficient opportunity to escape prejudice by promptly investigating claims." *Id. at 380*. As the party **[**747]** opposing summary judgment, E-Z "may not rest upon the mere allegations or denials of the pleadings . . . ." *Wis. Stat. § 802.08(3)*. ***HN16***[] "The ultimate burden [] of demonstrating that there is sufficient evidence . . . to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is **[****33]** the object of the motion." *Transp. Ins. Co. v. Hunzinger Constr. Co., 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993)*. E-Z bears the burden of proving that Oneida County suffered no prejudice. *Weiss, 79 Wis. 2d at 227*. Therefore, E-Z "must set forth specific facts showing that there is a genuine issue for trial" on the issue of prejudice. *§ 893.80(3)*.

[*P50] The circuit court found that E-Z set forth no facts showing that Oneida County suffered no prejudice. The circuit court went so far as to state that E-Z "provides no evidentiary citation" for its entire prejudice argument. We agree.

[*P51] E-Z bore the burden to produce evidence that the delayed notice of claim did not harm Oneida County's ability to adequately defend its case. E-Z introduced no such evidence. The depositions of Todd Laddusire and Bart Sexton—the only significant evidentiary materials introduced at the summary judgment proceeding—did not touch on the issue of prejudice.

[*P52] The circuit court cautioned the parties early in the litigation that the issue of prejudice would require substantial discovery. When the circuit court denied Oneida County's motion for judgment on the pleadings, it cautioned both parties that:

> The determination **[****34]** as to whether E-Z is barred from bringing this action for failing to comply with the notice of claims requirements is a complex issue that would likely necessitate extensive factual support. Specifically, **[**748]** failing to comply with the time limits in *§ 893.80* does not serve as an automatic bar to an action. Even if plaintiff fails to satisfy these time requirements, an action still survives if the plaintiff can show that the defendant had actual notice of the claim and that the defendant was not prejudiced by a delay of, or failure to provide, the requisite notice. *§ 893.80(1)(a)*. The determination of whether the County had actual notice of the claim and whether any prejudice exists are intensive factual issues that will likely require extensive discovery.

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governmental entities to potentially infinite periods of liability. We therefore conclude that the general rule in *§ 990.001(1)* is inapplicable in the instant case.

[17] "We attempt, whenever possible, to give reasonable effect to every word in a statute, avoiding both surplusage and absurd or unreasonable results." *Hocking v. City of Dodgeville, 2010 WI 59, ¶18, 326 Wis. 2d 155, 785 N.W.2d 398*.

Despite having received such guidance from the circuit court, E-Z inexplicably failed to conduct any discovery on the issue of prejudice.

[*P53] E-Z could have asked Sexton a number of questions to determine whether Oneida County did or did not suffer prejudice because of the delayed notice. For example, E-Z never questioned Sexton to determine whether Oneida County suffered from an inability to investigate the claim because of the delayed notice. **[****35]** In addition, E-Z never asked whether either Sexton or Oneida County had difficulty finding documents or other witnesses relevant to the proceedings. E-Z simply failed to introduce evidence on the issue of prejudice. Because of this, the circuit court properly granted summary judgment in favor of Oneida County.

[*436]** IV. CONCLUSION

[*P54] We hold that antitrust actions brought pursuant to *Wis. Stat. § 133.18* are not exempt from the notice of claim requirements found in *Wis. Stat. § 893.80(1)*. Additionally, we hold that E-Z did not meet the requirements of *§ 893.80(1)(a)* when it failed to give Oneida County notice of its claim within the 120-day limitations period. Accordingly, we reverse the court of **[**749]** appeals and conclude that the circuit court properly granted summary judgment in favor of Oneida County.

By the Court.—The decision of the court of appeals is reversed.

Dissent by: PATIENCE DRAKE ROGGENSACK

Dissent

[*P55] PATIENCE DRAKE ROGGENSACK, J. *(dissenting)*. Appellate courts apply a three-part test to determine whether the notice requirement of *Wis. Stat. § 893.80(1)* (2009-10)[1] applies to the claim under review. *Oak Creek Citizen's Action Comm. v. City of Oak Creek, 2007 WI App 196, ¶7, 304 Wis. 2d 702, 738 N.W.2d 168*. I **[****36]** conclude that E-Z Roll Off, LLC (E-Z) makes a restraint of trade claim under ch. 133 of the Wisconsin Statutes that meets the three-part test for an exception to the requirements of *§ 893.80(1)*: (1) ch. 133 provides a specific statutory scheme for the identification and resolution of claims; (2) compliance with *§ 893.80(1)* would hinder the legislature's preference for prompt action on ch. 133 claims; and (3) the purposes for which *§ 893.80(1)* was enacted would not be furthered by requiring a notice of claim to be filed for ch. 133 claims. Accordingly, I would affirm the court of appeals and I respectfully dissent from the majority opinion.

I. BACKGROUND

[*P56] E-Z was in the solid waste hauling business.[2] It provided waste containers to residential, commercial and construction customers. E-Z hauled the **[**750]** waste it collected to the Oneida County landfill, and Oneida County charged E-Z a per ton tipping fee **[****37]** to utilize the landfill.

[*P57] E-Z paid a $54 per ton tipping fee for its use of the landfill, less a $10 per ton discount when E-Z brought a sufficient volume of waste to Oneida County's landfill. In February 2004, an employee of E-Z saw a receipt from the Oneida County landfill that showed Waste Management Wisconsin, Inc. (Waste Management) was being charged only $5.25 per ton as a tipping fee by Oneida County.

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[1] All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated. (The 2005-06 are applicable to the notice question presented; however, the 2009-10 statutes referenced herein are the same as the 2005-06 version of *§ 893.80(1)* in all relevant parts.)

[2] E-Z went out of business in May, 2008.

[*P58] Apparently, the lower tipping fee accorded to Waste Management was part of the June 25, 2003 contract[3] between Waste Management and Oneida County wherein Waste Management agreed to transport municipal solid waste for Oneida County for $24.50 per ton and Oneida County agreed to charge Waste Management only a $5.25 tipping fee rather than the usual $54 per ton rate.

[*P59] On February 17, 2004, the Laddusires, who own E-Z, met with Bart Sexton, **[***437]** the Oneida County Solid Waste Director, to complain about the high tipping fee E-Z was paying and to request a reduction of its tipping fee. Sexton refused their request, and in April 2004 E-Z filed a written complaint with the Wisconsin Department of Agriculture, Trade and Consumer Protection (Consumer **[****38]** Protection agency). Although the Consumer Protection agency forwarded E-Z's complaint to Oneida County on May 4, 2004, the Consumer Protection agency took no further action on the complaint.

[*P60] On September 28, 2005, E-Z filed a "Notice of Injury" with Oneida County, in which it alleged that **[**751]** the preferential tipping fee that Oneida County granted to Waste Management was a violation of *Wis. Stat. § 133.03(1)*. It alleged that it had lost past and future earnings due to the lower prices that Waste Management was able to charge its customers because of the lower tipping fee that Waste Management was accorded by Oneida County for the tipping it did at the landfill.

[*P61] E-Z filed this action on April 20, 2006. Oneida County moved to dismiss, alleging that E-Z failed to comply with the notice of claim requirements of *Wis. Stat. § 893.80(1)*, and the circuit court dismissed E-Z's claim. The court of appeals reversed, concluding that ch. 133 claims were excepted from compliance with *§ 893.80(1)*. *E-Z Roll Off, LLC v. Cnty. of Oneida, 2010 WI App 76, ¶1, 325 Wis. 2d 423, 785 N.W.2d 645*.

II. DISCUSSION

A. Standard of Review

[*P62] The circuit court dismissed E-Z's claim on summary judgment. We review summary judgment **[****39]** using the same methodology as did the circuit court and the court of appeals. *Grygiel v. Monches Fish & Game Club, Inc., 2010 WI 93, ¶12, 328 Wis. 2d 436, 787 N.W.2d 6*. This summary judgment turns on statutory interpretation. Statutory interpretation presents a question of law for our independent review, in which we benefit from the discussions in previous court decisions. *Richards v. Badger Mut. Ins. Co., 2008 WI 52, ¶14, 309 Wis. 2d 541, 749 N.W.2d 581*. As we interpret *Wis. Stat. § 893.80(1)*, we assess its interaction with the ch. 133 claim made herein. The interaction of E-Z's ch. 133 claim with the obligations set out in *§ 893.80(1)* presents a question of law for our independent consideration. **[**752]** *Nesbitt Farms, LLC v. City of Madison, 2003 WI App 122, ¶4, 265 Wis. 2d 422, 665 N.W.2d 379*.

B. E-Z's Contention

[*P63] E-Z contends that Oneida County violated *Wis. Stat. § 133.03(1)* through its contract with Waste Management. Oneida County contracted to pay Waste Management $24.50 per ton for solid waste removal, and combined that payment with a $5.25 per ton tipping fee that Oneida County charged Waste Management. This contractual tipping fee of $5.25 is a $49.75 per ton reduction in charges on **[****40]** the solid waste that Waste Management dumped into the Oneida County landfill, not just solid waste that is hauled for Oneida County. E-Z alleged that the contract was an unreasonable restraint of trade in that it "permits Waste Management, Wisconsin, Inc., to under bid and drive out competition in Oneida County and the areas which the Oneida County Transfer Station has traditionally served,"[4] because Waste Management was charged $49.75 less per ton to dump solid waste at the Oneida County landfill than were other users of the landfill.

[*P64] **[***438]** Stated otherwise, E-Z alleges that if Waste Management had been required to pay the $54 per ton tipping fee as E-Z was, Waste Management would have had to increase the prices it offered to customers for

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[3] Compl., ¶3.

[4] Compl., ¶¶3,4,6,7.

whose business E-Z was competing. It is argued that the lower tipping fee permitted Waste Management to compete unfairly with E-Z.

[*P65] In regard to *Wis. Stat. § 893.80(1)*, E-Z does not argue that it timely filed a notice of claim. Rather, E-Z contends that it is not required to comply with *§ 893.80(1)* because its ch. 133 claim falls outside of the **[**753]** scope of *§ 893.80(1)*'s command, and further, even if it were required to comply with *§ 893.80(1)*, **[****41]** Oneida County had actual notice of its claim. The court of appeals agreed with E-Z's first argument, concluding that ch. 133 claims are not required to comply with *§ 893.80(1)*. *E-Z Roll Off, 325 Wis. 2d 423, ¶1*. I agree with the court of appeals.

C. Statutory Concerns

1. Notice of claim

[*P66] *Wisconsin Stat. § 893.80(1)* provides in relevant part:

> Except as provided in subs. (1g), (1m), (1p) and (8),[5] no action may be brought or maintained against any . . . political corporation, governmental subdivision or agency thereof . . . for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . political corporation, governmental subdivision or agency . . . under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if . . . the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . .; and
>
> (b) A claim containing the address of the **[****42]** claimant and an itemized statement of the relief sought is presented to the appropriate clerk . . . and the claim is disallowed.

[*P67] **[**754]** Although we once stated that *Wis. Stat. § 893.80(1)* applies to all types of actions, not just to tort actions, *DNR v. City of Waukesha, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994)*, we have modified that statement as being overly broad. *State ex rel. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996)*. In addition, numerous appellate opinions have identified various exceptions to the statutory notice of claim requirements. See *id. at 596* (noting that *§ 893.80(5)* expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of *§ 893.80* and concluding that *§ 893.80(1)* does not apply to claimed violations of the open records law); see also *Gillen v. City of Neenah, 219 Wis. 2d 806, 822-23, 580 N.W.2d 628 (1998)* (concluding that *§ 893.80(1)* does not apply to actions under *Wis. Stat. § 30.294* to enjoin violations of the public trust doctrine); *Oak Creek, 304 Wis. 2d 702, ¶2* (concluding that *§ 893.80(1)* does not apply to an action to compel a city **[****43]** to comply with the direct legislation statute); *Town of Burke v. City of Madison, 225 Wis. 2d 615, 617-18, 593 N.W.2d 822 (Ct. App. 1999)* (concluding that actions objecting to annexation brought under Wis. Stat. § 66.021 are not required to comply with *§ 893.80(1)*); *Gamroth v. Vill. of Jackson, 215 Wis. 2d 251, 259, 571 N.W.2d 917 (Ct. App. 1997)* (concluding that special assessment **[***439]** appeals brought under Wis. Stat. § 66.60(12)(a) fall outside of *§ 893.80(1)*'s requirements).

[*P68] Based on our analysis in Auchinleck, a three-part test has evolved by which courts assess whether the claimant is required to comply with *Wis. Stat. § 893.80(1)* for the claim presented. *Oak Creek, 304 Wis. 2d 702, ¶7* (citing *Nesbitt Farms, 265 Wis. 2d 422, ¶9*. This three-part test provides:

> **[**755]** "(1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of *§ 893.80(1)*, Stats., would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which *§ 893.80(1)* was enacted would be furthered by requiring that a notice of claim be filed."

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[5] None of these listed exceptions apply here.

Id. (quoting *Nesbitt Farms, 265 Wis. 2d 422, ¶9*). Accordingly, **[****44]** I begin with *Wis. Stat. § 133.03(1)*, the claim herein made.

2. *Wisconsin Stat. § 133.03(1)*

[*P69] E-Z claims anticompetitive conduct that it alleges is regulated by ch. 133, specifically *Wis. Stat. § 133.03(1)*. *Section 133.03(1)* addresses anticompetitive contracts in restraint of trade. *Section 133.03(1)* provides in relevant part: "Unlawful contracts; conspiracies. (1) Every contract . . . in restraint of trade or commerce is illegal." It is this *§ 133.03(1)* claim that the circuit court dismissed on summary judgment because the notice of claim provisions of *Wis. Stat. § 893.80(1)* had not been met. Accordingly, I consider the viability of E-Z's ch. 133 claim in light of *§ 893.80(1)* and the requisite three-part test for exceptions thereto.

a. Specific statutory scheme

[*P70] Chapter 133 sets out a specific statutory scheme that addresses anticompetitive conduct that is quite comprehensive. First, it defines those who are covered by the prohibitions contained therein. *Wis. Stat. § 133.02(3)*. Second, it sets out various prohibited practices: *Wis. Stat. § 133.03* (unlawful contracts; conspiracies), *Wis. Stat. § 133.04* (price discrimination; intent to destroy competition), *Wis. Stat. § 133.05* (secret **[**756]** rebates; **[****45]** unfair trade practices) and *Wis. Stat. § 133.06* (interlocking directorates). Third, ch. 133 provides for discovery in regard to alleged violations. *Wis. Stat. § 133.13*. Fourth, remedies are established for contraventions of ch. 133: *Wis. Stat. § 133.14* (illegal contracts are void); *Wis. Stat. § 133.16* (injunctive relief, temporary and permanent, and attorney fees may be accorded); and *Wis. Stat. § 133.18* (damages and attorney fees are available).

[*P71] The enforcement of a claim for relief due to an alleged restraint of trade by contract has been specifically provided for by the legislature in *Wis. Stat. § 133.03(1)*. Not only is such a claim proscribed, but the legislature has specified various types of relief that a court can award. See e.g., *Wis. Stat. § 133.14* (illegal contracts are void); *Wis. Stat. § 133.16* (injunctive relief, temporary and permanent, and attorney fees may be accorded); and *Wis. Stat. § 133.18* (damages and attorney fees are available). Accordingly, I conclude that E-Z's *§ 133.03(1)* claim is part of a specific statutory scheme and therefore, it satisfies the first part of the requisite test for an exception to the directives of *Wis. Stat. § 893.80(1)*.[6]

[*440]** **[**757]** b. Preference for prompt resolution

[*P72] The next step is to assess whether enforcement of *Wis. Stat. § 893.80(1)* would contravene a legislative preference for prompt resolution of ch. 133 claims. *Wisconsin Stat. § 133.18* assists me in this assessment. *Section 133.18(5)* requires that "[e]ach civil action under this chapter and each motion or other proceeding in such action

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[6] In concluding **[****46]** that ch. 133 contains a specific statutory scheme, the court of appeals relied on *Gillen v. City of Neenah, 219 Wis. 2d 806, 580 N.W.2d 628 (1998)*. *E-Z Roll Off, LLC v. Cnty. of Oneida, 2010 WI App 76, ¶18, 325 Wis. 2d 423, 785 N.W.2d 645*. The majority opinion concludes that the reasoning of Gillen is "instructive," yet "inapplicable to the present case." Majority op., ¶28. In so concluding, the majority states that "[i]n contrast to the plaintiffs in Gillen, E-Z does not seek immediate injunctive relief under *Wis. Stat. § 133.16*. Rather, E-Z seeks declaratory relief and damages under *Wis. Stat. § 133.18*." Id. However, the distinction between the remedy sought by the plaintiffs in Gillen and the remedy E-Z sought in its complaint is not relevant to the determination of whether ch. 133 comprises a specific statutory scheme. Surely, a specific statutory scheme can include more than one section of a chapter. Here, the entirety of ch. 133 addresses anticompetitive conduct. The scheme is quite specific and quite comprehensive. Stated otherwise, the statutory scheme includes several statutory sections.

Furthermore, by considering only a single statutory section, specifically *Wis. Stat. § 133.18*, **[****47]** rather than the entire statutory scheme set out in ch. 133 that proscribes anticompetitive conduct, the majority's focus is too narrow. For example, a *Wis. Stat. § 133.03(1)* claimant could seek both damages under *§ 133.18* and a temporary and/or permanent injunction under *Wis. Stat. § 133.16*. Under the majority's reasoning, would that ch. 133 claim be an exception to the notice of claim provisions of *Wis. Stat. § 893.80(1)* given our decision in Gillen shall be expedited in every way and shall be heard at the earliest practicable date." However, Oneida County has 120 days after the filing of a notice of claim under § 893.80(1) to respond to a contention that it has entered into an illegal contract in restraint of trade. This time lag is in conflict with "expedited" **[****48]** procedures that the legislature has chosen for ch. 133 claims.

[*P73] Furthermore, Wis. Stat. § 133.16 provides for both temporary and permanent injunctive relief. It directs, "pending the filing of the answer . . . [a court] may, at any time, upon proper notice, make such temporary restraining order or prohibition as is just." We have noted that a statutory scheme that provides for immediate **[**758]** injunctive relief is inconsistent with Wis. Stat. § 893.80(1)'s requirements. Gillen, 219 Wis. 2d at 822. A party bringing a claim pursuant to Wis. Stat. § 133.03(1) has a statutory right to seek temporary and permanent injunctive relief. Requiring a party to wait 120 days before being able to use the statutory remedies that the legislature set out would be contrary to the legislature's stated purpose that ch. 133 "be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." Wis. Stat. § 133.01. Accordingly, I conclude that E-Z has satisfied the second part of the requisite test for an exception to the directives of § 893.80(1).

c. Purposes underlying Wis. Stat. § 893.80(1)

[*P74] The third part of the test for assessing a claimed exception to the directives of Wis. Stat. § 893.80(1) **[****49]** is whether the purposes underlying § 893.80(1) would be furthered by requiring that a notice of claim be filed. The purposes underlying § 893.80(1) are to permit timely investigation of claims so that the facts are not stale and to facilitate settlement of those that are meritorious. Thorp v. Town of Lebanon, 2000 WI 60, ¶¶23, 28, 235 Wis. 2d 610, 612 N.W.2d 59. However, as a party to the contract that E-Z alleges is in restraint of trade, little investigation would be needed by Oneida County, and settlement appears unlikely.

[*P75] **[***441]** In addition, in this step, it is worth noting that Wis. Stat. § 133.18(4) provides, "A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action." The circuit court concluded that the "event" that gives rise to the obligation to give notice within 120 days is the June 2003 signing of the contract between Waste Management and Oneida **[**759]** County.[7] However, E-Z did not learn of the $5.25 tipping fee that Waste Management was awarded as part of that contract until February 2004. Therefore, by the time E-Z had knowledge of the facts giving rise to its ch. 133 claim, 120 days had **[****50]** long since passed, if the circuit court is correct about the event leading to the notice of claim requirement. Stated otherwise, Oneida County could not timely investigate a claim E-Z did not know it had. That is what is alleged to have happened here.[8]

[*P76] Furthermore, if Wis. Stat. § 893.80(1) were applied to E-Z's claim, it never could have employed the statutes that the legislature enacted to promote competition and to restrict restraints of trade. A defendant could simply say **[****51]** that the complaining party learned of the violation too late and as a result, the defendant is not required to do anything about it. Surely, that is not what the legislature sought to achieve either under § 893.80(1) or ch. 133.

[*P77] Therefore, I conclude that E-Z has satisfied the third part of the requisite test for an exception to the directives of Wis. Stat. § 893.80(1). Accordingly, I **[**760]** conclude that E-Z's Wis. Stat. § 133.03(1) claim is excepted from § 893.80(1)'s notice requirements.

III. CONCLUSION

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[7] The majority concludes that it does not need to determine what "event" gave rise to the obligation to give notice, and consequently when the cause of action began to accrue. The majority so concludes because even if it accepted E-Z's argument that the cause of action did not accrue until it learned of the agreement in February, 2004, more than 120 days passed between when the cause accrued and E-Z's filing of the notice of claim in September 2005. Majority op., ¶43.

[8] Although Oneida County implies that this may not be an accurate statement of fact, on a motion for summary judgment the facts are construed to favor the non-moving party. DeHart v. Wis. Mut. Ins. Co., 2007 WI 91, ¶7, 302 Wis. 2d 564, 734 N.W.2d 394.

[*P78] I conclude that E-Z makes a restraint of trade claim under ch. 133 of the Wisconsin Statutes that meets the three-part test for an exception to the requirements of *Wis. Stat. § 893.80(1)*: (1) ch. 133 provides a specific statutory scheme for the identification and resolution of claims; (2) compliance with *§ 893.80(1)* would hinder the legislature's preference for prompt action on ch. 133 claims; and (3) the purposes for which *§ 893.80(1)* was enacted would not be furthered by requiring a notice of claim to be filed for ch. 133 claims. Accordingly, I would affirm the court of appeals and I respectfully dissent from the majority opinion.

[*P79] I am authorized to state that Chief Justice SHIRLEY S. **[****52]** ABRAHAMSON joins this dissent.

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Phillips v. BAC Home Loans Servicing, LP

United States District Court for the District of Hawaii

July 13, 2011, Decided; July 13, 2011, Filed

CV. NO. 10-00272 DAE-RLP

Reporter

2011 U.S. Dist. LEXIS 75692 *; 2012-2 Trade Cas. (CCH) P77,973; 2011 WL 2746731

MARK PHILLIPS, Plaintiff, vs. BAC HOME LOANS SERVICING, LP, FKA COUNTRYWIDE HOME LOANS SERVICING, LP; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and DOES 1 through 20 inclusive, Defendants.

Prior History: Phillips v. BAC Home Loans Servicing, LP, 2010 U.S. Dist. LEXIS 131739 (D. Haw., Dec. 13, 2010)

Core Terms

motion to dismiss, allegations, amended complaint, antitrust, mortgage, assertions, Defendants', monopolize, anti trust law, cause of action, leave to amend, relevant market, Unconscionability, Violations, lender, pleading requirements, circumstances, conspiracy, Practices, emotional distress, misrepresentation, anticompetitive, conclusory, fraudulent, disclose, unfair, vague, constitute fraud, fiduciary duty, deceptive act

Counsel: **[*1]** For Mark Phillips, re: Docket entry (4) **-** Surname is spelled as PHILLIPS other Mark Phillips, Plaintiff: James H. Fosbinder, LEAD ATTORNEY, Ivey Fosbinder Fosbinder LLLC, A Limited Liability Law Company, Wailuku, HI; Dexter K. Kaiama, Keoni Kealoha Agard, Honolulu, HI.

For BAC Home Loans Servicing, LP, formerly known as Countywide Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc., Defendants: Patricia J. McHenry, Sean Michael Smith, LEAD ATTORNEYS, Cades Schutte, Honolulu, HI.

Judges: David Alan Ezra, United States District Judge.

Opinion by: David Alan Ezra

Opinion

ORDER: (1) GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS; (2) DISMISSING COMPLAINT WITHOUT PREJUDICE AS AGAINST ALL DEFENDANTS

On June 30, 2011, the Court heard Defendants' Motion to Dismiss. James H. Fosbinder, Esq., appeared at the hearing on behalf of Plaintiff Mark Phillips ("Plaintiff"); Patricia J. McHenry, Esq., and Sean Michael Smith, Esq.,appeared at the hearing on behalf of Defendants BAC Home Loans Servicing, LP ("BAC") and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, "Defendants"). After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS IN PART and DENIES **[*2]** IN PART the Motion to Dismiss. (Doc. # 28.) The First Amended Complaint is DISMISSED WITHOUT PREJUDICE as against all Defendants.

BACKGROUND

On or about September 29, 2006, Plaintiff Mark Phillips ("Plaintiff") executed a promissory note in favor of First Magnus Financial Corporation ("First Magnus") in the amount of $240,000. [1] (MTD Ex. 3 at 2.) To secure payment on the promissory note, Plaintiff executed a mortgage encumbering real property located at 140 Uwapo Road # 40-202, Kihei, Hawaii, 96753 (the "Subject Property") in favor of First Magnus. (Id. at 2-3.) The mortgage was recorded in the State of Hawaii Bureau of Conveyances on October 16, 2006 as Document Number 2006-188427. (Id. at 1.) First Magnus is listed on the mortgage as the originating lender and Mortgage Electronic Registration Systems, Inc. ("MERS") is the mortgagee "acting solely as a nominee for Lender and Lender's successors and assigns." (Id. at 2.)

Plaintiff claims that on or about October 23, 2006, First Magnus sold Plaintiff's loan to Countrywide Home Loans, Inc. (FAC ¶ 48.) Thereafter, BAC Home Loans Servicing, LP ("BAC") allegedly serviced Plaintiff's loan.

On August 4, 2009, MERS executed an assignment, which purported to assign its interest in the mortgage to BAC. (FAC Ex. A.) This assignment was recorded in the State of Hawaii Bureau of Conveyances on September 11, 2009 as Document Number 2009-139370. (Id.) BAC recorded a Notice of Mortgagee's Intention to Foreclose Under the Power of Sale ("Foreclosure Notice") on the same day. [2] (MTD Ex. 4.) As recognized by this Court's December 13, 2010 Order, **[*4]** the Subject Property was sold at a foreclosure auction on June 10, 2010. (Order at 3-4.) Public records indicate that Federal National Mortgage Association now owns the Subject Property. (Id. at 4.)

On May 7, 2010, Plaintiff filed a Complaint in this Court against Defendants BAC and MERS (collectively, "Defendants"), alleging that Plaintiff had been lured into a predatory mortgage loan. (Doc # 1.) On September 8, 2010, Defendants filed a Motion to Dismiss (Doc. # 8), which the Court granted on December 13, 2010 (Doc. # 22). The Court dismissed with prejudice Plaintiff's TILA rescission and recoupment claims, dismissed without prejudice Plaintiff's remaining claims, and granted Plaintiff 30 days leave to file an amended complaint. (Id.)

On January 10, 2011, Plaintiff filed a First Amended Complaint **[*5]** ("FAC," Doc. # 23), which asserts the following claims:

- Count I: Violations of the Sherman Antitrust Act (FAC ¶¶ 72-79)
- Count II: Violations of the Hawaii Antitrust/Anti-Monopoly Acts (Id. ¶¶ 80-83)
- Count III: Civil Conspiracy (Id. ¶¶ 84-88)
- Count IV: Fraudulent Misrepresentation (Id. ¶¶ 89-96)
- Count V: Unfair and Deceptive Acts or Practices (Id. ¶¶ 97-109)
- Count VI: Breach of Fiduciary Duty (Id. ¶¶ 110-118)
- Count VII: Unjust Enrichment against Defendant BAC (Id. ¶¶ 119-124)

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[1] Defendants submitted a copy of the subject mortgage as Exhibit 3 to their Motion to Dismiss. "[A] district court ruling on a motion to dismiss may consider documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not **[*3]** physically attached to the [plaintiff's] pleading.'" *Parrino v. FHP, Inc., 146 F.3d 699, 705 (9th Cir. 1998)* (quoting *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*); see also *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)*. In the instant case, Plaintiff's entire Complaint revolves around the subject mortgage. The mortgage is clearly essential to the complaint, and neither party disputes its authenticity. Accordingly, it is appropriate for the Court to consider the mortgage itself when ruling on the Motion to Dismiss.

[2] Defendants submitted a copy of the Foreclosure Notice as Exhibit 4 to their Motion to Dismiss. Because Plaintiff's Complaint challenges the validity of the foreclosure, the Foreclosure Notice is clearly essential to the Complaint, and neither party disputes its authenticity. Accordingly, it is appropriate for the Court to consider the Foreclosure Notice when ruling on the Motion to Dismiss.

- Count VIII: Mistake against Defendant BAC (Id. ¶¶ 125-126)
- Count IX: Unconscionability against Defendant BAC (Id. ¶¶ 127-135)
- Count X: Intentional Infliction of Emotional Distress (Id. ¶¶ 136-140)
- Count XI: Violations of the Fair Debt Collection Practices Act against Defendant BAC (Id. ¶¶ 141-146)
- Count XII: Breach of the Covenant of Good Faith and Fair Dealing (Id. ¶¶ 147-149)
- Count XIII: Complaint to Quiet Title (Id. ¶¶ 150-155)

On February 7, 2011, Defendants filed a Motion to Dismiss the First Amended Complaint ("Motion to Dismiss"). ("MTD," Doc. # 28.) Plaintiff filed an Opposition to the Motion to Dismiss on April 29, 2011. ("Opp'n," Doc. # 33.) Defendants filed a Reply on May 18, 2011. ("Reply," **[*6]** Doc. # 35.)

STANDARD OF REVIEW

I. *Federal Rule of Civil Procedure 12(b)(6)*

Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* ("Rule"), a motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Review is limited to the contents of the complaint. See *Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994)*. A complaint may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)* (citation omitted). Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the plaintiff. See *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A complaint need not include detailed facts to survive a *Rule 12(b)(6)* motion to dismiss. See *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In providing grounds for relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. See *id. at 556-57*; see also *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988)* **[*7]** ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.") (citation omitted). "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotations and citations omitted). Thus, "bare assertions amounting to nothing more than a formulaic recitation of the elements" of a claim "are not entitled to an assumption of truth." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* ("[T]he non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.") (internal quotations and citations omitted).

A court looks at whether the facts in the complaint sufficiently state a "plausible" ground for relief. See *Twombly, 550 U.S. at 570*. A plaintiff must include enough facts to raise a reasonable expectation that discovery will reveal evidence and may not just provide a speculation of a right to relief. *Id. at 586*. When **[*8]** a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Id. at 558* (citation omitted). If a court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (finding that leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect") (internal quotations and citations omitted).

II. *Federal Rule of Civil Procedure 9(b)*

Federal Rule of Civil Procedure 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. Under Ninth Circuit law, "*Rule 9(b)* requires particularized allegations of the circumstances constituting fraud." In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc), superseded on other grounds by 15 U.S.C. § 78u-4.

In their pleadings, plaintiffs must include the time, place, and nature of the alleged fraud; "mere conclusory allegations of fraud are insufficient" to satisfy this requirement. Id. at 1548 (quoting **[*9]** Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)). "[T]he circumstances constituting the alleged fraud [must] 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)); see also Moore, 885 F.2d at 540 (finding that Rule 9(b) requires a plaintiff to attribute particular fraudulent statements or acts to individual defendants). However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); see also In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1547 ("We conclude that plaintiffs may aver scienter . . . simply by saying that scienter existed."); Walling v. Beverly Enter., 476 F.2d 393, 397 (9th Cir. 1973) (finding that Rule 9(b) "only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations" (citations omitted)).

A motion to dismiss for failure to plead with particularity **[*10]** is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). In considering a motion to dismiss, the court is not deciding the issue of "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

DISCUSSION

Moving Defendants contend that the First Amended Complaint is vague and conclusory and therefore should be dismissed for failure to comply with Federal Rules of Civil Procedure 8 and 12(b)(6). The Court agrees.

I. Plaintiff's New Claims

As a preliminary matter, Defendants argue that Counts I, II, III, IV, VII, VIII, IX, XI, and XIII of the First Amended Complaint should be dismissed or stricken because the Court only granted leave to amend the claims asserted in the original Complaint. (MTD at 6-7; Reply at 1-2.)

This contention is belied by the terms of the December 13, 2010 Order, which provides as follows:

> The Court recognizes that it may be possible for Plaintiff to state a claim if provided the opportunity **[*11]** to amend his Complaint. Accordingly, the Complaint is DISMISSED as against all Defendants in this action with leave to amend no later than 30 days from the filing of this Order, except for Plaintiff's TILA rescission and recoupment claims, which are barred as a matter of law. . . . Failure to do so and to cure the pleading deficiencies will result in dismissal of this action with prejudice. Plaintiff is advised that the amended complaint must clearly state how each of the named defendants have injured him, and it must also clearly identify the statutory provisions under which Plaintiff's claims are brought.

(Order at 30-31.) In the Order, the Court did not circumscribe which claims could be amended, aside from Plaintiff's TILA rescission and recoupment claims, and did not preclude Plaintiff from raising new claims. The Court will not now strike Counts I, II, III, IV, VII, VIII, IX, XI, and XIII of Plaintiff's First Amended Complaint solely because they were not included in the original Complaint. Defendants' argument on this point is inapposite.

II. Count I: Violation of the Sherman Antitrust Act

Plaintiff alleges that Defendants "engaged in predatory conduct or anticompetitive conduct" **[*12]** by "monopolizing or attempting to monopolize the mortgage lending and servicing market" in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. (FAC ¶¶ 73-74, 79.) Plaintiff seeks monetary relief for this violation, presumably pursuant to Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15.

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. Monopolization and attempted monopolization are the two traditional claims asserted under *Section 2*. To state a claim for monopolization, the plaintiff must sufficiently allege: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009)* (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*; *Alaska Airlines v. United Airlines, Inc., 948 F.2d 536, 540-41 (9th Cir. 1991)* **[*13]** (same); see also *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004)* (listing the elements of a monopolization claim).

To state a claim for attempted monopolization, the plaintiff must allege: "'(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008)* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*; see also *VeriSign, 611 F.3d at 506* (same).

An antitrust plaintiff must also demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." [3] *Brunswick, 429 U.S. at 489*. Indeed, the antitrust laws "were enacted for 'the protection of competition, not competitors.'" *Id. at 488* (quoting *Brown, 370 U.S. at 320*); see also *Cascade Health Solutions, 515 F.3d at 901-02* (recognizing the Supreme Court's "long and consistent adherence to the principle that the antitrust laws protect the process of competition, and not the pursuits of any particular competitor").

A plaintiff seeking damages pursuant to Section 4 of the Clayton Act must show causal antitrust injury, and to obtain injunctive relief pursuant to Section 16 of the Clayton Act, a plaintiff must allege threatened antitrust injury. [4] *Cargill, 479 U.S. at 109-13*. The purpose of the antitrust injury requirement is to "ensure[] that the harm **[*15]** claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." *Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. As such, "[t]o show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior [because] it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* (citing *Atlantic Richfield, 495 U.S. at 334*); see also *Cascade Health Solutions, 515 F.3d at 902* ("'Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'") (quoting *Brunswick, 429 U.S. at 489*).

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[3] This is different from antitrust standing. See *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110-11, 107 S. Ct. 484, 93 L. Ed. 2d 427 nn. 5-6 (1986)* **[*14]** (noting that antitrust injury is necessary, but not always sufficient, to establish standing under Section 4 and that the standing analysis under Section 16 may differ from that for Section 4); see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters, 459 U.S. 519, 535-46, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (articulating factors that courts should consider when determining whether a plaintiff has standing under Section 4); *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232-37 (9th Cir. 1998)* (examining whether a plaintiff had standing to assert claims for damages and injunctive relief under Sections 4 and 16 of the Clayton Act); *Amarel v. Connell, 102 F.3d 1494, 1506-07 (9th Cir. 1996)* (summarizing the factors relevant to determine whether a plaintiff has standing to pursue a damages claim under Section 4).

[4] Section 4 of the Clayton Act provides treble damages to **[*16]** "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. Section 16 of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*.

In addition to antitrust injury, antitrust plaintiffs must also properly allege a relevant market. See *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)* (finding that to state a claim under either Section 1 or Section 2 of the Sherman Act, the plaintiff must sufficiently allege a relevant market). The Ninth Circuit recently addressed the legal principles that govern definition of a relevant market, and it reaffirmed that a complaint may be dismissed under *Rule 12(b)(6)* if its relevant market definition is "facially unsustainable." *Id. at 1045* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997))*. The relevant market includes both the product market and the geographic market. *Brown Shoe, 370 U.S. at 324*; *Newcal Indus., 513 F.3d at 1045 n.4*. As to **[*17]** the product market, it must "encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus., 513 F.3d at 1045* (citing *Brown Shoe, 370 U.S. at 325*). It must therefore include "the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'" *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)* (quoting *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989))*; see also *Brown Shoe, 370 U.S. at 325* ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). "In limited settings, however, the relevant product market may be narrowed beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product clusters." *Thurman Indus., 875 F.2d at 1374* (citation omitted). To establish the existence of a legally cognizable submarket, "the plaintiff must be able to show (but need not necessarily establish in the complaint) that the alleged submarket is economically distinct **[*18]** from the general product market." *Newcal Indus., 513 F.3d at 1045*; see also *Brown Shoe, 370 U.S. at 325* (listing several "practical indicia" of an economically distinct submarket).

Here, contrary to the abundant weight of authority, Plaintiff devoted merely five words of its fifty-one page complaint to defining the relevant market. Plaintiff asserts that the relevant market is the "mortgage lending and servicing market" (FAC ¶ 74), but the complaint is utterly devoid of any explanation or elaboration to support this contention. For instance, the complaint does not contain any allegations concerning economic substitutes for the proposed product market, and it is entirely unclear to the Court why Plaintiff defined the relevant market in the way that it did. Moreover, the complaint does not even specify a relevant geographic market.

The Court is also concerned by the vagueness of Plaintiff's allegations in support of the antitrust claim. As noted, Plaintiff alleges that "Defendants have engaged in predatory conduct or anticompetitive conduct in an attempt to monopolize the mortgage lending and servicing market." (FAC ¶ 74.) The complaint, however, utterly fails to set forth any specific **[*19]** factual or legal allegations or to link those allegations to particular statutory violations. Instead, Plaintiff alleges that Defendants "worked to create the collapse of the mortgage market, which in turn created an economic collapse unprecedented since the Great Depression." (FAC ¶ 77.) Such sweeping statements fail to apprise Defendants of their alleged wrongdoings.

The Supreme Court acknowledged, in a case involving an alleged Sherman Act violation, that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors, 459 U.S. at 528 n.17*; see also *Twombly, 550 U.S. at 558* ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . , but quite another to forget that proceeding to antitrust discovery can be expensive."); *Kendall, 518 F.3d at 1046-47* (concluding that the Supreme Court clarified the Sherman Act pleading requirements in Twombly "because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much **[*20]** of a case") (citing *Twombly, 550 U.S. at 558-59*). Because Plaintiff has provided nothing more than legal conclusions in support of the antitrust claim, this claim must be dismissed.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count I of the First Amended Complaint.

III. Count II: Violations of the Hawaii Antitrust/Anti-Monopoly Acts

In Count II of the First Amended Complaint, Plaintiff relies on the factual allegations contained in Count I to assert violations of state antitrust laws. Plaintiff states generally that "[m]ortgage lending and servicing in Hawaii is an activity in or affecting interstate commerce." (FAC ¶ 81.) Plaintiff then alleges that Defendants have violated "the

Hawaii Anti-Trust Act, *Hawaii Revised Statutes § 480-13*, and the Hawaii Monopolization Act, *Hawaii Revised Statutes § 480-9*." (FAC ¶ 82.)

The close relationship between federal ***antitrust law*** and Hawaii ***antitrust law*** has been long established. See, e.g., *Robert's Haw. Sch. Bus v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 982 P.2d 853, 881 n.29 (Haw. 1999)* (noting the similarities between Section 2 of the Sherman Act and *Hawaii Revised Statute section 480-9*.) Indeed, the "[l]egislative history of Hawaii's **[*21]** ***antitrust law*** clearly indicates that the state laws are to be interpreted and construed in harmony with analogous federal antitrust laws." *Island Tobacco Co., Ltd. v. R. J. Reynolds Indus., Inc., 513 F. Supp. 726, 738 (D. Haw. 1981)*. Similar to federal law, therefore, Hawaii courts require plaintiffs in antitrust proceedings to plead the "nature of the competition" to "ensure that the injury results from a competition-reducing aspect of the defendant's behavior." *Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 228 P.3d 303, 325 (Haw. 2010)* (citing and relying on federal law).

As with Plaintiff's Sherman Act claim, Plaintiff's state antitrust claim is vague and conclusory and fails to set forth sufficient factual allegations to withstand a motion to dismiss. Broad assertions of state ***antitrust law*** violations of the type presented here simply do not give Defendants an opportunity to properly defend themselves. See *Iqbal, 129 S. Ct. at 1949* ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do."). Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count II of the First Amended Complaint.

IV. Count III: Civil Conspiracy

Count **[*22]** III alleges that "Defendants BAC, as successor in interest to First Magnus, MERS, as mortgagee, and the DOE Defendants agreed, between and among themselves, to engage in actions and a course of conduct designed to further an illegal act . . . and to commit one or more overt acts in furtherance of the conspiracy to defraud the Plaintiff." (FAC ¶ 85.) According to Plaintiff, Defendants had a "common purpose of accruing economic gains for themselves at the expense of and detriment to the Plaintiff." (Id. ¶ 86.)

This Count is dismissed because Hawaii does not recognize an independent cause of action for "civil conspiracy"—such theories of potential liability are derivative of other wrongs. See, e.g., *Chung v. McCabe Hamilton & Renny Co., 109 Haw. 520, 128 P.3d 833, 843 (Haw. 2006)*; *Weinberg v. Mauch, 78 Haw. 40, 890 P.2d 277, 286 (Haw. 1995)*. Here, in contravention of this principle, Plaintiff did not link the claim of civil conspiracy with another cause of action. [5] Further, to the extent that this count is premised at least in part on fraud, Plaintiff must meet the heightened pleading requirements of *Rule 9(b)* in alleging a conspiracy. See *Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007)* ("*Rule 9(b)* imposes **[*23]** heightened pleading requirements where the object of the conspiracy is fraudulent." (citation and internal quotations omitted)). The bald assertions contained in this claim do not satisfy *Rule 9(b)*'s pleading standard.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count III of the First Amended Complaint.

V. Count IV: Fraudulent Misrepresentation

Plaintiff next alleges that Defendants "knowingly and intentionally concealed material information from Plaintiff which was required by federal statutes and regulations to be disclosed to the Plaintiff both before and at the time of closing." (FAC ¶ 90.) Plaintiff also asserts that Defendants "materially misrepresented or failed to disclose material information to the Plaintiff with full knowledge by defendants that their affirmative representations were false, fraudulent, and misrepresented the truth at the time said representations were made or were omissions of material fact." (Id. ¶ 91.)

Plaintiff's vague assertions are insufficient to satisfy **[*24]** *Rule 9(b)*'s rigorous pleading requirements, which apply to allegations of fraud or mistake. See *Fed. R. Civ. P. 9(b)* ("In alleging fraud or mistake, a party must state with

[5] Plaintiff acknowledges as much in the Opposition. (See Opp'n at 23 (recognizing that "Plaintiff may not have tied his claim of civil conspiracy to any particular cause of action").)

particularity the circumstances constituting fraud or mistake."). As noted, a plaintiff "must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1393 (9th Cir. 1988)*. Fraud allegations must also include the "who, what, when, where, and how" of the misconduct, and set forth "more than the neutral facts necessary to identify the transaction." See *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*.

Here, with the exception of Paragraph 92, the allegations of misconduct related to this claim are overly broad and general in nature. These assertions do not distinguish between Defendants and are plainly insufficient to meet Plaintiff's burden under *Rule 8*, much less the more rigorous requirements of *Rule 9(b)* applicable here.

Paragraph 92, the lone paragraph that provides any clarity to the fraudulent misrepresentation claim, is similarly deficient. In this paragraph, Plaintiff **[*25]** alleges several instances of concealment and misrepresentation, but the complaint does not identify who specifically made these misrepresentations or how material facts were concealed from Plaintiff. Nor does Plaintiff specify how these representations were false. [6] Without more, the Court cannot conclude that Plaintiff's vague assertions satisfy *Rule 9(b)*'s heightened pleading requirement.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count IV of the First Amended Complaint.

VI. Count V: Unfair and Deceptive Acts or Practices

Plaintiff also contends that Defendants have **[*26]** engaged in unfair or deceptive acts and practices in violation of *Hawaii Revised Statute sections 480-2(a)* and *481A-3*. (FAC ¶¶ 97-109.)

Section 480-2(a) provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." *Haw. Rev. Stat. § 480-2(a)*. "Two distinct causes of action have emerged under *[section] 480-2(a)*: (1) claims alleging unfair methods of competition; and (2) claims alleging unfair or deceptive acts or practices." [7] *Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Haw. 77, 148 P.3d 1179, 1207 (Haw. 2006)*; see also *Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Haw. 1996)*. *Section 481A-3* similarly prohibits "deceptive trade practice[s]." *Haw. Rev. Stat. § 481A-3*.

Plaintiff contends that Defendants violated these statutes by: (1) targeting financially unsophisticated and otherwise vulnerable consumers for inappropriate credit products; (2) failing to adequately disclose the true costs and risks of the subject loan and its inappropriateness for Plaintiff; (3) failing to disclose that the lender approved the subject loan based on financial documents required by Defendants such as tax returns and pay stubs without regard to Plaintiff's ability to sustain the loan with any reasonable means test; (4) falsely representing or failing to fully and completely disclose the amounts Plaintiff was required to pay; (5) issuing a defective mortgage loan that resulted in little net benefit to Plaintiff with the primary objective of generating fees; and (6) entering into the public record a materially false document. (FAC ¶ 102.)

Once again, Plaintiff provides only labels and conclusions to support this claim. For instance, Plaintiff **[*28]** has utterly failed to allege any facts to suggest that Defendants were targeting financially unsophisticated or otherwise

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[6] As to Plaintiff's claim that Defendants "[f]alsely represented on August 4, 2009, that First Magnus transferred its interest in the Mortgage to BAC" (FAC ¶ 92(j)), this contention also fails to meet *Rule 9(b)*'s requirement that fraud be pleaded with particularity. In this allegation, Plaintiff is presumably referring to the assignment from MERS to BAC (see id. Ex. A; Opp'n at 19-21), but the complaint is completely devoid of any factual allegations to support Plaintiff's argument that MERS did not have authority to assign the mortgage. Accordingly, this contention cannot withstand a motion to dismiss.

[7] Although "[a]ny person" may bring an action for unfair methods of competition in violation of *section 480-2*, only consumers, the attorney general, or the director of the office of consumer protection may bring an action for unfair or deceptive acts or practices in violation of *section 480-2*. *Haw. Rev. Stat. § 480-2(d)*, *(e)*; see also *Davis v. Four Seasons Hotel, Ltd., 122 Haw. 423, 228 P.3d 303, 307 (Haw. 2010)*. A "consumer" is a "natural person **[*27]** who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." *Haw. Rev. Stat. § 480-1*.

vulnerable consumers. Nor has Plaintiff proffered facts with respect to Defendants' failure to adequately disclose "the true costs and risks of the subject loan." There are also no factual allegations to suggest that the lender failed to disclose that it approved loans "without regard to Plaintiff [sic] ability to sustain the loan with any reasonable means test." (Id.) Moreover, Plaintiff's assertion that Defendants created a defective mortgage loan that resulted in little net economic benefit to Plaintiff is so utterly lacking in factual basis that it cannot possibly satisfy federal pleading requirements.

Additionally, Plaintiff's contentions that Defendants falsely represented the amount Plaintiff was required to pay, and that Defendants caused to be recorded a materially false document purporting to convey an interest in the Subject Property, sound in fraud. These assertions, couched as legal conclusions, are insufficient to meet Plaintiff's burden under *Rule 8*, much less the more rigorous requirements of *Rule 9(b)* that apply to allegations of fraud or mistake. **[*29]** See *Fed. R. Civ. P. 9(b)* (requiring a party to state with particularity the circumstances constituting fraud or mistake).

In sum, the instant claim consists entirely of conclusory allegations and vague assertions, which do not satisfy federal pleading requirements and are insufficient to put Defendants on notice of the basis for Plaintiff's claims. See *Iqbal, 129 S. Ct. at 1949* (finding that a complaint does not "suffice if it tenders naked assertions devoid of further factual enhancement") (citation and quotation signals omitted). Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count V of the First Amended Complaint.

VII. Count VI: Breach of Fiduciary Duty

Plaintiff also argues that his relationship with Defendants was fiduciary in nature and that Defendants breached their fiduciary duties in connection with the loan. (See FAC ¶¶ 110-118.) Generally, there exists no fiduciary duty between borrowers and lenders. Unless a special relationship exists between a borrower and lender that elevates the lender's responsibility, the standard "arms-length business relationship" applies. *Giles v. General Motors Acceptance Corp., 494 F.3d 865, 883 (9th Cir. 2007)*; see also *Pension Trust Fund for Operation Engineers v. Federal Ins. Co., 307 F.3d 944, 954 (9th Cir. 2002)*.

Here, **[*30]** the complaint is completely devoid of any allegations to suggest that Plaintiff's relationship with Defendants is anything other than an ordinary, arms-length, lender-borrower relationship. Plaintiff's unsubstantiated assertion that Defendants owe him a fiduciary duty is simply not sufficient to establish the existence of such a duty. [8] Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count VI of the First Amended Complaint.

VIII. Count IX: Unconscionability

Plaintiff argues in Count IX that "the terms and conditions of the Note and Mortgage are unconscionable, and **[*31]** Plaintiff is entitled to rescission, damages, repayment, reimbursement or indemnification of all monies that were paid and other claims in such amounts as shall be proven at the time of trial." (FAC ¶ 135.)

"Unconscionability" is generally a defense to the enforcement of a contract, and is not a proper claim for affirmative relief. See, e.g., *Carey v. Lincoln Loan Co., 203 Ore. App. 399, 125 P.3d 814, 829 (Or. App. 2005)* ("[U]nconscionability is not a basis for a separate claim for relief.") To the extent that unconscionability can be addressed affirmatively as a part of a distinct cause of action, such a claim exists where "the clauses are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." *Lewis v. Lewis, 69 Haw. 497, 748 P.2d 1362, 1366 (Haw. 1988)* (emphasis added and citations omitted).

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[8] Additionally, to the extent that Plaintiff asserts Defendants breached their purported fiduciary duties by engaging in fraudulent conduct, those allegations fail to satisfy *Rule 9(b)*'s heightened pleading requirement. Moreover, the Court will not accept Plaintiff's invitation to "recognize that the law is changing with regard to lenders' fiduciary duties and find that Plaintiff has stated a cause of action for breach of fiduciary duty." (See Opp'n at 26.) Plaintiff's argument on this point is premised solely upon California state law, which simply is not relevant to the instant action. (See id. at 24-26.)

Here, Plaintiff's allegations fail to address any specific contract terms between Plaintiff and Defendants, and instead, address Defendants' alleged conduct generally. To the extent Plaintiff refers to the contract, it is to state that "First Magnus did not explain to [Plaintiff] that the payments on the Note he signed would for 10 years pay only interest on the loan, **[*32]** and that he would build no equity in the Subject Property as the result of those payments." (FAC ¶ 133.) Even this allegation, however, does not allege that any particular contract terms are unconscionable; to the contrary, Plaintiff asserts that First Magnus failed to inform him of the contract terms. Moreover, this claim is completely devoid of any facts to demonstrate unconscionability. Plaintiff's contentions in Count IX therefore fail to state a claim.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count IX of the First Amended Complaint.

IX. Count X: Intentional Infliction of Emotional Distress

Plaintiff next asserts a cause of action for intentional infliction of emotional distress. Plaintiff specifically contends that he "suffered emotional distress in the form of lost sleep, constant worry, and grief from the loss of his property." (FAC ¶ 139.)

"Under Hawaii law, the elements of IIED are '(1) that the act allegedly causing the harm was intentional or reckless, (2) that the act was outrageous, and (3) that the act caused (4) extreme emotional distress to another.'" *Enoka v. AIG Haw. Ins. Co., 109 Haw. 537, 128 P.3d 850, 872 (Haw. 2006)* (quoting *Hac v. Univ. of Haw., 102 Haw. 92, 73 P.3d 46, 60-61 (Haw. 2003))*. **[*33]** The Hawaii Supreme Court defines the term "outrageous" as conduct "'without just cause or excuse and beyond all bounds of decency.'" *Enoka, 128 P.3d at 872* (quoting *Lee v. Aiu, 85 Haw. 19, 936 P.2d 655, 670 n.12 (Haw. 1997))*. "Moreover, 'extreme emotional distress' constitutes, inter alia, mental suffering, mental anguish, nervous shock, and other 'highly unpleasant mental reactions.'" Id. (quoting *Hac, 73 P.3d at 60*).

Here, Plaintiff fails to allege any facts to support an inference that Defendants acted in an intentional or reckless manner or that they engaged in outrageous conduct or caused him to suffer severe mental and emotional distress. Plaintiff's conclusory allegations are once again insufficient to state a claim for relief. See *Iqbal, 129 S. Ct. at 1949* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Count X of the First Amended Complaint.

X. Remaining Claims and Leave to Amend

Plaintiff concedes that the causes of action for Unjust Enrichment (Count VII), Mistake (Count VIII), Violations of the Fair Debt Collection Practices Act (Count XI), Breach of **[*34]** the Covenant of Good Faith and Fair Dealing (Count XII), and Complaint to Quiet Title (Count XIII) "are unlikely to prevail as written." (Opp'n at 28-29.) Plaintiff therefore requests leave to amend these claims and any others that the Court finds to be deficient.

Pursuant to *Rule 15(a)(2)*, courts should "freely give leave [to amend] when justice so requires." Further, "requests for leave should be granted with extreme liberality." *Moss v. U.S. Secret Service, 572 F.3d 962, 972 (9th Cir. 2009)*. "Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by an amendment." Id. "However, 'liberality in granting leave to amend is subject to several limitations.'" *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1058 (9th Cir. 2011)* (quoting *Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989))*. "Those limitations include undue prejudice to the opposing party, bad faith by the movant, futility, and undue delay." Id. (citing *Ascon Props, 866 F.2d at 1160*). "Further, '[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.'" Id. (quoting **[*35]** *Ascon Props, 866 F.2d at 1160*).

Due to the deferential standard for amended complaints in this Circuit, the Court will provide Plaintiff one further opportunity to amend the complaint consistent with both this Order as well as the Court's December 13, 2010 Order. Accordingly, the First Amended Complaint is DISMISSED WITHOUT PREJUDICE as against all Defendants in this action with leave to amend no later than 30 days from the filing of this Order. Failure to file an amended complaint and to cure the pleading deficiencies will result in dismissal of this action with prejudice. Plaintiff is advised that the amended complaint must clearly state how each of the named defendants have injured him, and it must also clearly identify the statutory provisions, if any, under which Plaintiff's claims are brought. Moreover, the Court does not here limit Plaintiff's amended pleading only to the causes of action presently contained in the complaint—Plaintiff may allege new theories of liability, provided that they are supported by the proper factual and legal basis.

CONCLUSION

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART the Motion to Dismiss. The First Amended Complaint is **[*36]** DISMISSED WITHOUT PREJUDICE as against all Defendants.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 13, 2011.

/s/ David Alan Ezra

David Alan Ezra

United States District Judge

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Sato v. Wachovia Mortg., FSB

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

July 13, 2011, Decided; July 13, 2011, Filed

NO. 5:11-cv-00810 EJD (PSG)

Reporter

2011 U.S. Dist. LEXIS 75418 *; 2011 WL 2784567

BONNIE C. SATO, Plaintiff(s), v. WACHOVIA MORTGAGE, FSB, et. al., Defendant(s).

Subsequent History: Application denied by *Sato v. Wachovia Mortg., FSB, 2012 U.S. Dist. LEXIS 13430 (N.D. Cal., Feb. 3, 2012)*

Core Terms

preempted, removal, allegations, Notice, preemption, foreclosure, modification, state law, misrepresentation, leave to amend, regulations, mortgages, motion to dismiss, diversity, documents, trust deed, default, lending, supplemental jurisdiction, violations, costs, unlawful detainer action, promissory estoppel, parties, unfair, MOOT, foreclosure proceeding, savings association, mortgage payment, motion to strike

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Under *Fed. R. Civ. P. 12(d)*, for a motion to dismiss, the court does not generally look beyond the complaint as doing so may enter the purview of summary judgment. There are, however, two exceptions to this rule. First, the court may properly take judicial notice of material which is attached as part of the complaint or relied upon by the complaint. Second, the court may properly take judicial notice of matters in the public record pursuant to *Fed. R. Evid. 201(b)*. *Rule 201(b)* requires a judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Under *Rule 201(d)*, a court shall take judicial notice if requested by a party and supplied with the necessary information.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

HN2[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 8(a) requires a plaintiff to plead each claim with sufficient specificity to give the defendant fair notice of what the claim is and the grounds upon which it rests. A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. Moreover, the factual allegations must be enough to raise a right to relief above the speculative level such that the claim is plausible on its face.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] Motions to Dismiss, Failure to State Claim

Under Fed. R. Civ. P. 12(b)(6), when deciding whether to grant a motion to dismiss, the court generally may not consider any material beyond the pleadings. The court must accept as true all well-pleaded factual allegations. The court must also construe the alleged facts in the light most favorable to the plaintiff. Material which is properly submitted as part of the complaint may be considered. But courts are not bound to accept as true a legal conclusion couched as a factual allegation.

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

HN4[] Heightened Pleading Requirements, Fraud Claims

Fraud-based claims are subject to heightened pleading requirements under Fed. R. Civ. P. 9(b). In that regard, a plaintiff alleging fraud must state with particularity the circumstances constituting fraud. Fed. R. Civ. P. 9(b). The allegations must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. To that end, the allegations must contain an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN5[] Motions to Dismiss, Failure to State Claim

If dismissal is granted under Fed. R. Civ. P. 12(b)(6), leave to amend should be freely allowed unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. Fed. R. Civ. P. 15(a). Where amendment to the complaint would be futile, the court may order dismissal with prejudice.

Constitutional Law > Supremacy Clause > Federal Preemption

HN6[] Supremacy Clause, Federal Preemption

Federal preemption of state laws stems from the *Supremacy Clause of the Constitution*, *U.S. Const. art. VI, cl. 2*. The laws of the United States shall be the supreme law of the land any thing in the Constitution or laws of any state to the contrary notwithstanding.

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Legislation > Interpretation

HN7[] Supremacy Clause, Federal Preemption

Generally, preemption analysis starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Congressional intent is therefore the "ultimate touchstone" of preemption inquiry. Such intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. State law may also be preempted by federal regulations. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. If these conditions are met, the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.

Constitutional Law > Supremacy Clause > Federal Preemption

HN8[] Supremacy Clause, Federal Preemption

There are times when the traditional presumption against preemption does not apply. Indeed, the presumption is not triggered when the State regulates in an area where there has been a history of significant federal presence.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Banking Law > ... > Banking & Finance > Regulators > US Office of Thrift Supervision

HN9[] Federal Acts, Home Owners' Loan Act

Congress has legislated in the field of banking from the days of McCulloch v. Maryland, creating an extensive federal statutory and regulatory scheme. The Home Owners' Loan Act (HOLA), *12 U.S.C.S. § 1461, et seq.* was enacted to charter savings associations under federal law, at a time when record numbers of home loans were in default and a staggering number of state-chartered savings associations were insolvent. One of HOLA's central purposes was to restore public confidence in the banking system by consolidating the regulation of savings and loan associations with the federal government. To achieve this purpose, Congress authorized the Office of Thrift Supervision (OTS) to promulgate regulations governing federal savings associations. *12 U.S.C.S. § 1464*. OTS occupies the entire field in that regard. *12 C.F.R. § 560.2(a) (2011)*.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN10[] Federal Acts, Home Owners' Loan Act

The Home Owners' Loan Act's implementing regulations, *12 C.F.R. § 560.2(b)(4)*, *(b)(9)-(10) (2011)* set forth a list, "without limitation," of the categories of state laws that are expressly preempted: The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan; Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants; Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN11[] **Federal Acts, Home Owners' Loan Act**

Although The Home Owners' Loan Act, *12 U.S.C.S. § 1461, et seq.* and its related regulations have been described as so pervasive as to leave no room for state regulatory control, state laws may nonetheless survive a preemption claim in limited circumstances. Those state laws which "only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of the regulations may not be preempted. *12 C.F.R. § 560.2(c)*. In order to determine whether a particular state law has such an effect, the Ninth Circuit has provided the following process: When analyzing the status of state laws under *§ 560.2*, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

Real Property Law > Financing > Foreclosures > General Overview

HN12[] **Financing, Foreclosures**

Cal. Civ. Code § 2923.5(a)(2) requires a mortgage lender to contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. Under *§ 2923.5(a)(1)*, a notice of default cannot be filed until 30 days after this contact is made.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Constitutional Law > Supremacy Clause > Federal Preemption

Real Property Law > Financing > Foreclosures > General Overview

HN13[] **Federal Acts, Home Owners' Loan Act**

The overwhelming weight of authority has held that a claim under *Cal. Civ. Code § 2923.5* is preempted by the Home Owners' Loan Act (HOLA), *12 U.S.C.S. § 1461, et seq.* This is because the notice requirement imposed by *§ 2923.5* implicates HOLA's express preemption of state laws regulating the processing and servicing of mortgages.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN14[] **Deceptive & Unfair Trade Practices, State Regulation**

Under California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et. seq.*, there are three varieties of unfair competition: acts or practices which are unlawful, or unfair, or fraudulent. Unlawful practices are forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. Unfair practices constitute conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. The fraudulent prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. The UCL borrows violations of other laws and treats them as unfair business practices, and also makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN15[] **Deceptive & Unfair Trade Practices, State Regulation**

Although California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et. seq.* is a law of general applicability, it may nonetheless be preempted by the Home Owners' Loan Act, *12 U.S.C.S. § 1461, et seq.* if, as applied, it is a type of state law contemplated by *12 C.F.R. § 560.2(b)*. If it is, the preemption analysis ends.

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN16[] **Federal Acts, Home Owners' Loan Act**

Alleged misrepresentations concerning inadequate disclosures of fees, interest rates, or other loan terms directly affect lending and are preempted by the Home Owners' Loan Act, *12 U.S.C.S. § 1461, et seq.*, while allegations which rely on the general duty not to misrepresent material facts are not preempted.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

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

HN17[] **Deceptive & Unfair Trade Practices, State Regulation**

A plaintiff alleging unfair business practices under California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et. seq.*, must state with reasonable particularity the facts supporting the statutory elements of the violation.

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

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

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

HN18[] Federal & State Interrelationships, Erie Doctrine

In California, the elements of fraud are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud or to induce reliance (4) justifiable reliance; and (5) resulting damage. Although the federal district court looks to state law to determine if the elements of fraud have been properly pleaded, a plaintiff must still meet the federal standard to plead fraud with particularity.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN19[] Consideration, Promissory Estoppel

A successful claim for promissory estoppel requires: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN20[] Motions to Strike, Immaterial Matters

Under *Fed. R. Civ. P. 12(f)*, the court may strike from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. A motion to strike will generally not be granted unless it is clear the matter to be stricken could not have any possible bearing on the subject matter of the litigation.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

HN21[] Specific Cases Removed, Federal Questions

A state court action may be removed to federal court so long as the action could have originally asserted federal-question jurisdiction. *28 U.S.C.S. 1441(b)*. The defendant must show the basis for federal jurisdiction. Removal jurisdiction statutes are strictly construed against removal. A well-pleaded complaint presents a federal-question on the face of the pleading. An anticipated or even actual federal defense is not sufficient to confer jurisdiction. A plaintiff, however, may not defeat removal by purposely omitting necessary federal questions from the complaint.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Real Property Law > ... > Landlord's Remedies & Rights > Eviction Actions > Forcible Entry & Detainer

HN22[] Specific Cases Removed, Federal Questions

Unlawful detainer claims themselves do not arise under federal law, and therefore, the federal district court lacks federal-question jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN23[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The supplemental-jurisdiction statute is not a source of original subject-matter jurisdiction, and a removal petition therefore may not base subject-matter jurisdiction on the supplemental jurisdiction statute, even if the action which a defendant seeks to remove is related to another action over which the federal district court already has subject-matter jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN24[] **Subject Matter Jurisdiction, Amount in Controversy**

Under *28 U.S.C.S. § 1332(a)*, federal courts have original jurisdiction where: (1) opposing parties are citizens of different states; and (2) the amount in controversy exceeds $75,000. Where diversity is cited as a basis for jurisdiction, removal is not permitted if a defendant in the case is a citizen of the state in which the plaintiff originally brought the action, even if the opposing parties are diverse. *28 U.S.C.S. § 1441(b)*.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN25[] **Costs & Attorney Fees, Costs**

An order remanding a case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. *28 U.S.C.S. § 1447(c)*. Since the process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources, requiring the payment of fees and costs is appropriate where the removing party lacked an objectively reasonable basis for seeking removal. District courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. In addition, the Ninth Circuit clarified that removal is not objectively unreasonable solely because the removing party's arguments lack merit, or else attorney's fees would always be awarded whenever remand is granted. Instead, the objective reasonableness of a removal depends on the clarity of the applicable law and whether such law "clearly foreclosed" the arguments in support of removal.

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For Wachovia Mortgage, FSB, Defendant: Yaw-Jiun Wu, LEAD ATTORNEY, Robert Arthur Bailey, Anglin, Flewelling, Rasmussen, Campbell & Trytten, LLP, Pasadena, CA.

For NDEX West, LLC, Defendant: Edward A. Treder, LEAD ATTORNEY, Barrett Daffin Frappier Treder & Weiss, LLP, Diamond Bar, CA; Deepika Singh Saluja, Barrett Daffin Frappier Treder Weiss, LLP, Diamond Bar, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DENYING AS MOOT DEFENDANT'S MOTION TO STRIKE; GRANTING DEFENDANT'S MOTION TO REMAND; DENYING AS MOOT PLAINTIFF'S EX PARTE MOTION TO AMEND COMPLAINT

[Docket Item Nos. 11, 12, 17, 26]

Within this action alleging the wrongful institution of foreclosure proceedings, Defendant Wachovia Mortgage, FSB ("Wachovia") moves to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)* and to strike portions of the complaint pursuant to *Federal Rule of Civil Procedure 12(f)*. Wachovia also moves to remand the unlawful detainer portion of this case to the Monterey Superior Court on various **[*2]** grounds. After reviewing the complaint as well as the moving, responding and reply papers for each motion, the Court found these matters suitable for decision without oral argument pursuant to *Civil Local Rule 7-1(b)*. As such, the hearing previously scheduled was vacated and the motions submitted. For the reasons set forth below, the motion to dismiss will be granted with leave to amend in part, rendering the motion to strike moot. The motion to remand will be granted. [1]

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1986, Sato purchased the property at issue located at 25500 Via Marquita in Carmel (the "Property") by executing a Deed of Trust in the amount of $317,000.00. Complaint at ¶ 10. Sato then refinanced the Property in 2008 through Wachovia. Id. at ¶ 11. On the corresponding Deed of Trust for this new loan, Wachovia was listed as the "lender" and Golden West Savings Association Service Company was listed as the "trustee." Id.

Sato remained current on her mortgage payments. Id. at ¶¶ 12-15. However, after a series of personal events which diminished her financial status, Sato contacted Wachovia in early 2008 **[*3]** and requested information about a loan modification since her current loan was an adjustable rate, negative amortization loan. Id. at ¶¶ 12-17. Wachovia representatives told Sato "numerous times" that she must stop making mortgage payments in order to for Wachovia to review her loan for a potential modification. Id. at ¶ 18. Relying on these statements, Sato did in fact stop paying her mortgage and believed Wachovia was in the process of reviewing of her loan. Id. at ¶¶ 21, 23.

Sato provided all information requested of her during the period her loan was under review. Id. at ¶ 25. According to Sato, however, Wachovia "routinely botched up documents, lost documents and asked for the same documentation over and over again" and despite her requests, Sato could not get a straight answer from Wachovia regarding the status of her loan. Id. at ¶¶ 24, 26. Wachovia never returned a "valid answer" on Sato's potential loan modification, and never discussed with her options to avoid foreclosure." Id. at ¶¶ 27-29. At some point, Wachovia stopped reviewing Sato's account and initiated foreclosure proceedings. Id. at ¶ 31. Thus, on June 28, 2010, a Notice of Default was recorded by Defendant NDex **[*4]** West ("NDex"). Id. at ¶ 35. Thereafter, NDex was substituted as

[1] This disposition is not designated for publication in the official reports.

Trustee (although they had already filed a Notice of Default) on August 13, 2010, and a Notice of Trustee's Sale was filed by NDex on September 30, 2010. Id. at ¶¶ 36, 37.

Sato initiated this case in Monterey County Superior Court on January 13, 2011, alleging eight claims for relief: (1) Quiet Title; (2) violation of *California Civil Code § 2923.5*; (3) violation of *California Business and Professions Code § 17200 et. seq.*; (4) intentional misrepresentation; (5) negligent misrepresentation; (6) promissory estoppel; (7) injunctive relief; and (8) recission. On February 22, 2011, Wachovia removed Sato's action to this court pursuant to *28 U.S.C. § 1332 et. seq.* A subsequent unlawful detainer action brought by Wachovia in Monterey County Superior Court was thereafter removed by Sato on March 15, 2011, and consolidated into this case.

II. THE MOTION TO DISMISS

Wachovia moves to dismiss all of Sato's claims as pre-empted by the Home Owners' Loan Act ("HOLA"). As discussed further below, the court agrees that the first, second, seventh and eighth claims are preempted and cannot be saved through amendment. Thus, they will be dismissed **[*5]** without leave to amend. The remaining claims will be dismissed with leave to amend.

A. Request for Judicial Notice ("RJN")

In support of this motion to dismiss, Wachovia requested the court take judicial notice of various documents. See Wachovia's RJN. Exs. A-I. These documents include: (A) the Deed of Trust, (B) the Charter of Wachovia Mortgage, FSB, (C) a certification from the Comptroller of the Currency, (D) the Notice of Default, (E) the Substitution of Trustee, (F) the Notice of Trustee's Sale, (G) a letter from Wachovia to Sato informing her of a rate adjustment, (H) a letter from Wachovia to Sato informing her she did not qualify for a loan modification, and (I) the Trustee's Deed upon Sale.

HN1[] For a motion to dismiss, the court does not generally look beyond the complaint as doing so may enter the purview of summary judgment. See *Fed. R. Civ. P. 12(d)*. There are, however, two exceptions to this rule. First, the court may properly take judicial notice of material which is attached as part of the complaint or relied upon by the complaint. See *Lee v. City of Los Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001)*. Second, the court may properly take judicial notice of matters in the public **[*6]** record pursuant to *Federal Rule of Evidence 201(b)*. Id. *Rule 201(b)* requires a "judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." A court "shall take judicial notice if requested by a party and supplied with the necessary information." See *Fed. R. Evid. 201(d)*.

Here, Sato does not challenge the authenticity of the documents contained in Wachovia's RJN. Exhibits A, D, E, F and I are judicially noticeable as matters of public record. Exhibits G and H are judicially noticeable because they are relied upon by the complaint. Complaint at ¶¶ 31, 32. Additionally, exhibits B and C are judicially noticeable as "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)(2)*; *Hite v. Wachovia Mortg., No. 2:09-cv-02884-GEB-GGH, 2010 U.S. Dist. LEXIS 57732, at *6-9 (E.D. Cal. June 10, 2010)*; *Gens v. Wachovia Mortg. Corp., No. CV10-01073 JF (HRL), 2010 U.S. Dist. LEXIS 54932, at *6-7 (N.D. Cal. May 12, 2010)*. **[*7]** Therefore, Wachovia's RJN is granted in its entirety.

B. Legal Standards

1. Dismissal under *Rule 12(b)(6)*

HN2[] *Federal Rule of Civil Procedure 8(a)* requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). Moreover, the factual allegations "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." Twombly, 550 U.S. at 556-57.

HN3[] When deciding whether to grant a motion to dismiss, the court generally "may not consider any material beyond the pleadings." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). The court **[*8]** must accept as true all "well-pleaded factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). The court must also construe the alleged facts in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988). "[M]aterial which is properly submitted as part of the complaint may be considered." Twombly, 550 U.S. at 555. But "courts are not bound to accept as true a legal conclusion couched as a factual allegation." Id.

Additionally, HN4[] fraud-based claims are subject to heightened pleading requirements under Federal Rule of Civil Procedure 9(b). In that regard, a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). To that end, the allegations must contain "an account of the time, place, and specific content of the false representations as well as the identities of **[*9]** the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007).

HN5[] If dismissal is granted, leave to amend should be freely allowed "unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000); Fed. R. Civ. P. 15(a). Where amendment to the complaint would be futile, the court may order dismissal with prejudice. Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996).

2. Preemption under HOLA

HN6[] Federal preemption of state laws stems from the Supremacy Clause of the Constitution. United States v. Arizona, No. 10-16645, 641 F.3d 339, 2011 U.S. App. LEXIS 7413, at *4. "[T]he laws of the United States...shall be the supreme law of the land...any Thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

HN7[] Generally, "[p]reemption analysis 'start[s] **[*10]** with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" City of Columbus v. Ours Garage & Wrecking Service, Inc., 536 U.S. 424, 438, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)). Congressional intent is therefore the "ultimate touchstone" of preemption inquiry. Medtronic, 518 U.S. at 485. Such intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). State law may also be preempted by federal regulations. Id. at 153. "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." Id. If these conditions are met, "the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." New York v. Fed. Commc'ns Comm'n, 486 U.S. 57, 64, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988).

HN8[] There are times when the traditional presumption **[*11]** against preemption does not apply. Indeed, the presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." United States v. Locke, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000). As relevant here, HN9[] "Congress has legislated in the field of banking from the days of McCulloch v. Maryland, 17 U.S. 316, 325-26, 426-27, 4 L. Ed. 579 (1819), creating an extensive federal statutory and regulatory scheme." Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002). HOLA was enacted "to charter savings associations under federal law, at a time when record numbers of home loans were in default and a staggering number of state-chartered savings associations were insolvent." Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1004 (9th Cir. 2008). One of HOLA's central purposes was to restore public confidence in the banking system by consolidating the regulation of savings and loan associations with the federal government. Id. To achieve this purpose, Congress authorized the Office of Thrift Supervision ("OTS") to promulgate regulations governing federal savings associations. 12 U.S.C. § 1464; Silvas, 514 F.3d at 1005. OTS occupies **[*12]** the entire field in that regard. 12 C.F.R. § 560.2(a) (2011).

HN10[] HOLA's implementing regulations set forth a list, "without limitation," of the categories of state laws that are expressly preempted:

> The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
>
> ....
>
> Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
>
> ....
>
> Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages....

12 C.F.R. § 560.2(b)(4), (b)(9)-(10) (2011).

HN11[] Although HOLA and its related regulations have been described as "so pervasive as to leave no room for state regulatory control," state laws may nonetheless survive a preemption **[*13]** claim in limited circumstances. Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979), aff'd, *445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754*. Those state laws which "only *incidentally affect* the lending operations of Federal savings associations or are otherwise consistent with the purposes of" the regulations may not be preempted." 12 C.F.R. § 560.2(c) (emphasis added). In order to determine whether a particular state law has such an effect, the Ninth Circuit has provided the following process:

> When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

Silvas, 514 F.3d at 1005 (quoting OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sep. 30, 1996)).

B. [*14] Discussion

As a preliminary matter, it is important to note that Sato obtained the subject home loan from Wachovia Mortgage, FSB, in 2008. Complaint at ¶ 11; RJN, Ex. A. At that time, Wachovia was an independent "Federal savings bank chartered under section 5 of the Home Owners' Loan Act" and "subject to all lawful and applicable rules, regulations, and orders of the Office of Thrift Supervision." RJN, Ex. B. Although Wachovia was subsequently acquired by a national banking association, namely Wells Fargo Bank, N.A., district courts have held that HOLA preemption applies to all conduct relating to the loan. DeLeon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010); Haggarty v. Wells Fargo Bank, N.A., No. C 10-02416 CRB, 2011 U.S. Dist. LEXIS 9962, at *10-11 (N.D. Cal. Feb. 2, 2011); Guerrero v. Wells Fargo Bank, N.A., No. CV 10-5095-VBF(AJWx), 2010 U.S. Dist. LEXIS 96261, at *8-9 (C.D. Cal. Sep. 14, 2010); Zlotnik v. U.S. Bancorp, No. C 09-3855 PJH, 2009 U.S. Dist. LEXIS 119857, at *17-19 (N.D. Cal. Dec. 22, 2009). This court agrees with the conclusions of its predecessors and will therefore examine this matter under HOLA. Sato's argument in opposition, which mainly **[*15]** discusses preemption under the National Bank Act ("NBA"), 12 U.S.C. § 38 et. seq., is misplaced. [2]

1. Claim 2: Violation of California Civil Code § 2923.5

Sato alleges Wachovia violated the notice provisions contained in California Civil Code § 2923.5 by failing to contact her prior to foreclosure proceedings. **HN12**[] The statute requires a mortgage lender to "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Cal. Civ. Code § 2923.5(a)(2). A notice of default cannot be filed until 30 days after this contact is made. Cal. Civ. Code § 2923.5(a)(1).

Sato's claim under § 2923.5 must be dismissed for three reasons: (1) § 2923.5 does not apply to Sato's mortgage loan, (2) § 2923.5 is preempted by HOLA, and (3) Sato is no longer eligible for relief under § 2923.5 even if the statute was viable here.

As to the first reason for dismissal, the court need not look further than the **[*16]** plain language of the statute. "This section shall apply only to mortgages or deeds of trust recorded from *January 1, 2003, to December 31, 2007*, inclusive, that are secured by owner-occupied residential real property containing no more than four dwelling units." Cal. Civ. Code § 2923.5(i) (emphasis added). Sato obtained her loan in 2008. Complaint at ¶ 11. The deed of trust was recorded on January 29, 2008. RJN, Ex. A. Thus, § 2923.5 does not apply to Sato's loan.

Regarding preemption, **HN13**[] "the overwhelming weight of authority has held that a claim under section 2923.5 is preempted by HOLA." Taguinod v. World Savings Bank, 755 F. Supp. 2d 1064, 1074, 2010 U.S. Dist. LEXIS 127677, at *20 (C.D. Cal. 2010); see also, e.g., Nguyen v. Wells Fargo Bank, N.A., 749 F. Supp. 2d 1022, 1033 (N.D. Cal. 2010); Beall v. Quality Loan Serv., No. 10-CV-1900-IEG (WVG), 2011 U.S. Dist. LEXIS 29184, at *21-23 (C.D. Cal. Mar. 21, 2011). This is because the notice requirement imposed by § 2923.5 "implicates HOLA's express preemption of state laws regulating the 'processing' and 'servicing'" of mortgages. DeLeon, 729 F. Supp. 2d at 1127. Although one California appellate court has found against HOLA preemption, **[*17]** that court's determination is neither binding on this court, nor persuasive in its reasoning. See Mabry v. Sup. Ct., 185 Cal. App. 4th 208, 226-32, 110 Cal. Rptr. 3d 201 (2010). In the simplest of terms, the Mabry court held that since the term "foreclosure" does not explicitly appear in 12 C.F.R. § 560.2(b), state statutes that can be read to regulate only the foreclosure process, like § 2923.5, are not preempted by HOLA. Id. at 231. But looking to the categories of state laws expressly preempted by HOLA is only the first step of the two step inquiry prescribed by the Ninth Circuit. See Silvas, 514 F.3d at 1005; see also Giordano v. Wachovia Mortg., FSB, 5:10-cv-04661-JF, 2010 U.S. Dist. LEXIS 136284, at *11-14 (N.D. Cal. Dec. 14, 2010). Having undertaken the second step, this court finds - as others have found even after Mabry - that the additional notice and disclosure requirements imposed by § 2923.5 affect lending in a manner that cannot be described as incidental, even if foreclosure activities are not explicitly listed in 12 C.F.R. § 560.2(b). For this reason, § 2923.5 is preempted by HOLA.

In addition to the grounds stated above, Sato's claim under § 2923.5 would nonetheless be subject to dismissal **[*18]** even if the statute was applicable. The only available remedy available for a violation of § 2923.5 is the postponement of an impending foreclosure to permit the lender to comply with the statute. Mabry, 185 Cal. App. 4th at 223-24. Since the subject property has since been sold, Sato can obtain no further relief. RJN, Ex. I.

[2] In any event, it is likely preemption under NBA would lead to the same result. Zlotnik v. U.S. Bancorp, 2009 U.S. Dist. LEXIS 119857, at *19 (finding the preemption analysis under NBA as identical to that under HOLA).

Claim 2 will be dismissed without leave to amend.

2. Claim 3: Violation of California Business and Professions Code

Sato alleges violations of California's Unfair Competition Law ("UCL"). *Cal. Bus. & Prof. Code § 17200 et. seq.* ***HN14***[] Under the UCL, there are three varieties of unfair competition: "acts or practices which are *unlawful*, or *unfair*, or *fraudulent*." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 618-19, 17 Cal. Rptr. 2d 708 (1993)*. "Unlawful" practices are "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Sup. Ct., 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. "Unfair" practices constitute "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly **[*19]** threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The "fraudulent" prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. See *id. at 180*; see also *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227 (2006)*; *Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)*. The UCL 'borrows' violations of other laws and treats them as unfair business practices, and also "makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech, 20 Cal. 4th at 180*.

Sato's UCL claim can be separated into three basic allegations: (1) "fraudulent representations" concerning the continuation of mortgage payments and the availability of a loan modification, (2) a violation of *California Civil Code § 2923.6*, and (3) a violation of *California Civil Code § 2923.5*. Sato contends she lost money and property as a result of Wachovia's conduct.

Sato's third allegation under *§ 2923.5*, which is identical to her stand-alone claim under that statute, is preempted for the same reasons discussed in the preceding section. Similarly, **[*20]** the second allegation under *§ 2923.6* is preempted as plead. ***HN15***[] Although the UCL is a law of general applicability, it may nonetheless be preempted if, as applied, it is a type of state law contemplated by *12 C.F.R. § 560.2(b)*. *Silvas, 514 F.3d at 1006*. "If it is, the preemption analysis ends." Id. Here, Sato alleges Wachovia violated *§ 2923.6* by failing to modify her loan. Complaint at ¶ 64. This clearly falls under the preemption provisions for "processing, origination, sale or purchase of ... mortgages" and "terms of credit." See *Stefan v. Wachovia, No. C 09-2252 SBA, 2009 U.S. Dist. LEXIS 113480, at *8-10 (N.D. Cal. Dec. 7, 2009)*; see also *Guerrero, 2010 U.S. Dist. LEXIS 96261, at *8-10*. Since both allegations of statutory violations are subject to HOLA preemption, they cannot support this UCL claim.

The first allegation presents a different issue. Sato contends Wachovia told her "numerous times" that she must default in order for her loan to be reviewed for potential modification, and that Wachovia deceived her by offering modification while simultaneously attempting to foreclose on the property. See Complaint at ¶¶ 18, 58, 65. District courts are split as to whether this type of misrepresentation **[*21]** claim is preempted by HOLA. Compare *Guerrero, 2010 U.S. Dist. LEXIS 96261, at *8-10* (finding HOLA preemption for fraud claims arising from the loan modification process) and *Stefan, 2009 U.S. Dist. LEXIS 113480, at *8-10*, with *DeLeon v. Wells Fargo Bank, N.A., No. 10-CV-01390-LHK, 2011 U.S. Dist. LEXIS 8296, at *14-21 (N.D. Cal. Jan. 28. 2011)* (finding against preemption of false representation claims that did not impose obligations on lending activity). From these cases, it appears the distinction is this: ***HN16***[] alleged misrepresentations concerning "inadequate disclosures of fees, interest rates, or other loan terms" directly affect lending and are preempted, while allegations which "rely on the general duty not to misrepresent material facts" are not preempted. *DeLeon, 2011 U.S. Dist LEXIS at *17*.

Here, Sato's allegations could be read two ways, one which would render them preempted and one which would not. If the court infers from the allegations that loan modifications must always be made available, and that Wachovia was required to review, or even modify, Sato's loan and to hold all foreclosure efforts during that time, then the allegations are preempted because they surely seek **[*22]** to impose an obligation which affects lending. See *Ortiz v. Wells Fargo Bank, N.A., No. C 10-4812 RS, 2011 U.S. Dist. LEXIS 58243, at *14-15 (N.D. Cal. May 27, 2011)* (holding that ostensible UCL claim alleging misrepresentation of availability of loan modification is preempted by HOLA). However, if the court infers that the allegations only invoke a general duty to not engage in fraud during business dealings, then the claim only incidentally affects lending and is not preempted. *DeLeon, 2011 U.S. Dist LEXIS at *18-19*. At this stage in the case, the court must construe the complaint in the manner most favorable to Sato. *Love, 915 F.2d at 1245*. Thus, the court finds that Sato's UCL claim is not preempted to the extent it relies on general allegations of misrepresentation.

But that does not end the discussion. ***HN17***[] "A plaintiff alleging unfair business practices under [the UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (1993)*. Removing the statutory violations from this claim renders it devoid of sufficient facts to support a UCL violation. What **[*23]** is left are only general, vague and conclusory allegations which lack the "who, what, when, where, and how" required by *Rule 9(b)*. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. It must be amended to survive.

Accordingly, Claim 3 will be dismissed with leave to amend since Sato may be able to allege additional facts to support misrepresentation. Any amended UCL claim must remove reference to violations of the preempted statutes.

3. Claim 1, 7 & 8: Quiet Title, Injunctive Relief and Rescission

In her first claim, Sato seeks to quiet title in her favor notwithstanding the foreclosure process. Her seventh claim for injunctive relief seeks to postpone the trustee's sale. Sato also seeks to rescind the Notice of Trustee's Sale and re-start the foreclosure process in the eighth claim. To the extent the claim for quiet title is premised on defective notice under *§ 2923.5*, it fails as that statute is inapplicable and preempted by HOLA. Moreover, Sato's allegations in each of these claims that NDex West had no ability to commence foreclosure proceedings due to a violation of *California Civil Code § 2934a* is directly contradicted by judicially-noticeable documents referenced by **[*24]** Sato in the complaint, which plainly demonstrate NDex was substituted as trustee before the Notice of Trustee's Sale was recorded. RJN, Exs. E, F. Similarly, the claims for injunctive relief and rescission can no longer be maintained based on another judicially-noticeable document - the Trustee's Deed upon sale. RJN, Ex. I.

Under these circumstances, allowing for amendment of the claims would be futile. Claims 1, 7 and 8 are therefore dismissed without leave to amend.

4. Claims 4 & 5: Intentional and Negligent Misrepresentation

Sato's fourth and fifth claims allege fraud based on intentional and negligent misrepresentation. These claims both rely on the allegations that: (1) Defendants failed to properly assign and transfer their rights under the Deed of Trust prior to foreclosure, in violation of certain California statutes, and (2) Wachovia misrepresented to Sato that she had to default on her mortgage payments in order to qualify for a loan modification.

As discussed above, the portion of these claims alleging Defendants' inability to foreclose is contradicted by judicially-noticeable documents and therefore cannot be maintained. The remaining portion of these claims, however, may survive **[*25]** summary dismissal on preemption grounds because they do not attempt to impose substantive requirements on the process of lending, much like Sato's misrepresentation-based UCL claim. This conclusion notwithstanding, however, the Court has determined these claims have not been sufficiently plead.

HN18[] In California, the elements of fraud are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud or to induce reliance (4) justifiable reliance; and (5) resulting damage. *Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)*. Although the court looks to state law to determine if the elements of fraud have been properly pleaded, a plaintiff must still meet the federal standard to plead fraud with particularity. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. Under these standards, the fraud claims are incomplete. While Sato identifies the alleged misrepresentations made to her, she provides little more. She has not adequately alleged that Defendants knew the statements were false, that they intended to deceive her, that her reliance on their statements was justifiable, or that she suffered damages as a result. Moreover, neither claim is plead with particularity. **[*26]** Thus, these claims must be dismissed for much the same reason as her UCL claim.

Claim 4 and 5 will be dismissed with leave to amend. If Sato chooses to amend these claims, she much remove the allegations alleging statutory violations, and must provide sufficient and particular facts supporting each element of fraud.

5. Claim 6: Promissory Estoppel

For this claim, Sato repeats allegations that Wachovia represented to her numerous times that she must default on her mortgage payments in order to qualify for a loan modification. She also alleges that Wachovia represented there was "no reason that she should not be accepted for a modification." Sato alleges damages due to reliance on these representations. Much like her UCL claim, this claim for promissory estoppel can be read in two ways: one which would result in HOLA preemption in requiring a loan modification or postponement of foreclosure, and one which would not result in preemption by simply alleging promises that were not kept. As with the UCL claim, the court cannot find clear preemption at this point. *Love, 915 F.2d at 1245*.

This raises the question of whether the promissory estoppel claim has been sufficiently plead. In its current **[*27]** form, it is missing basic facts which render it incomplete. ***HN19***[] A successful claim for promissory estoppel requires: "(1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance." *Boon Rawd Trading Intern. Co., Ltd. v. Paleewong Trading Co., Inc., 688 F. Supp.2d 940, 953 (N.D. Cal. 2010)*; see also *Ecology, Inc. v. State of California, 129 Cal. App. 4th 887, 901-902, 904, 28 Cal. Rptr. 3d 894 (2005)*. Here, Sato's claim is missing allegations critical to her theory. For this claim to survive, Sato must allege Wachovia represented it would hold foreclosure proceedings while her loan was under review. Without that promise, the other two representations alleged by Sato are meaningless in this context since it is not reasonable to believe, relying only on the representations alleged, that foreclosure was not a possibility even if the loan was under review. More facts are needed to establish the specific promises made.

Since Sato may be able to provide additional facts which would support a claim of promissory estoppel, claim 6 is dismissed **[*28]** with leave to amend.

II. THE MOTION TO STRIKE

HN20[] The Court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. A motion to strike will generally not be granted unless it is clear the matter to be stricken could not have any possible bearing on the subject matter of the litigation. See *LeDuc v. Ky. Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992)*. Here, Wachovia moves to strike two specific portions of the complaint. However, because the court has granted Wachovia's motion to dismiss all of the claims, the motion to strike will be denied as moot.

III. THE MOTION TO REMAND

Through this motion, Wachovia seeks to remand an unlawful detainer action originally filed against Sato in Monterey County Superior Court. Wachovia also seeks to recover its fees for having to bring this motion. Sato removed this separate action from state court after the commencement of this case, alleging that the court has both federal-question and diversity jurisdiction. Notice of Removal, Docket Item No. 14 at 5-6. She also argues this court should exercise supplemental jurisdiction pursuant to *28 U.S.C. § 1367* as Wachovia's **[*29]** unlawful detainer action and Sato's wrongful foreclosure action arise between the same parties and involve the same facts. Since the unlawful detainer complaint presents only state claims on its face and diversity jurisdiction is lacking, the court grants Wachovia's motion.

A. Legal Standard

HN21[] A state court action may be removed to federal court so long as the action could have originally asserted federal-question jurisdiction. *28 U.S.C. 1441(b)*. The defendant must show the basis for federal jurisdiction. *Nishimoto v. Federman-Bachrach & Assocs., 903 F.2d 709, 712 (9th Cir. 1990)*. Removal jurisdiction statutes are strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)*. A "well-pleaded complaint" presents a federal-question on the face of the pleading. *Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)*. An anticipated or even actual federal defense is not sufficient to confer jurisdiction. *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)*. A plaintiff, however, may not defeat removal by purposely omitting necessary federal questions from the complaint. *Id. at 22*.

1. [*30] Federal Question & Supplemental Jurisdiction

Wachovia alleges a single claim against Sato for unlawful detainer. Docket Item No. 14 at Ex. 1. *HN22*[] Unlawful detainer claims themselves do not arise under federal law, and therefore, the court lacks federal-question jurisdiction. See, e.g., *Fed. Nat'l Mortg. Assoc. v. Lopez, No. C 11-00451 WHA, 2011 U.S. Dist. LEXIS 44818, 2011 WL 1465678 at *1 (N.D. Cal. Apr. 15, 2011)*; *GMAC Mortg. LLC v. Rosario, No. C 11-1894 PJH, 2011 U.S. Dist. LEXIS 53643, 2011 WL 1754053, at *2 (N.D. Cal. May 9, 2011)*; *Wescom Credit Union v. Dudley, No. CV 10-8203 GAF (SSx), 2010 U.S. Dist. LEXIS 130517, 2010 WL 4916578, at *2 (C.D. Cal. Nov. 22, 2010)*.

Despite what appears to be a clear legal standard, Sato nonetheless asserts that Wachovia violated California's non-judicial foreclosure statutes as a reason for removal. This is not a defense based in federal law. But even if it was, it does not appear on the face of Wachovia's complaint or otherwise confer federal jurisdiction. See *Taylor, 481 U.S. at 63* (holding jurisdiction must appear on the face of the complaint); see also *Hunter, 582 F.3d at 1042-43* **[*31]** (holding jurisdiction cannot rest on actual or anticipated defense).

Moreover, Sato's argument that this court should exercise supplemental jurisdiction is unavailing. *HN23*[] "The supplemental-jurisdiction statute is not a source of original subject-matter jurisdiction, and a removal petition therefore may not base subject-matter jurisdiction on the supplemental jurisdiction statute, even if the action which a defendant seeks to remove is related to another action over which the federal district court already has subject-matter jurisdiction." *Pacific Bell v. Covad Communications Co., No. C 99-1491 SI, 1999 U.S. Dist. LEXIS 8846, at *9 (N.D. Cal. June 8, 1999)* (quoting *Ahearn v. Charter Twp. Of Bloomfield, 100 F.3d 451, 456 (6th Cir. 1996))*. Thus, any relationship between the unlawful detainer action and the wrongful foreclosure case is irrelevant for purposes of removal. There is no basis for either federal question or supplemental jurisdiction here.

2. Diversity Jurisdiction

Sato also alleges jurisdiction since Wachovia is a citizen of South Dakota while she is a citizen of California. *HN24*[] Federal courts have original jurisdiction where (1) opposing parties are citizens of different states and **[*32]** (2) the amount in controversy exceeds $75,000. *28 U.S.C. § 1332(a)*. Where diversity is cited as a basis for jurisdiction, removal is not permitted if a defendant in the case is a citizen of the state in which the plaintiff originally brought the action, even if the opposing parties are diverse. See *28 U.S.C. § 1441(b)*. Much like federal question jurisdiction, diversity jurisdiction simply does not exist here. First, Sato fails to allege the amount in controversy exceeds $75,000 in the Notice of Removal. Second, removal is improper because this case was originally filed in a California state court. Sato is a citizen of California. Docket Item No. 14 at 5. Thus, even assuming the parties are diverse, *28 U.S.C. § 1441(b)* prohibits removal by Sato.

Because the court lacks a basis for jurisdiction, the unlawful detainer action will be remanded to Monterey County Superior Court.

B. Request for Attorney's Fees

Wachovia requests an award of fees in connection with this motion to remand. *HN25*[] "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." *28 U.S.C. § 1447(c)*. Since "[t]he process of removing a case **[*33]** to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources," requiring the payment of fees and costs is appropriate where "the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Captial Corp., 546 U.S. 132, 140-41, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)*. In Martin, the Court explained that "district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." *Id. at 141*. In addition, the Ninth Circuit clarified in *Lussier v. Dollar Tree Stores, Inc., 518 F. 3d 1062, 1065 (9th Cir. 2008)* that "removal is not objectively unreasonable solely because the removing party's arguments lack merit, or else attorney's fees would always be awarded whenever remand is granted." Instead, the objective reasonableness of a removal depends on the clarity of the applicable law and whether such law "clearly foreclosed" the arguments in support of removal. *Id. at 1066-67*.

Here, Wachovia contends Sato lacked an objectively reasonable basis for removal because there are clearly settled reasons why removal is not appropriate. The court **[*34]** agrees. As determined above, there is no basis for jurisdiction disclosed on the face of the complaint, and Sato makes no effort to support her statement contained in the Notice of Removal that this unlawful detainer action somehow arises under federal law. Furthermore, Sato's reliance on diversity as a basis for jurisdiction is unreasonable considering the two doctrines which prevent removal based on diversity are codified and not subject to debate under the facts of this case. This leaves Sato's claim that the court should exercise supplemental jurisdiction. But as already stated, supplemental jurisdiction alone cannot form the basis of subject matter jurisdiction, even if another related action is already pending in federal court. *Pacific Bell, 1999 U.S. Dist. LEXIS 8846 at *9*; *Flower v. Wachovia Mortg., FSB, No. C 09-343 JF (HRL), 2009 U.S. Dist. LEXIS 36299, at *26-27 (N.D. Cal. Apr. 10, 2009)*. In short, all of Sato's arguments are "clearly foreclosed" by the by the applicable law, and there are no unusual circumstances which would justify a different conclusion especially since Sato is represented by counsel. Since the court cannot find a valid reason for removal, it appears **[*35]** the this case was removed solely to delay the imposition of a state court judgment displacing Sato from the home, and to force Wachovia to sustain additional costs. The court will not countenance such frivolous behavior, especially when the precise purpose of *§ 1447(c)* is to prevent such tactics. An award of fees and costs is therefore appropriate here.

Wachovia seeks a total of $2,145.00 in fees and costs, which amounts to 7.8 hours of time at a rate of $275.00 per hour. See Decl of Yaw-Jiun (Gene) Wu at ¶ 4. Pursuant to *§ 1447(c)*, the Court awards fees only for the time spent on the motion to remand as those fees were incurred directly as a result of the removal. See *Baddie v. Berkeley Farms, 64 F.3d 487, 490 (9th Cir. 1995)*. For that reason, the court will not award fees for counsel's communications with either his client or Wells Fargo's other counsel, for analyzing the due date for the motion, or for speaking with the court clerk. Thus, the court finds reasonable a total of 6.8 hours at counsel's hourly rate. Accordingly, Wachovia's request for fees and costs is granted in the amount of $1,870.00.

IV. ORDER

Based on the foregoing:

1. Wachovia's Motion to Dismiss (Docket Item No. 11) **[*36]** is GRANTED WITHOUT LEAVE TO AMEND as to counts 1, 2, 7 and 8. The Motion is GRANTED WITH LEAVE TO AMEND as to counts 3, 4, 5, and 6. Any amended complaint must be filed within 30 days of the date this order is filed.

2. Wachovia's Motion to Strike (Docket Item No. 12) is DENIED AS MOOT.

3. Wachovia's Motion to Remand (Docket Item No. 17) is GRANTED. Wachovia's request for fees pursuant to *28 U.S.C. § 1447(c)* is also GRANTED in the amount of $1,870.00.

4. Given the ruling on the Motion to Dismiss, Sato's Ex Parte Motion to Amend the Complaint (Docket Item No. 26) is DENIED AS MOOT.

IT IS SO ORDERED.

Dated: July 13, 2011

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

End of Document

Sweetwater Valley Farm, Inc. v. Dean Foods Co. (In re Southeastern Milk Antitrust Litig.)

United States District Court for the Eastern District of Tennessee, Greeneville Division

July 14, 2011, Filed

No. 2:07-CV 208; Master File No. 2:08-MD-1000

Reporter

801 F. Supp. 2d 705 *; 2011 U.S. Dist. LEXIS 76314 **; 2012-1 Trade Cas. (CCH) P77,946; 2011 WL 2749579

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: Sweetwater Valley Farm, Inc., et al. v. Dean Foods Co., et al., No. 2:07-CV 208.

Subsequent History: Motion denied by *Sweetwater Valley Farm, Inc. v. Dean Foods Co. (In re Southeastern Milk Antitrust Litig.), 2011 U.S. Dist. LEXIS 160060 (E.D. Tenn., July 20, 2011)*

Prior History: *Sweetwater Valley Farm, Inc. v. Dean Foods Co. (In re Southeastern Milk Antitrust Litig.), 2011 U.S. Dist. LEXIS 76552 (E.D. Tenn., July 14, 2011)*

Core Terms

milk, prices, conspiracy, dairy, plaintiffs', cooperatives, fluid, farmers, antitrust, marketing, monopolization, southeast, bottling, blend, anti-competitive, plants, monopsonize, relevant market, monopoly power, geographic, horizontal, monopsony, market share, participated, competitors, Orders, market power, filed-rate, damages, anti trust law

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For Stephen J. Cornett, William C. Frazier, Brandon C. McCain, Jerry L. Holmes, Barbara Arwood, doing business as Vba Dairy, Victor Arwood, Jeffrey P. Bender, Randel E. Davis, Fred Jacques, John M. Moore, D. L. Robey Farms, Interested Parties: Robert G. **[**8]** Abrams, Baker & Hostetler (DC), Washington, DC.

For Robert D Stoots, Interested Party: Robert G. Abrams, Robert J. Brookhiser, Baker & Hostetler (DC), Washington, DC.

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For Cobblestone Milk Cooperative, Inc.; Roger Jefferson; and Ben Shelton, Movant: Robert G. Abrams, LEAD ATTORNEY, Baker & Hostetler (DC), Washington, DC.

For Allen Meyer, Tracy Noll, Cletes Beshears, Objectors: Jerry L Beane, LEAD ATTORNEY, Andrews Kurth, LLP, Dallas, TX.

For Dairy Cooperative Marketing Association, Inc., Objector: Craig V Gabbert, Jr, LEAD ATTORNEY, Harwell, Howard, Hyne, Gabbert & Manner, PC, Nashville, TN.

Judges: J. RONNIE GREER, UNITED STATES DISTRICT JUDGE.

Opinion by: J. RONNIE GREER

Opinion

[*712] **MEMORANDUM OPINION AND ORDER**

I.Introduction

This multidistrict class action case involves allegations by plaintiffs, independent dairy farmers, independent cooperative members and DFA member dairy farmers, both on behalf of themselves and as a class action pursuant to *Rule 23 of the Federal Rules of Civil Procedure* [1] against **[**9]** Dean Foods Company ("Dean"), National Dairy Holdings, L.P. ("NDH"), Dairy Farmers of America, Inc. ("DFA"), Dairy Marketing Services, LLC ("DMS"), Southern Marketing Agency, Inc. ("SMA"), Mid-Am Capital, LLC ("Mid-Am"), James Baird ("Baird"), Gary Hanman ("Hanman") and Gerald Bos ("Bos") (collectively referred to as "defendants") seeking treble damages and injunctive relief for violations of sections 1 and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and a state law breach of contract claim against DFA.

Several motions for summary judgment have been filed: (1) Defendants' joint motion for summary judgment on Counts One through Five of the complaint, [Doc. 839]; (2) supplemental motions for summary judgment by SMA, [Doc. 829], Baird [Doc. 826], Bos, [Doc. 833], and Hanman, [Doc. 836]. **[**10]** DFA has also moved for summary judgment as to Count Six, the state law breach of contract claim, [Doc. 842]. [2] The plaintiffs have responded to all motions for summary judgment, the defendants have replied and supplemental briefs have been filed by the parties as to certain questions raised at oral argument by the Court. Oral argument was heard on January 20, 2011, and April 21, 2011. An order was entered on May 12, 2011, [Doc. 1543], announcing the Court's decision as to several of those motions. This memorandum opinion is entered for the purpose of setting forth more fully the Court's analysis and conclusions with respect to the motions.

II.Factual and Procedural Background

As set forth above, plaintiffs' allege violations of *§§ 1* and *2* of the Sherman Act and breach of contract by DFA. More specifically, plaintiffs allege a conspiracy to monopolize and monopsonize against all defendants under *§ 2* (Count One), attempt to monopolize and monopsonize under *§ 2* (Count Two), a monopolization **[**11]** claim against DFA, DMS and SMA under *§ 2* (Count Three), monoposonization against Dean under *§ 2* (Count Four), and conspiracy to restrain trade against all defendants under *§ 1* (Count Five). Plaintiffs also pursue a breach of contract claim against DFA in Count Six.

The plaintiffs are dairy farmers who produce or have produced during the relevant time period fluid Grade A milk within **[*713]** Federal Milk Market Orders ("FMMO" or "Order") 5 and 7 which was sold, directly or through an agent, to Defendants or Co-cospirators in Orders 5 and 7. Defendants Dean and NDH purchase, process and ship fluid Grade A milk. Dean owns a number of bottling plants in the southeast and is the largest fluid Grade A milk bottler in the southeast. NDH owns several Grade A milk bottling plants in the southeast and is the second largest Grade A milk bottler in the southeast. DFA owns fifty percent of NDH. DFA is a dairy farmer cooperative which markets, processes and ships Grade A milk. DFA owns and operates hauling companies, processing plants and distribution centers and is the third largest fluid Grade A milk bottler in the southeast. DFA is also the largest dairy cooperative in the country. DFA is owned by its **[**12]** dairy farmer members and governed by a board of directors comprised of dairy farmer members. DFA markets milk produced by its dairy farmer members and distributes the

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[1] This Court has previously granted a motion for class certification as to the Sherman Act claims but has denied class certification as to the breach of contract claim against DFA. The Circuit Court of Appeals for the Sixth Circuit recently denied defendants' request for permission to file an interlocutory appeal of the Court's class certification order and motions to decertify the class are currently pending.

[2] This order will not address the motion for summary judgment filed by DFA as to the breach of contract claim. The parties have agreed to stay that count pending the trial or other disposition of the other claims.

net proceeds or profits from its operations to its dairy farmer members. DFA also markets milk on behalf of some non-members.

DMS is a common marketing agency that markets milk on behalf of dairy farmers. DMS also performs milk marketing services for certain milk processors pursuant to outsourcing contracts. SMA is a common marketing agency that assists in marketing raw Grade A milk on behalf of its six member dairy cooperatives. SMA handles coordination of hauling and transportation of its member cooperatives' raw Grade A milk from the farm to the processing plant and in recent years the coordination of the purchase and hauling of supplemental milk on behalf of its member co-ops. Mid-Am is a subsidiary of DFA and was formed by DFA and others to provide capital to, and make equity investments in, dairy processing and fluid Grade A milk bottling operations.

Baird is the manager of SMA, an officer, director, and general manager of Lone Star Milk Producers, a dairy cooperative based in Texas, and the principal owner, officer **[**13]** and manager of Lone Star Milk Transport, Inc., BullsEye Transport, LLC, and BullsEye Logistics, LLC, Texas-based companies that transport Grade A milk for DFA and SMA. Baird is also the principal owner and manager of GSC, LLC, an entity designed to manage and/or coordinate the operations of defendants SMA, DMS and other entities. Hanman was DFA's chief executive officer from its formation in 1998 until he retired on December 31, 2005. Hanman also served on the management committee of Dairy Management, LLC, the sole general partner of defendant NDH. Bos was DFA's chief financial officer from its formation until his retirement on December 31, 2005. Bos also served on the management committee of Dairy Management, LLC. The plaintiffs allege that Baird, Hanman and Bos have participated in, authorized, directed and/or knowingly approved or ratified the illegal conduct alleged in their complaint.

Plaintiffs allege that certain other milk marketers, milk purchasers, milk processors and other entities and individuals have participated as co-conspirators with the defendants in the violations alleged in their complaint and have performed acts and made statements in furtherance thereof. The third **[**14]** party co-conspirators include DairyCom, Inc., the Kroger Co., Prairie Farms Dairy, Inc., Robert W. Allen, Jay Bryant, Herman Brubaker, Gregg L. Engles, Michael J. McCloskey, Allen A. Meyer and Pete Shinkle.

This Court would ordinarily set out relevant facts related to the issues raised by the summary judgment motions. That is virtually impossible in this case, however, given the voluminous nature of the pleadings and exhibits filed by the parties, especially **[*714]** their statements of undisputed material facts. Both the statements of facts in support of the motions and plaintiffs' responses thereto, as well as plaintiffs' separate statement of facts, identify many "facts" which are irrelevant or, in reality, appear to be mainly arguments and/or conclusory statements advanced in support of their allegations. In reality, the material events related to the issues raised by these motions are largely undisputed, with the parties disputing only the inferences potentially to be drawn from those events by the finder of fact. Facts which are relevant to the Court's determination of these issues will be discussed within the body of the memorandum opinion.

III. Summary Judgment Standard

Generally, summary **[**15]** judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*; [3] *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc., 862 F.2d 597, 601 (6th Cir. 1988)*. Only factual disputes that might affect the outcome of a lawsuit under governing law are "material." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. To be "genuine," a dispute must involve evidence upon which a jury could find for the nonmoving party. *Id.* The burden is upon the moving party to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Thereafter, the nonmoving party must present significant probative evidence in support of the complaint to defeat the motion. *Anderson, 477*

[3] This language is quoted from the text of *Rule 56(c)(2)* effective until December 1, 2010. The language in the text effective, December 1, 2010, is *slightly* different; however, the standard for granting summary judgment remains the same.

U.S. at 249-50. The nonmoving party is required to show more than a metaphysical doubt as to the existence of a genuine issue of material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In deciding the motion, "[t]he court cannot **[**16]** weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute." Stephens v. Koch Foods, LLC, 667 F.Supp.2d 768, 2009 WL 3297289, *8 (E.D. Tenn. 2009) (citing *Anderson*).

The parties in this case have devoted considerable of their briefing and oral argument to the question of whether or not antitrust plaintiffs must meet a different standard from that required of other civil plaintiffs. The burden on the plaintiff in an antitrust case is the same as it is on any other civil plaintiff. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). As in other civil cases, courts addressing summary judgment motions in antitrust cases "must . . . consider all facts in the light most favorable to the non-movant and must give the non-movant the benefit of every reasonable inference." Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 930 (6th Cir. 2005) (internal quotations and citations omitted).

Some **[**17]** special rules do apply, however, with respect to the manner in which the court views certain ambiguous circumstantial evidence in a § 1 case. In conspiracy cases, "[t]he element of agreement, . . . is nearly always established by circumstantial evidence, as conspirators seldom make records of their illegal agreements." United States v. Short, 671 F.2d 178, 182 (6th Cir. 1982). Both the Supreme Court and the Sixth Circuit have, however, **[*715]** made it clear that in a case based on circumstantial evidence, an antitrust plaintiff may not reach a jury where the evidence on which he relies to prove an agreement is, at best, ambiguous. Matsushita, 475 U.S. at 588) ("conduct as consistent with permissible competition as illegal conspiracy does not, standing alone, support an inference of agreement"); Wallace v. Bank of Bartlett, 55 F.3d 1166 (6th Cir. 1995). An antitrust plaintiff bears the burden of presenting evidence that "tends to exclude the possibility that the [defendants] were acting independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). An antitrust plaintiff will be unable to demonstrate a conspiracy if, "using ambiguous evidence, the inference of a conspiracy is **[**18]** less than or equal to an inference of independent action." *See* Riverview Investments, Inc. v. Ottawa Cmty. Imp. Corp., 899 F.2d 474, 483 (6th Cir. 1990) (citing Matsushita, 475 U.S. at 588). The Supreme Court reiterated that standard as recently as 2007 in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007):

> [P]roof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, *see* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed.2d 775 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, *see* Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

550 U.S. at 554. This is consistent with the standard set forth by the Sixth Circuit in numerous cases. *See* Nat'l Hockey League Players Ass'n. v. Plymouth Whalers Hockey Club, 419 F.3d 462, 475 (6th Cir. 2005) (Sherman Act conspiracy claim fails if evidence is "equally consistent with independent conduct"); Sancap Abrasives Corp. v. Swiss Industrial Abrasives, 19 F. App'x. 181, 187 (6th Cir. 2001); Super Sulky, Inc. v. United States Trotting Ass'n, 174 F.3d 733, 740 (6th Cir. 1999); **[**19]** Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009-10 (6th Cir. 1999); Bailey's Inc. v. Windsor America, Inc., 948 F.2d 1018, 1028 (6th Cir. 1991); Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605, 616-17 (6th Cir. 1990); City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1085 (6th Cir. 1989).

IV. Analysis and Discussion

A. The Section 1 Claim-Unlawful Conspiracy Among Defendants To Foreclose Competition and Fix Prices (Count Five)

Count Five of plaintiffs' consolidated amended complaint ("complaint") alleges a decade long, multi-faceted, far-reaching conspiracy among defendants and third-party co-conspirators "to eliminate competition for the purchase of fluid Grade A milk from dairy farmers in the southeast." Plaintiffs allege that defendants have committed certain overt acts in furtherance of the conspiracy alleged, including the following acts: (a) The use of long term full supply agreements to control southeast area farmers' access to fluid Grade A milk bottling plants; (b) depressing, fixing and stabilizing prices for fluid Grade A milk paid to dairy farmers; (c) requiring southeast dairy farmers to market their fluid Grade A milk to DFA controlled entities to gain **[**20]** access to bottling plants; (d) threatening to cut off and cutting off southeast dairy farmers' access to bottling plants; (e) boycotting dairy farmers, cooperatives and Grade A milk bottlers; (f) "flooding" the southeast Grade A market to depress prices paid to farmers; (g) utilizing DFA-controlled entities to monitor prices for Grade A milk paid to independent dairy **[*716]** farmers and independent cooperative members; (h) "punishing" independent cooperatives and fluid Grade A milk bottlers that do not comply with defendants' conspiracy in an effort to eliminate or control those entities as competitive outlets for milk; and (i) purchasing fluid Grade A milk bottling plants, closing down those plants and/or refusing to operate the plants with the purpose and intent of stifling competition from independent dairy farmers, cooperatives and fluid Grade A milk bottlers in the southeast.

Section 1 of the Sherman Act provides in pertinent part:

> [e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal.

15 U.S.C. § 1. While *§ 1* appears to prohibit every restraint of trade, the Supreme Court has interpreted the statute as **[**21]** condemning only those combinations which constitute unreasonable restraints of trade. *Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. In order to establish their claim under *§ 1 of the Sherman Act*, the plaintiffs must prove that the defendants "(1) participated in an agreement that (2) unreasonably unrestrained trade in the relevant market.") *Nat'l Hockey League Players' Assoc., 325 F.3d at 718*.

Whether an agreement unreasonably restrains trade is determined under one of two approaches: the *per se* rule and the rule of reason. *Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Association, 388 F.3d 955, 959 (6th Cir. 2004)*. In *per se* cases, evidence of actual effect on competition is not required because these actions are conclusively presumed to be unreasonable. *Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *Northern Pacific Railway Company v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. A restraint on trade is *per se* illegal when "the practice facially appears to be one that would almost always tend to restrict competition and decrease output." *National Collegiate Athletic Association v. Bd. of Regents of Univ. Of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* **[**22]** (citations omitted).

Examples of practices which are *per se* illegal are horizontal price fixing, market allocation, group boycotts or tying arrangements, activities which are considered inherently anti-competitive. *Copperweld Corp., 467 U.S. at 768*; *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *Northern Pacific Railway Company, 356 U.S. at 5-6*. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 1522-23, 99 L. Ed. 2d 808 (1988)*. There is often no bright line separating per se from rule of reason analysis. *NCAA, 468 U.S. at 104, n.26*.

A *per se* rule is inappropriate where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anti-competitive. *Meijer, Inc. v Barr Pharmaceuticals, Inc., 572 F. Supp. 2d 38, 47 (D.D.C. 2008)*. *Per se* analysis should not be extended "to restraints imposed in the context of business relationships where the economic impact of certain practices is not **[**23]** immediately obvious . . . ." *Balmoral Cinema, Inc. v Allied Artists Pictures Corp., 885 F.2d 313, 316 (6th Cir. 1989)* (quoting *FTC v Indiana Federation of Dentists,* ***[*717]*** *476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

Furthermore, "there is a presumption in favor of a rule-of-reason standard," *Business Elec., 485 U.S. at 726*. Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of "produces significant anticompetitive effects within the relevant product and geographic markets." *NHL Players' Assoc., 325 F.3d at 718*; *Worldwide Basketball and Sport Tours, 388 F.3d at 959* (quoting *Nat'l Hockey League Players, 325 F.3d at 718*)).

Although defendants raise numerous arguments in favor of summary judgment, each of which will be addressed hereinafter, the defendants argue that the case can be disposed of in their favor on a more simple basis. Defendants argue that all of plaintiffs' claims require definition of a relevant market, and, since plaintiffs cannot establish the relevant geographic market, all of plaintiffs' claims fail. Plaintiffs respond that not all of their claims and, more particularly, their conspiracy claims do not require that they establish the **[**24]** relevant geographic market. Put more simply, with respect to Count Five, the defendants claim that the allegations of violation of *§ 1* are subject to rule of reason analysis requiring plaintiffs to establish the relevant geographic market while plaintiffs argue that their § 1 claim is for a horizontal, *per se* illegal agreement in restraint of trade. The parties also differ on the question of whether or not to apply the rule of reason analysis or *per se* analysis to the conspiracy alleged is a question of law for the Court to decide or a question of fact for the jury.

1. Question of Law or Fact?

The question of whether the appropriate rule of law to be applied to the conspiracy alleged by the plaintiffs in their complaint is to be determined by the Court or is a question of fact for the jury has not been precisely answered in the Sixth Circuit. This Court concludes, however, that the weight of authority supports defendants' argument that determination of the appropriate rule of law to be applied is a question of law to be decided by the Court and that approach also appears to be consistent with the Sixth Circuit's application of the legal rules involved.

As defendants note in their brief, **[**25]** a leading antitrust treatise recognizes that the selection of the mode of analysis is a question of law for the court:

> While applying any one of antitrust's modes of analysis might involve many fact questions, the selection of a mode is entirely a question of law. To be sure, the Supreme Court stated in *Maricopa* that "the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." But that statement was not meant to indicate that the fact finder should determine whether the *per se* rule or the rule of reason applied to a particular set of facts. Rather, it meant that once the court decided that the rule of reason should apply, disputed factual questions about reasonableness should be left to the jury. In a footnote the court made clear that determining the rule of decision was a question of law.

XI Herbert Hovencamp, ***Antitrust Law*** ¶ 1909b at 279 (2d Ed. 2005) (citing *Perceptron, Inc. v. Sensor Adaptive Machs., Inc., 221 F.3d 913 (6th Cir. 2000))*. This statement is also consistent with other decisions of the Sixth Circuit. For instance, in *Expert Masonry, Inc. v. Boone County, Kentucky, 440 F.3d 336 (2006)*, **[**26]** the Sixth Circuit said: "In the first instance, *courts* must distinguish between some types of unlawful anticompetitive restraints that **[*718]** [are] . . . *per se* illegal under the antitrust laws, and the far-larger type of restraints that should be analyzed under the rule of reason approach . . . ."). *Id. at 342* (emphasis added). Likewise, in *United States v. Cooperative Theaters Of Ohio, Inc., 845 F.2d 1367 (6th Cir. 1988)*, although a criminal case, the district court held as a matter of law that the alleged conduct constituted a *per se* violation of the Sherman Act, a ruling affirmed by the Sixth Circuit. *See also* *Care Heating & Cooling, Inc. v. American Standard, Inc., 427 F.3d 1008, 1012 (6th Cir. 2005)* ("if a court determines that a practice is illegal *per se*, further examination of the practice's impact on the market or the procompetitive justifications for the practice is unnecessary for finding a violation of ***antitrust law***," suggesting that the decision as to whether a practice is illegal *per se* is one committed to the court).

The approach is likewise consistent with that taken by the United States Supreme Court and other circuit courts of appeals. The Supreme Court has repeatedly noted **[**27]** that the *per se* rule should be applied to conduct only after ***courts*** have had "considerable experience with certain business relationships." *United States v. Topco*

Associates, Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). Since it seems quite clear that the *per se* rule should be applied to conduct only after it has been examined carefully by the courts, not juries, it also seems rather clear that the question of whether allegedly unlawful conduct is subject to *per se* analysis or rule of reason analysis is a legal question for the court, not a question for the jury. *See also* Northern Pacific Railway Company, 356 U.S. at 5 (suggesting that the court must first determine whether the conduct alleged to be unlawful is the type of conduct that has a "pernicious effect on competition and lacks any redeeming virtue . . .," to be considered illegal *per se*); Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981) (where the district judge had held, after hearing argument from both sides, that Toshiba had imposed a horizontal, illegal *per se* territorial restriction on Copy-Data, a holding reversed by the Second Circuit on appeal as a matter of law). [4]

2. Horizontal or Vertical? *Per Se* or Rule of Reason?

It is beyond question that plaintiffs present their claim as a horizontal, *per se* illegal conspiracy to restrain trade and fix prices on the part of the defendants, [see complaint, Doc. 87, ¶ 162], arguing only alternatively that the agreements at issue violate § 1 of the Sherman Act under rule of reason analysis. In addition, plaintiffs repeatedly referred to their claim as a horizontal, *per se* claim in their pleadings and repeatedly referred to the agreements at issue during oral argument as horizontal agreements. The labels attached to the conduct by the plaintiffs are not determinative, however, i.e. that plaintiffs repeatedly state that the conspiracy they allege is a horizontal, *per se* illegal conspiracy to fix prices and allocate markets does not make it so. In fact, the Supreme Court has recognized just this. California Dental Ass'n. v. Federal Trade Commission, 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999).

The Sixth Circuit has succinctly defined the two major types of antitrust conspiracies, as follows:

> Courts have identified two major types of antitrust conspiracies to restrain trade: horizontal and vertical. **[**29]** Crane & Shovel Sales Corp. v Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988). Horizontal conspiracies involve agreements among competitors at the same **[*719]** level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product, and therefore may constitute *per se* violations of ***antitrust law***. *Id.; see also* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978). Vertical conspiracies, on the other hand, involve agreements among actors at different levels of market structure to restrain trade, "such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market." Crane & Shovel Sales Corp., 854 F.2d at 805.

Care Heating & Cooling, 427 F.3d at 1013. Vertical restraints are analyzed under the rule of reason. *Id.* (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57-58, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)). To the extent there was any lingering doubt about whether vertical restraints are subject to *per se* or rule of reason analysis, that suggestion was quashed by the United States Supreme Court in Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) **[**30]** (vertical restraints to be judged according to the rule of reason). *See also* Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430 (6th Cir. 2008).

As an initial matter then, the Court must determine whether or not the agreement alleged by the plaintiffs is horizontal in nature, which may constitute a *per se* violation of ***antitrust law***, or vertical in nature, which must be analyzed under the rule of reason. In making this determination, as set forth above, the labels used by the plaintiffs are largely irrelevant and the decision will be made against a backdrop of several well established principles. First of all, "[t]here is an automatic presumption in favor of the rule of reason standard." Care Heating & Cooling, 427 F.3d at 1012 (citing Business Electronics Corp., 485 U.S. at 726; Continental T.V., Inc., 433 U.S. at 49). Secondly, the category of agreements to be analyzed under a *per se* analysis has been shrinking over the last few years. *See*

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[4] Both plaintiffs and defendants incorrectly **[**28]** cite this case as a Sixth Circuit decision.

Leegin. Finally, the *per se* rule should be applied only in "clear cut cases" of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts. *NHL Players Assoc., 325 F.3d at 718* **[**31]** (citing *Sylvana, 433 U.S. at 49-50*). *See also* *Balmoral Cinema, 885 F.2d at 316* ("*per se* analysis should not be extended 'to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . . .'").

As noted above, plaintiffs allege a horizontal conspiracy to restrain trade among the named defendants and certain non-defendant co-conspirators identified in the complaint. These include some processors of raw milk (Dean, NDH, DFA, Kroger, Prairie Farms), membership cooperatives (DFA, Prairie Farms), common marketing agencies (SMA, DMS) and individuals, (Hanman, Bos, Baird, etc.). This diverse group of actors are not just horizontal competitors but a collection of actors in the milk industry whose roles run the gambit of activities from gathering and marketing of raw milk from the farm to processing and marketing of processed milk at the retail level. This does not appear on its face to be a horizontal conspiracy, despite plaintiffs' argument that defendants were horizontal competitors in both milk bottling and procurement of milk prior to the alleged illegal agreements to allocate markets. They also point to record **[**32]** evidence that certain witnesses admitted under oath that Suiza/Dean, NDH and DFA viewed each other as competitors in both markets. Apparently recognizing the flaw in their **[*720]** position, defendants appear to argue in their pleadings that the conspiracy involved Dean, NDH and DFA/DMS/SMA as horizontal competitors and that the various other defendants and non-defendant co-conspirators, some of whom the defendants apparently acknowledge as vertical entities, simply joined in the horizontal agreement. In making this argument, plaintiffs appear to rely primarily on two Seventh Circuit cases.

In *Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217 (7th Cir. 1993)*, a marine dealer brought antitrust claims against its competitors, and the competitors' trade association and a boat show producer, challenging its exclusion from boat shows. The alleged illegal agreement was entered into by the marine dealers' competitors and the competitors' trade association, who, it was alleged, conspired to force Denny's out of boat shows because it was a price cutter. The operator of the premises where the boat shows were conducted, it was alleged, joined the conspiracy, by allowing Denny's competitors **[**33]** and their trade association to accomplish their illegal goals. The Seventh Circuit held that the fact that the conspiracy was joined by the operator of the premises where the boat shows were held did not transform the illegal agreement between Denny's competitors and their trade association into a vertical agreement.

In *Toys "R" Us, Inc. v. Federal Trade Commission, 221 F.3d 928 (7th Cir. 2000)*, the court examined agreements between retailers and toy manufacturers in which each manufacturer promised to restrict distribution of its products to low priced warehouse club stores on condition that other manufacturers would do the same. Toys "R" Us, a toy retailer, invited manufacturers to stop selling toys to wholesale toy clubs which competed with Toys "R" Us and the manufacturers complied. The Seventh Circuit acknowledged that the agreements between Toys "R" Us and the manufacturers were vertical agreements but determined that the FTC's finding of the horizontal agreement among the manufacturers was warranted under the circumstances, based on evidence in the form of statements by the manufacturer's executives that each manufacturer had agreed to the Toys "R" Us proposal on condition that **[**34]** its competitors do the same.

It seems to the Court that the *Denny's Marine* and *Toys "R" Us* cases are distinguishable from the factual situation at issue here. In the present case, although plaintiffs make an allegation of an explicit agreement to fix prices, they in reality claim concerted action on a host of non-price restrictions by vertically situated actors in furtherance of that conspiracy. *See* *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430 (6th Cir. 2008)*. In addition, these two Seventh Circuit cases have not been widely cited for the proposition advanced by the plaintiffs and, indeed, the *Denny's Marina* case does not appear to have been cited at all for the proposition advanced by plaintiffs.

The Court thus concludes that the alleged agreements challenged by the plaintiffs are vertical in nature, not horizontal, and therefore not subject to *per se* analysis. Even if the Court were to determine that the agreements are horizontal in nature, however, the Court would conclude that these agreements do not involve the kind of "naked restraint" subject to *per se* analysis, as argued by the defendants.

As set forth above, *per se* analysis is reserved **[**35]** for a very limited category of activities. The practice must be one which facially appears to be one that would always or almost always tend to restrict competition and decrease output. As noted above, not all horizontal price fixing is the kind of naked restraint of trade subject **[*721]** to a *per se* analysis. *See* *Care Heating & Cooling, 427 F.3d at 1013* (horizontal conspiracies "***may*** constitute *per se* violations of ***antitrust law***." (emphasis added)). In order to overcome the automatic presumption in favor of the rule of reason standard applied in the Sixth Circuit, the case must be a clear cut case of trade restraint that is so unreasonably anti-competitive as to present straightforward questions for reviewing courts. *Id. at 1012*.

As set forth above, the plaintiffs in this case allege a decade long, wide-ranging conspiracy to fix prices and allocate markets, activities which are traditionally *per se* illegal. In support of their claim, they point to a number of largely undisputed acts by the defendants which they argue are in furtherance of the alleged conspiracy. These overt acts, including the use of exclusive supply agreements, most favored nation pricing, alleged DFA control of NDH, agreements **[**36]** to require farmers to join SMA, simultaneous decisions by Dean and NDH to terminate non-DFA suppliers, DFA's non-disclosed control of DMS, "flooding", pooling, outsourcing agreements, and the like, are activities or conduct which are not manifestly anti-competitive, do not always or almost always tend to restrict competition or decrease output, do not always have an adverse impact on the market and are not, in and of themselves, illegal.

The essence of plaintiffs' argument here is that defendants have used a series of legal, potentially competitive practices to accomplish an unlawful effect on prices and markets. Such a claim of necessity requires the Court to examine both the history of the restraint and the restraint's effect on competition, or traditional rule of reason analysis. In other words, plaintiffs will be required to prove not only that defendants combined, contracted or conspired but also that the agreements produced adverse anti-competitive effects within the relevant product and geographic markets, that the conduct was illegal, and that the contract formed was a proximate cause of plaintiffs' injury. *Int'l Logistics Group Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989)* **[**37]** (citing *Crane & Shovel Sales Corp., 854 F.2d at 805*).

3. The Relevant Market

Having decided that the plaintiffs' conspiracy claims are subject to a rule of reason analysis, the Court must determine whether or not the plaintiffs have established a relevant geographic market within which defendants have conspired with the resulting adverse anti-competitive effects. Plaintiffs argued in their complaint, and continue to argue, that the relevant geographic market is Federal Milk Market Orders 5 and 7.

Before reaching the merits of an antitrust claim, it is necessary to identify the relevant market. *Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 574 (6th Cir.1986)*; *Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 954 (6th Cir.1983)*. The plaintiffs bear the burden of defining "the relevant market within which the alleged anticompetitive effects" of the defendants' actions occur. *See* *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 916 (6th Cir. 2009)*; *Worldwide Basketball & Sport Tours, Inc., 388 F.3d at 962* ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.") (quoting *NHL Players' Assoc., 325 F.3d at 719-20*.

A **[**38]** relevant market consists of both a product component and a geographic component. *Kentucky Speedway, 588 F.3d at 916* (citing *NHL Players' Assoc., 325 F.3d at 719*). Dr. Gordon Rausser was hired by the plaintiffs to define the relevant market in this case. The parties **[*722]** agree that the relevant product market is raw Grade A milk and that there is no reasonable interchangeability with a substitute product. *Spirit Airlines, Inc. v. Northwest Airlines, Inc. 431 F.3d 917, 933 (6th Cir. 2005)*. Therefore, the Court will turn to the issue of the relevant geographic market as defined by Dr. Rausser. In his report, Dr. Rausser concludes that the "relevant geographic market for Southeast dairy farmers is the area compromising Orders 5 and 7 because those Orders are treated as a common market, milk marketed in both orders is collectively pooled to arrive at an average blend price for both Orders, and Southeast farmers have severely limited options to move milk out of those Orders." Rausser Rpt. p. 8. [5]

The relevant geographic market is "the area of effective competition." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. That means "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Id.; see also White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 503 (6th Cir. 1983)*. Market definition is a highly fact-based inquiry. *Foundation For Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 531 (6th Cir. 2001)*. The Sherman Act applies with equal force to buyer side conspiracies, commonly referred to as monopsony. The Supreme Court has recognized that a conspiracy against buyers to stifle competition is as unlawful as one among sellers. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*.

Where, as here, the plaintiffs **[**40]** allege a buyer-side conspiracy, the market is defined differently, requiring the Court "to reverse all of the factors involved in light of the buyer-side nature of the alleged activity." *Todd v. Exxon Corp., 275 F.3d 191, 201-02 (2d Cir. 2001)* (citing *IIA Phillip E. Areeda, et al.,* ***Antitrust Law****: an Analysis of Antitrust Principles and Their Application*, ¶ 574 at 302 n.12 (referring to a buyer-side analysis as the "mirror image" of the traditional seller-side market analysis)). In the context of a buyer-side conspiracy, "the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes." *Id.* (quoting *Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony*, *76 Cornell L.Rev. 297, 324 (1991)*).

Defendants correctly argue that courts consistently reject overly narrow geographic markets that ignore the "commercial realities" facing buyers and sellers or that unduly limit the "relevant area of effective competition." *Nilavar v. Mercy Health Sys., 244 F. Appx. 690, 698 (6th Cir. 2007)*. They argue that the undisputed record here shows that at least 40% of the milk pooled in **[**41]** Orders 5 and 7 was produced elsewhere and that, in effect, Professor Rausser ignored the commercial realities by excluding these producers of raw milk from his analysis because they are within "the relevant area of effective competition" and impact significantly the supply of, demand for and price of raw milk in Orders 5 and 7. Defendants further argue that a relevant market may not be **[*723]** defined by reference to federal order boundaries, which were established for administrative purposes, and that defendants have not themselves treated Orders 5 and 7 as a relevant market.

Plaintiffs respond with alternative arguments. First, they argue that the relevant market must be analyzed by reference to the available buyers in the relevant geographic market, not by reference to the available sellers of raw milk, and, secondly, even if it is required that determination of the relevant geographic market includes consideration that 40% of the raw milk is produced outside the relevant market as one of the commercial realities required to be considered, Professor Rausser has done so. [6] Plaintiffs further argue that the federal milk marketing orders are relevant and a factor to be considered in determining **[**42]** the relevant geographic market and they further argue that defendants have, in fact, treated Orders 5 and 7 as a relevant geographic market.

In short, plaintiffs argue that there are genuine issues of material fact to be decided by the jury which preclude a finding concerning the relevant market as a matter of law. Defendants, on the other hand, argue that there is no genuine issue of material fact, that Professor Rausser has not considered all of the economic realities in formulating his opinion, and that the Court should grant judgment as a matter of law. Although significant questions have been raised about Professor Rausser's approach, especially the possible, and maybe total, lack of consideration by him of the raw milk flowing into Orders 5 and 7 from elsewhere, genuine questions of material fact do exist requiring the

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[5] Dr. Rausser acknowledges that based upon his analysis of the available data, "the geographic boundaries of the relevant market include Orders 5, 6 and 7." Rassuer Rpt p. 66. Order 6, that is, Florida, **[**39]** also has severely limited options to move milk out of its order. In addition, 6 of the 12 Order 6 pool distributing plants which are the closest plants to Orders 5 and 7 are controlled by Dean and NDH. Rassuer Rpt. p. 62. Therefore, Order 6 is very similarly situated to Orders 5 and 7 but was not included in the relevant geographic market.

[6] Plaintiffs do not explain why Professor Rausser would have considered the amount of milk coming into Orders 5 and 7 as one of the "commercial realities" if determination of the relevant market did not require him to do so.

question of the relevant market to be submitted to the jury. As this Court has noted in other orders, plaintiffs may not be able to carry their **[**43]** burden of proof and convince the jury that the relevant market is Orders 5 and 7; however, that is not the question before the Court. Plaintiffs have established a jury question on the issue of the relevant geographic market.

B. Monopolization, Monopsonization and Attempted Monopolization and Monopsonization — Counts Two, Three and Four

Count Three of plaintiffs' complaint alleges that DFA and DFA controlled entities possess monopoly power in the market for marketing and sales of fluid Grade A milk to fluid Grade A milk bottling plants in the southeast. Plaintiffs allege that DFA has maintained and enhanced its market dominance by unreasonably restraining trade, artificially and anti-competitively reducing the price of fluid Grade A milk purchased from plaintiffs and members of the class, eliminating competition from rival cooperatives and independent dairy farmers, and foreclosing and excluding competitors from access to fluid Grade A milk bottling plants by engaging in predatory and unlawful conduct. More specifically, plaintiffs allege that DFA has gained monopoly power through the very same acts alleged to have been engaged in by defendants in furtherance of their alleged § 1conspiracy, **[**44]** [Complaint, ¶ 146].

Plaintiffs define the relevant geographic market as the southeast United States, comprised of Federal Milk Market Orders 5 and 7. They define the relevant product market as the market for sales or marketing of fluid Grade A milk to fluid Grade A bottling plants and the market for purchase of fluid Grade A milk by fluid Grade A milk bottling plants. They allege in their complaint that defendants control **[*724]** 77% of the fluid Grade A milk bottling capacity in the southeast, over 80% of the Grade A milk marketed in the southeast and 90% of the fluid Grade A milk produced in the southeast.

In Count Four, plaintiffs make almost identical allegations against Dean and non-defendant co-conspirator bottlers for unlawful monopsonization. [7] Count Two of the plaintiffs' complaint alleges that the same defendants named in Counts Three and Four of the complaint have attempted to monopolize and monopsonize.

Section 2 **[**45]** of the Sherman Act, *15 U.S.C. § 2*, makes it illegal to "monopolize, (monopsonize), or attempt to monopolize (monopsonize) or combine or conspire to monopolize (monopsonize) any part or the trade or commerce among the several states . . ." The offenses of monopolization/monopsonization, attempt to monopolize/monopsonize and conspiracy to monopolize/monopsonize are distinct causes of action and require different proofs.

To establish a monopoly or monopsony under *§ 2* of the Sherman Act, plaintiffs must establish two elements: "1) possession of monopoly (or monopsony) power in the relevant market; and 2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. A claim for attempted monopolization (or monopsonization) requires: "(1) a specific intent to monopolize (or monopsonize); 2) anti-competitive conduct; and 3) a dangerous probability of success." *Tarrant Service Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609, 615 (6th Cir. 1993)*. **[**46]** Market strength that approaches monopoly (or monopsony) power, meaning the ability to control prices and exclude competition, is a necessary element for showing a dangerous probability of achieving monopoly (or monopsony) power in an attempt case. *Tarrant Serv. Agency, 12 F.3d at 615*; *see also* *Smith Wholesale Co., Inc. v. Philip Morris USA, Inc., 219 Fed. App'x. 398, 409 (6th Cir. 2007)*.

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[7] Monopsonization is monopoly power exercised by a buyer, rather than a seller, *Telcor Communications, Inc. v. Southwestern Bell Telephone Co., 305 F.3d 1124 (10th Cir. 2002)*, and is sometimes referred to as a "mirror image" of monopolization. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 321, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*.

In order to succeed on either a monopolization or attempt to monopolize claim, plaintiffs must establish the relevant market in which they compete [or do business] with the alleged monopolizer. *See, e.g.,* *Grinnell, 384 U.S. at 571-73*; *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*; *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395-99, 396 n.23, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611-12, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. The relevant market consists of two components: product and service market and geographic market. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The relevant product market is not at issue in this motion.

A geographic market is "an area of effective competition." *Re/Max Int'l., 173 F.3d at 1016*. The area is not defined **[**47]** by "metes and bounds," but "is the locale in which consumers of a product or service can turn for alternative sources of supply." *Id.; see also* *White and White, Inc. v.* **[*725]** *American Hosp. Supply Corp., 723 F.2d 495, 501 (6th Cir. 1983)* ("[T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.") (quoting *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

Thus, "[t]he first step in any action brought under *§ 2* of the Sherman Act is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact possesses monopoly power." *Conwood Co. v. United States Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)* (citing *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268-69 (2d Cir. 1979))*. The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *E.I. duPont de Nemours & Co., 351 U.S. at 391*. A plaintiff may establish that a defendant holds monopoly **[**48]** power by presenting either 1) direct evidence of actual control over prices or actual exclusion of competitors, or 2) circumstantial evidence showing a high market share within a defined market. *Re/Max Int'l, Inc., 173 F.3d at 1016*.

Neither the Supreme Court nor the Sixth Circuit has adopted a uniform standard as to a percentage of market power that triggers monopoly (or monopsony) power for purposes of *§ 2*. *See e.g.,* *Smith Wholesale Co., Inc., 219 Fed. App'x at 409*. The standard for monopoly power appears to be very high, and market share is typically a determining factor. *See* *Grinnell, 384 U.S. at 570*. While market share might, in many instances, lead to an inference of monopoly (or monopsony) power, it is not, in and of itself, the only factor to consider. *Amer. Council of Certified Podiatric Physicians and Surgeons v. Amer. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999)* ("[M]arket share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.").

In the Sixth Circuit, it appears that market share is a "starting point" in assessing market **[**49]** power and that the threshold is, indeed, very high. *See* *Byars v. Bluff City News Co, Inc., 609 F.2d 843, 850 (6th Cir. 1979)* (finding that 75-80 percent or greater is a "starting point" in assessing monopoly power). *See also* *Smith Wholesale Co., 219 Fed. App'x at 409* (56% market share insufficient); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1443 (6th Cir. 1990)* (19-29% market shares insufficient and "there is substantial merit in a presumption that market shares below 50 or 60% do not constitute market power" (quoting *Areeda & Hovenkamp,* ***Antitrust Law***, Section 578.3 (1988 Supp.)); even a high market share, however, does not appear to be sufficient alone to determine a firm's capacity to achieve monopoly or monopsony. *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982)* (citations omitted).

The real test is whether defendants possess sufficient market power to achieve their aims. *Id. at 826*. "Market power is the power to force a purchaser (or seller) to do something that he would not do in a competitive market," and it entails the "ability of one seller (or purchaser) to restrict output or raise prices." *PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 817 (6th Cir. 1997)* **[**50]** (quoting *Eastman Kodak Co., 504 U.S. at 464*). In order for a Sherman Act claim to lie against a defendant, there must be a **[*726]** finding of market power. *Hand v. Central Transp., Inc., 779 F.2d 8, 11 (6th Cir. 1985)*.

Defendants claim that plaintiffs cannot establish that DFA possessed, or had a dangerous probability of acquiring, monopoly power in the relevant market; that Dean possessed, or had a dangerous probability of acquiring, monopsony power in the relevant market; and that plaintiffs' claim of shared monopoly fails as a matter of law. Plaintiffs predictably respond by arguing that both Dean and DFA have the necessary market power and they also make the somewhat strained argument that these counts "are not limited solely to Dean and DFA," claiming that Court Two is a claim for attempt to monopolize and monopsonize "against all defendants acting in concert with other of the defendants," (a somewhat nonsensical statement) and that Count Four is a claim for unlawful monopsony against Dean, NDH and DFA collectively.

1. Does DFA Possess, or Have a Dangerous Probability of Acquiring, Monopoly Power in the Relevant Market?

As plaintiffs correctly argue, a plaintiff can demonstrate the possession **[**51]** of, or dangerous probability of acquiring, monopoly power in one of two ways. "The first is by presenting direct evidence showing the exercise of actual control over prices or the actual exclusion of competitors." *Re/Max Int'l v. Realty One, Inc., 173 F.3d at 1016*. "The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market." *Id.* Defendants argue that plaintiffs have neither direct nor circumstantial evidence that DFA possesses unilateral monopoly power.

This Court agrees with defendants and the monopolization claim, Court Three, against DFA will be dismissed. As an initial matter, plaintiffs' attempt to salvage their unilateral conduct claims by aggregating the market shares of various defendants is misplaced. "Market power under *§ 2* of the Sherman Act is 'the ability of a single seller to raise prices and restrict output.'" *Smith Wholesale Co., 219 Fed. App'x at 409* (quoting *Virgin Atl. Airways, Ltd. v. British Airways, 257 F.3d 256, 265 (2d Cir. 2001))*. Likewise, the Sixth Circuit has rejected the argument that market power may be measured by considering a combination of the market shares of more than one company. *See* ***[**52]*** *Smith Wholesale Co., 219 Fed. App'x at 409* ("[c]onsidering a combination of market shares of more than one company is an inappropriate measure of [ ] market power.") (citing *Arthur S. Langenderfer, 917 F.2d at 1433*). Thus it seems quite clear, at least in the Sixth Circuit, that it is the ability of a single actor, exercising unilateral market power which is the relevant inquiry in a monopolization case.

The plaintiffs appear to rely largely on the first method of demonstrating the possession of, or dangerous probability of acquiring, monopoly power. To prove monopoly power by presenting circumstantial evidence, it is the defendants' market share which is the relevant inquiry, *Re/Max Int'l., 173 F.3d at 1016*, although "[m]arket share, standing along, is insufficient to establish market power as a matter of law and is only the starting point for determining whether monopoly power exists." *Smith Wholesale Co. v. Philip Morris USA, Inc., 2005 U.S. Dist. LEXIS 18078, 2005 WL 1981452, at *8 (E.D. Tenn. August 17, 2005)*. Plaintiffs' expert witness, Dr. Rausser, conducted no analysis of DFA's market share or market power and indeed testified at his deposition that he held no opinion on these issues.

Plaintiffs also argue, **[**53]** however, that they have direct evidence of DFA monopoly power. Plaintiffs point to evidence that DFA sets the price that both other cooperatives and independent dairy farmers receive **[*727]** for their milk and DFA's use of fully supply contracts as direct evidence of DFA's monopoly power. As plaintiffs acknowledge, DFA's actions are not, in and of themselves, a violation of *§ 2*. While the evidence is clear that DFA is a hard-nosed actor in the market, the evidence establishes only that DFA has market power, not that it has unlawful monopoly power. Thus, there is no material question of fact regarding DFA's monopoly power.

2. Does Dean Possess, or Have a Dangerous Probability of Acquiring, Monoposy Power in the Relevant Market?

Defendants make essentially the same arguments with respect to Dean's possession of monopsony power in the market to buy raw milk that it makes with respect to the alleged monopolization by DFA of the market for raw milk.

Once again, plaintiffs shared or combined market arguments fail with respect to the monopsonization claim for the same reason they fail with the respect to the monopolization claim. This Court also agrees with defendants that plaintiffs have not created **[**54]** an issue of material fact with respect to whether or not Dean possessed, or had a dangerous probability of acquiring, monopsony power in the relevant market.

Plaintiffs have, in fact, attempted to show through circumstantial evidence Dean's monopsony power by calculating its share of bottling capacity in Orders 5 and 7 at various points and times. While the various experts have reached different conclusions, it appears that the experts have calculated that Dean's share of bottling capacity is around 40%. Even assuming that an examination of bottling capacity is relevant on the question of Dean's share of the market alleged, i.e. purchases of raw Grade A milk by processing plants, it appears that these market share estimates are insufficient to establish monopsony power. Plaintiffs' class expert, Dr. John C. Beyer, estimated Dean's share of bottling capacity in Orders 5 and 7 as approximately 26% in 2002 and 41% in 2007. Dr. Rausser estimated Dean's share of bottling capacity to be approximately 41.5% and Dr. Scott estimated Dean's share at 43.4%, respectively, as of 2007. As set forth above, these percentages of market share, even assuming that they measure the correct market, do not **[**55]** meet the threshold of what it takes to establish monopoly or monopsony power. *See* *Byars, 609 F.2d at 850* (finding that 75-80% or greater is a "starting point" in assessing monopoly power); *Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 935 (6th Cir. 2005)* (noting Judge Learned Hand's explanation of when market share becomes large enough to constitute a monopoly: "over ninety . . . percent [ ] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough . . ."); *Smith Wholesale Co., 219 Fed. App'x at 409* (56% market share insufficient). Furthermore, the undisputed evidence is that existing competitors have expanded and new rivals have appeared during the relevant time period in Orders 5 and 7.

Once again, plaintiffs also appear to rely on an argument that there is direct evidence that Dean possessed monopsony power in the market to buy raw milk or had a dangerous probability of acquiring such power. First, plaintiffs point to testimony from representatives of Dean's main supplier, DFA, and its main competitor, NDH, to support its argument that Dean has the ability to control prices paid to sellers in the market. DFA's director **[**56]** of customer relations, Frank Johns, testified that Dean would be a "deal breaker" in terms of implementing any price increase. Similarly, they point to testimony of NDH President Meyer who testified that NDH wouldn't accept an over-order premium unless assured that Dean and other processors were accepting the same over-order premium. Specifically, he testified **[*728]** that "If Dean wouldn't accept a premium, I wouldn't accept the premium." This testimony, however, tends only to establish that Dean is a major player, perhaps a leader, in the market, and that Dean has a degree of market power. It does not establish, however, that Dean has the ability to set prices at an anti-competitive level, despite Professor Rausser's opinion to the contrary.

Plaintiffs also point to proof which they say establishes that Dean excludes competition from the market, mainly evidence related to the Red Oak plant in Georgia and the acquisition and shut down of eight bottling plants in the southeast. These acquisitions and shut downs, however, do not necessarily constitute evidence of excluding competition and plaintiffs point to no evidence that Dean actually shuttered plants in order to prevent price competition. **[**57]** For these reasons, the Court finds that there is no genuine issue of material fact as to whether or not Dean possessed, or had a dangerous probability of acquiring, monopsony power in the relevant market and summary judgment will be granted as to Court Four.

3. Jointly Acquired Market Power

As noted above, Court Two of plaintiffs' complaint asserts a claim under *§ 2* of the Sherman Act for attempt to monopolize and monopsonize. Specifically, paragraph 134 of the complaint alleges: "DFA, both by itself and in combination with DFA-controlled market agencies DMS and SMA, has attempted to and continues to attempt to possess market power in the marketing and sales of fluid Grade A milk to fluid Grade A milk bottling plants in the southeast market and maintains a dominant position in the market for the purchase of fluid Grade A milk by fluid Grade A milk bottling plants in the southeast," clearing alleging a scheme to monopolize. The complaint further alleges, in paragraph 137, that "Defendants have attempted to and continue to attempt to obtain market power in the purchase of fluid Grade A milk by fluid Grade A milk bottling plants in southeast market and they have acted with the specific **[**58]** intent to obtain a monopsony and use their market dominance in the bottling of fluid Grade A milk . . .," alleging a scheme on the part of defendants to monopsonize. Plaintiffs now recharacterize their Count Two claim as "a claim for attempt to monopolize and monopsonize against all defendants acting in concert with other of the defendants." [8]

As set forth above, a claim for attempted monopolization requires specific intent to monopolize, anti-competitive conduct and dangerous probability of success. *Tarrant Serv. Agency, 12 F.3d at 615*. Apparently recognizing that they are unable to show sufficient market share on the part of any defendant to establish monopoly or monopsony power, plaintiffs appear to attempt in this count to aggregate market share in an effort to do what they cannot otherwise do. Such an approach, however, flies in the face of clear Sixth Circuit precedent. Although plaintiffs attempt rather feebly to distinguish the case, the Sixth Circuit has, by clear implication, rejected the "shared monopoly" theory of **[**59]** the plaintiffs. In the *Smith Wholesale* case, one which originated in this Court, the Sixth Circuit specifically held, when considering an attempted monopolization claim under *§ 2* of the Sherman Act, that "a combination of market shares of more than one company is an inappropriate measure of [ ] market power and that market power under *§ 2* relates to the ability of a ***single seller*** to raise prices and restrict output". This Court agrees with defendants' assertion that plaintiffs in reality suggest that somehow the Sixth Circuit **[*729]** did not mean what the Sixth Circuit said. Respectfully, that is an argument that must be presented to the Sixth Circuit, not to this Court. This Court will assume that the Sixth Circuit meant exactly what it said until the Sixth Circuit says otherwise. For this reason alone, Count Two of the complaint fails as a matter of law.

Furthermore, it appears to this Court that the plaintiffs misstate and misuse the holding of cases from other circuits in an attempt to salvage their attempt to monopolize and monopsonize claims. A review of each of the cases cited by the defendants reveals that the language quoted by the defendants in those cases about the collective or **[**60]** joint use of monopoly power applies in the context of the language of *§ 2* of the Sherman Act which makes it illegal to "combine or conspire with any other person or persons to monopolize any part of the trade or commerce." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Thus, the language from these cases is completely inapposite and has no application to a claim of attempt to monopolize; rather, what plaintiffs in reality allege is a conspiracy to monopolize or monopsonize, the very same claim they have raised in Count One of their complaint. The elements of a conspiracy to monopolize are the existence of a conspiracy, i.e. that defendants engaged in a conspiracy, and specific intent to monopolize. *Richter Concrete, 691 F.2d at 827*. Both a conspiracy to monopolize and attempt to monopolize require that defendant have monopoly power or a dangerous probability of acquiring it. *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Centers, Inc., 200 F.3d 307 (5th Cir. 2000)*. Thus, it appears to this Court that the only real difference between a claim of attempt to monopolize under *§ 2* and a claim of conspiracy to monopolize under *§ 2* is joint **[**61]** or collective action by the defendants.

The plain language of *§ 2* further bolsters the Court's decision. As noted above, *§ 2* authorizes three distinct claims: (1) monopolization (or monopsonization); (2) attempt to monopolize (or monopsonize); and (3) conspiracy to monopolize (or monopsonize). The fact that a separate offense under *§ 2* exists for concerted action, i.e. conspiring, strongly suggests that claims for monopoly/ monopsony, and attempt are unilateral action claims and that any claim for joint action must be brought as a conspiracy claim rather than an attempt claim. *See H.L. Hayden Co. of N. Y., Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)*; *Carpet Group International v. Oriental Rug Importers Ass'n, 256 F. Supp. 2d 249 (D. New Jersey, 2003)*.

To the extent plaintiffs allege unilateral conduct on the part of Dean and DFA, their attempt claim in Count Two fails for the same reasons their claims of monopolization and monopsonization in Counts Three and Four against Dean and DFA fail. To the extent they allege joint or collective action on the part of the defendants to monopolize, that claim duplicates the claim made by the plaintiffs in Count One of the complaint **[**62]** and Count Two should be dismissed for that reason alone. Furthermore, it appears that plaintiffs have abandoned completely their claims of

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[8] The Court has previously noted the illogical nature of this statement and fails to grasp how ***all defendants*** would act in concert with ***other of the defendants***.

unilateral conduct with respect to Count Two and Count Four and pursue only a unilateral monopolization claim against DFA in Count Three, which fails for the reasons set forth above. Counts Two, Three and Four of the complaint will therefore be dismissed.

C. Triable Issue of Fact as to the Alleged Conspiracies (Counts One and Five)

This Court has previously discussed the legal principles which apply to **[*730]** the adjudication of motions for summary judgment in antitrust cases at length in dealing with the retailer plaintiffs' motions for summary judgment and above and sees no purpose in discussing the standard again. *See* Sec. III above.

The parties have committed a substantial part of their briefs to their argument as to whether or not there is genuine issue of material fact with respect to the alleged conspiracies to suppress dairy farmer pay prices and monopolize/monopsonize. They have filed voluminous statements of fact and the exhibits to their motions consist of hundreds, if not thousands, of pages of documents. Over the almost one year since the joint **[**63]** motion of the defendants was filed, this Court has made every effort to review this vast volume of pleadings and documents. Based upon that review, the Court has concluded that genuine issues of material fact do indeed exist with respect to the conspiracy allegations which require a jury to perform its traditional fact-finding role. Although it might be preferable for this Court to examine in detail in this memorandum opinion each of the arguments made by all of the parties in this case, such an approach would require an enormous amount of time and would increase the size of this already too long memorandum by dozens of pages. As a result, the Court simply finds that there are genuine issues of material fact with respect to the conspiracy claims of plaintiffs which require that those claims be submitted to the jury. The motion for summary judgment on this ground is DENIED.

D. Antitrust Injury and Antitrust Standing

"Standing, in a conventional Article III sense, requires just proof of actual injury, causation and redressability." *NicSand, Inc. v. 3M Company, 507 F.3d 442, 449 (6th Cir. 2007)* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. A determination of antitrust **[**64]** standing, however, requires more. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Furthermore,

> Antitrust standing to sue is at the center of all ***antitrust law*** and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of antitrust standing insures that antitrust litigants use the laws to prevent anti-competitive action and make certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to affect.

HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991).

In **[**65]** other words, standing requires more than injury proximately caused by a violation of the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Plaintiffs must also prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Antitrust injury must be attributable to an anti-competitive aspect of the practice under scrutiny. *Atlantic Ridgefield Co. v.* ***[*731]*** *USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

Defendants once again raise substantial issues; however, they appear to this Court to involve disputed factual issues which must be resolved by a jury. There is evidence from which a jury could conclude that defendants, the buyers within the relevant geographic market, have restricted opportunities to sellers, i.e. plaintiffs, such that they have no other option but to sell at the price set by defendants. As a result, the jury could conclude that plaintiffs are the direct victims of anti-competitive conduct on the part of defendants. In other words, the jury may find that plaintiffs have suffered an antitrust injury because of defendants' monopsonistic behavior; *see* *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*, **[**66]** and that they have antitrust standing to pursue these claims. Summary judgment is DENIED on this ground.

E. Filed—Rate Doctrine

One aspect of plaintiffs' case deals with their allegation that defendants "flooded" the southeast with excess milk reducing the federal minimum blend prices for milk. Plaintiffs complaint explains how minimum blend prices are set and the effect, as they see it, of flooding on the federal minimum blend prices:

> 50. USDA regulations mandate that fluid Grade A milk bottlers pay at least the weighted uniform average or minimum "blend" price for fluid Grade A milk that is "pooled" on an order. Dairy farmers "pool" Grade A milk on an order by delivering specified minimum quantities of fluid Grade A milk to USDA-regulated fluid Grade A milk bottling plants associated with that order. Dairy farmers' delivery of the minimum quantity of fluid Grade A milk to fluid Grade A milk bottling plants is referred to as "touching base." USDA regulations require that dairy farmers touch base each month they are pooled on an order.
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> 51. The minimum blend price for an order is based upon the end uses of all Grade A milk pooled on that order. Thus, for example, if 60 percent of all Grade **[**67]** A milk pooled on an order was used as Class I milk (fluid Grade A milk), and the remaining 40 percent was used as Class III milk (cheese milk), the minimum blend price for all Grade A milk pooled on the order would consist of the Class I price for 60 percent and the Class III price for 40 percent. To use hypothetical prices for this example, if the Class I price is $2.00 per pound and the Class III price is $1.50 per pound, the minimum blend price would be $1.80 per pound. (Using the hypothetical utilization of 60 percent for Class 1 yields $2.00 x .6 = $1.20. 40 percent utilization for Class III yields $1.50 x .4 = $.60. When these two prices are added together, $1.20 + $.60 = $1.80.)
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> 52. Due to seasonal and other variations in Grade A milk production and demand and uneven distribution of dairy farmers throughout the United States, Class I utilization, the highest valued use of Grade A milk in the USDA pricing scheme, varies between orders. On some orders, such as Orders 5 and 7 where demand for bottled fluid Grade A milk often exceeds Grade A milk production, Class I utilization has traditionally exceeded 70 percent. In other areas, such as the Southwest where demand for bottled fluid **[**68]** Grade A milk does not exceed Grade A milk production, the percentage of Class I utilization may often be as low as 40 percent. Consequently, orders with high Class I utilization generally have higher FMMO minimum blend prices than orders with lower Class I utilization.
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> **[*732]** 53. Shifting substantial quantities of Grade A milk from one order to another is referred to as "diluting" or "flooding" a pool because the "outside" Grade A milk increases the total volume of Grade A milk pooled to the point that it decreases the Order's Class I utilization, and hence reduces the minimum blend prices. Because DFA has the capacity to flood pools and to move money arbitrarily among its members, it can use that power, as well as other means, to stifle competition in the Southeast market.
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> 54. USDA minimum prices for Class I Grade A milk represent the minimum or floor prices that fluid Grade A milk bottlers must pay for Grade A milk marketed pursuant to USDA regulation. Cooperatives and independent dairy farmers are free to negotiate for prices in excess of FMMO minimum prices to reflect more accurately market conditions. The amounts by which prices for Grade A milk exceed FMMO minimum blend prices are known **[**69]** generically as "overorder premiums." Fluid Grade A milk bottling plants in the Southeast traditionally paid overorder premiums for Grade A milk prior to the successful implementation of Defendants' conspiracy, monopolization and monopsonization.
>
> 55. The actual price a dairy farmer receives for Grade A milk is referred to as the "mailbox price." The mailbox price received by independent dairy farmers is comprised of the FMMO minimum blend price plus any over-order premium and bonuses for volume or quality, minus marketing costs. The mailbox price received by dairy

> cooperative members is calculated in the same way except additional charges may be deducted by the cooperative. Prior to Defendants' antitrust violations, dairy farmers in the Southeast received mailbox prices for Grade A milk that included over-order premiums that reflected more accurately competitive market conditions.

Professor Rausser, plaintiffs' damages expert, calculates the damages he claims were caused by defendants' flooding of the southeast- his Stage 1 damages. To arrive at those damages, he estimates the amount of milk that he believes should have been shipped into Orders 5 and 7 from other areas and then "re-compute[s] **[**70]** the uniform prices in Order 7 [but not Order 5] applying the federal formulas." Based on that recalculation, he claimed that plaintiffs were underpaid by $80 million as a result of an artificial reduction of the federal minimum blend prices for milk.

Defendants argue that these Stage 1 damages are barred by the filed-rate doctrine, which as a general rule bars challenges under state law and federal antitrust laws to rates set by federal agencies. This Court has previously discussed the origin and purpose of the filed-rate doctrine as well as the regulatory scheme involved in the setting of milk prices. *See* Doc. 79, pp. 9-11. In response to the defendants' prior motion to dismiss, plaintiffs responded to this same argument by asserting that the filed-rate doctrine does not apply here because minimum blend prices are not filed with or approved by a regulatory agency so as to invoke the doctrine. They further responded that it was the fixing of over order premiums which is at the heart of their complaint, not the minimum blend prices established by the Secretary of Agriculture. This Court previously agreed with plaintiffs on both points, noting that defendants had cited no authority for **[**71]** the proposition that federal minimum blend prices are subject to the filed-rate doctrine. The Court specifically determined, based on plaintiffs' allegations, that it is the "mailbox price" which they allege is fixed at an artificially low amount and that these prices are neither **[*733]** regulated nor approved by the Department of Agriculture. The Court therefore found the filed-rate doctrine to be inapplicable to this case.

Plaintiffs argue that much has changed since the Court decided the motion to dismiss. They claim that discovery has made it clear that plaintiffs' "flooding" allegations present a direct challenge to the federal minimum blend price and that the federal minimum blend price is in fact a price set by the USDA through its federal market administrator. They further argue that the law has changed as well, citing a district court decision which specifically addressed the question of whether federal minimum blend prices are subject to the filed-rate doctrine. In *Carlin v. Dairy America, Inc., 690 F.Supp.2d 1128, 1133-41 (E.D. Cal. 2010)*, the district court determined that the monetary damages sought by plaintiffs in that case, a class of dairy farmers against a dairy corporative **[**72]** and a common marketing agency, could only be calculated by reference to rates set by the Secretary, something the filed-rate doctrine forbids. *Id. at 1135-36*. Defendants now renew their argument that plaintiffs' Stage 1 damages are barred by the filed-rate doctrine because they "can only be ascertained by reference to rates set by the Secretary pursuant to the FMMOs." *Id. at 1136*. [9]

Defendants make essentially the same arguments with respect to the filed-rate doctrine that they made previously with respect to the motion to dismiss. At the outset, however, it is important to note the different standards which apply for a motion to dismiss as opposed to a motion for summary judgment. The Court addressed a legal issue with respect to the motion to dismiss. The record is now complete and **[**73]** the Court must address both the factual and legal issues raised by the motion and apply the appropriate summary judgment standard to the analysis.

Defendants do appear to have changed position somewhat since the time of the motion to dismiss. At that time, they clearly argued that the filed-rate doctrine has no application because it was not the federal minimum blend price which they challenged but rather the over-order premiums paid to farmers which were at the heart of their claims. They now simply take the position that the federal minimum blend price is not subject to the filed-rate doctrine. They make several arguments in this respect. First they argue that the USDA does not file or otherwise

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[9] The *Carlin* court noted this Court's prior decision not to apply the filed-rate doctrine, specifically noting that this Court's decision was based on the fact that "the rates being challenged were not the minimum blend rate determined by the Secretary, but were over-order premiums above the minimum rates that were allegedly manipulated by the defendants' anti-competitive behavior." *690 F.Supp.2d at 1134*.

meaningfully review the federal minimum blend prices, they argue, somewhat tongue in cheek, that they have not changed their position and they argue that the *Carlin* decision is inapposite.

For the reasons which follow, this Court now concludes that the filed-rate doctrine does in fact bar plaintiffs' claim for the so-called Stage 1 damages calculated by Professor Rausser. What is abundantly clear at this point, after the factual record has been completed, is that, at least as far as these Stage **[**74]** 1 damages are concerned, plaintiffs do directly challenge the federal minimum blend prices, and they can hardly argue otherwise. In order to arrive at the amount of Stage 1 damages, Professor Rausser ***recalculates*** the federal minimum blend price based on what he now believes it should have been. The Court cannot imagine a more direct attack on the federal minimum blend prices.

[*734] As noted above, this Court's prior decision was premised upon two bases: (1) That plaintiffs' claim related to over-order premiums, not to the federal minimum blend prices, and (2) that minimum blend prices are not filed rates set by a government regulatory agency. The Court concludes that the first basis for the Court's decision is now shown to be factually inaccurate and the second contrary to the weight of authority, especially given the factual state of the record. This Court finds the rationale in the *Carlin* case and *Servais v. Kraft Foods, Inc., 2001 WI App 165, 246 Wis. 2d 920, 631 N.W.2d 629 (Wis. App. 2001)*, *aff'd.* *2002 WI 42, 252 Wis. 2d 145, 643 N.W.2d 92 (Wis. 2001)*, to be persuasive and, to the extent Professor Rausser's damages rely on recalculating the federal minimum blend price, that claim for damages is barred by the filed rate doctrine and summary judgment **[**75]** will be GRANTED as to that claim. [10]

This Court discussed briefly the *Servais* case in its prior opinion with respect to the motion to dismiss. In *Carlin*, dairy farmers brought a putative class action against Dairy America, Inc., an entity established by a group of nine dairy cooperatives for the purpose of marketing dairy products manufactured by the cooperatives, and California Dairies, Inc., a dairy cooperative with a major stake in the Dairy America marketing cooperative. The plaintiffs alleged misreporting of pricing data by the defendants which led to significantly lower than would have been the case minimum prices for raw milk. The defendants moved to dismiss on grounds of the filed-rate doctrine. The district court, after reviewing the history of the **[**76]** filed-rate doctrine and noting the lack of any federal cases applying the doctrine in the context of federal milk marketing orders, concluded that the filed-rate doctrine applies generally to minimum rates for raw milk, distinguishing this Court's prior decision in this antitrust litigation on the basis that this Court had found that the rates being challenged were not the minimum blend rate determined by the Secretary but were over-order premiums above the minimum rates. The *Carlin* court stated as follows:

> Plaintiffs' claims for monetary damage are, so far as the court can discern, solely the product of minimum prices for raw milk set by FMMO's that were artificially depressed by Defendants' misreporting of prices for NFDM. The crux of Plaintiffs' claims is that the minimum raw milk prices set forth in the FMMO's would have been higher had Defendants not misreported forward contract prices for NFDM. The monetary damages Plaintiffs claim are to be determined, as the court understands it, by calculating the difference between raw milk minimum prices as set forth in the FMMOs and what those prices would have been had Defendants not submitted on unauthorized forward contract sales prices. **[**77]** In other words, Plaintiffs' damages can only be ascertained by reference to rates set by the Secretary pursuant to the FMMO's during the time period in question. This is precisely what the filed-rate doctrine forbids.

Id. at 1136. After rejecting plaintiffs' argument that the filed-rate doctrine does not apply to federal minimum milk prices, the district court also rejected many of the same technical objections to applicability of the doctrine raised by plaintiffs in this case. At least one other district court has also rejected similar arguments. *See In* ***[*735]*** *Re Hawaiian & Guamanian Cabotage Antitrust Litigation, 754 F.Supp.2d 1239, 1245 (W.D. Wash. Nov. 30, 2010)*. (collecting cases).

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[10] Plaintiffs do, as they must, acknowledge that "some of Prof. Rausser's damages rely on re-calculating the federal blend price. If true, those damages would be disallowed, not plaintiffs' entire claims." Plaintiffs would have considerably more credibility with the Court if they would simply acknowledge that Professor Rausser does in fact re-calculate the federal blend price. He states unequivocally in his report that he does so.

Given that Professor Rausser's Stage 1 damages opinion includes his recalculation of the federal minimum blend price, plaintiffs' claim related to those damages falls squarely withing the purpose of the filed-rate doctrine and would require this Court to substitute its judgment in this judicial proceeding for that of the governing regulatory agency. This Court agrees with the *Carlin* court that that is precisely the type of determination forbidden by the filed-rate doctrine. To allow plaintiffs' claim for Stage **[**78]** 1 damages would require the Court to determine what the reasonable government minimum milk price would have been if defendants had not conspired as alleged in their complaint. Despite their prior claims, plaintiffs are in fact challenging the minimum prices set by the Secretary of Agriculture. In addition, now that the record has been fully developed, plaintiffs' arguments that the USDA does not file or otherwise meaningfully review the federal minimum blend price fails as well. The record in the case establishes that these rates are in fact filed with a government agency which has the authority to set and review those rates, regardless of the actual degree of agency review. *In re Hawaiian & Guamanian Cabotage Antitrust Litigation, 754 F.Supp.2d at 1245* (citing *Carlin, 690 F.Supp.2d at 1136-37*); *In re N.J. Title Ins. Litig. 2009 U.S. Dist. LEXIS 92310, 2009 WL 3233529 at *2 (D. New Jersey)* ("application of the filed-rate doctrine does not depend upon meaningful agency review of filed rates") (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,, 476 U.S. [409] at 417 n.19, 106 S. Ct. 1922, 90 L. Ed. 2d 413*)).

In sum, the filed-rate doctrine bars plaintiffs' claim for Stage 1 damages and the motion for summary judgment is **[**79]** GRANTED in this respect.

F. The Bos Motion, [Doc. 833]

Gerald L. Bos ("Bos") is one of the individual defendants named by the plaintiffs in the two conspiracy counts contained in the amended complaint. Bos joins the joint motion of all other defendants for summary judgment; however, he has filed a separate motion for summary judgment raising issues not raised in the joint motion. Bos argues that, regardless of whether or not plaintiffs can establish a triable issue on the existence of a conspiracy generally, they cannot establish a triable issue on the question of whether or not Bos "actively and knowingly" participated in a conspiracy to eliminate competition for the purchase and sale of raw milk and to suppress farmer pay prices. Plaintiffs predictably respond that the evidence is not only sufficient to create a triable issue but is somewhat overwhelming as to Bos's participation in the conspiracy. The Court agrees with Bos and his supplemental motion for summary judgment will be granted.

1. Factual Background

Plaintiffs' statement of the background facts in this case is set out in their brief in five sentences; beyond that, they simply refer the Court to their response to DFA's statement **[**80]** of facts, and plaintiffs' additional statement of facts, as well as their briefing with respect to the joint motion. Defendant does no better, setting out a two sentence statement of facts and referring the Court to other facts relevant to the motion which are discussed in the body of the motion. Neither party's approach to identification of genuine issues of material fact is helpful to the Court. As a result of the way the parties have approached the statement of facts in their briefs, the Court will not attempt to set out a statement of facts but will simply say that the Court has viewed **[*736]** the facts, as it is required to do, in the light most favorable to the plaintiffs.

Bos is the former chief financial officer of DFA, having retired from DFA in 2005 after 26 years with DFA and its predecessor Mid-America Dairymen, Inc. Bos served as a part time consultant to DFA after his retirement for approximately three years.

2. Legal Standard

The parties agree that the appropriate standard to be applied to the question of individual liability under the antitrust laws has been stated by the Sixth Circuit in *Brown v. Donco Enterprises, Inc., 783 F.2d 644 (6th Cir. 1986)*. In *Brown*, the Sixth Circuit **[**81]** found it to be "undisputed that a corporation's officers and agents may be held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts." *Brown, 783 F.2d at 646* (citing *United States v. Memphis Retail Package Stores Association, 334 F.Supp. 686, 689 (W.D. Tenn. 1971))*. The specific holding of the Sixth Circuit in *Brown* is easily extracted from the Sixth Circuit's opinion and is a rather straightforward standard which must be applied. The Sixth Circuit held:

> Individual liability under the antitrust laws can be imposed only where corporate agents are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. To support a determination of liability under this standard, the evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions.

Brown, 783 F.2d at 646.

Both plaintiffs and the defendant take this relatively straightforward statement of the standard to be applied and attempt to modify it to meet their own purposes. In doing so, both parties misstate the Sixth Circuit's holding in *Brown* and this Court's prior holding as well. Bos states the standard **[**82]** as follows: "Individual liability may be imposed only where corporate agents are actively and knowingly engaged in a scheme designed to achieve anti-competitive ends and that an individual defendant exerted his influence so as to shape corporate intentions", citing *Brown* and this Court's prior memorandum opinion, Doc. 61 (internal quotation marks omitted). Plaintiffs, on the other hand, state the standard as:

Under *Brown*, Bos is individually liable under the antitrust laws if he:

- Authorize[s] or participate[s] in the unlawful acts,
- Exerts his influence so as to shape corporate intentions,
- Becomes an active participant in formulating policy decisions with his client to restrain competition, or
- Direct[s] the corporation to engage in the complained of acts for anti-competitive purpose.

Dairy Farmers Response, [Doc. 923, p. 3].

In other words, defendant alleges that individual liability made be imposed only where two showings are made. First, he claims that individual liability attaches only where a corporate agent actively and knowingly engages in the scheme designed to achieve anticompetitive ends, and secondly, where the individual defendant asserted his influence so as to shape corporate **[**83]** intentions. On the other hand, plaintiffs appear to argue that individual liability may attach in any one of four alternative situations. Both parties are wrong. The standard set out by the Sixth Circuit for individual liability of a corporate agent is that the agent "actively and knowingly engaged in a scheme designed to achieve anti-competitive ends." *Brown, 783 F.2d at 646*. The Sixth Circuit also makes it clear that, at a minimum, to support "a determination of liability ***under [*737] this standard***, the evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions." *Id.* (emphasis added). In other words, in the Sixth Circuit, to meet the standard for individual liability, *i.e.* active and knowing participation, the evidence must show that the defendant exerted influence over corporate decisions to the point that his influence shaped corporate intentions.

Plaintiffs, however, are by far the worst offenders here. They appear to completely misstate and misuse the standard established by the Sixth Circuit. Nothing in the *Brown* decision suggests a four part alternative standard for individual liability and plaintiffs' argument that it must show only active **[**84]** and knowing participation without also showing that the defendant exerted his influence so as to shape corporate intentions, is simply wrong. Plaintiffs also gloss over their attempt to evade the requirement by arguing that simple participation in the unlawful acts is sufficient when in fact the evidence must show that an individual's participation was active and knowing. The Court will now turn to the question of whether or not the evidence creates a genuine issue of material fact as to whether or not Bos actively and knowingly engaged in an anticompetitive scheme.

3. Analysis

Bos argues in his motion that there is no evidence against Bos which would establish a triable issue of fact with respect to whether Bos, as an individual, "actively and knowingly engaged in a scheme designed to achieve anticompetitive ends." More specifically, Bos not only argues that there is no evidence that he ever knowingly joined any illegal agreement, he also argues that there is no evidence to establish that he actively and knowingly participated in the various constituent parts of the alleged scheme, including plaintiffs' alleged plan by DFA and Dean to expand DFA's control of milk produced by requiring **[**85]** dairy farmers in the southeast to become members of DMS before they could obtain access to Dean plants, no evidence that Bos actively and knowingly participated in any scheme to fix prices, and no evidence that he actively and knowingly shared pay price information or participated in the alleged flooding scheme. Bos further argues that there is no evidence that he actively and knowingly participated in any scheme to organize and maintain SMA for an anticompetitive purpose or any scheme to use DCMA to set agreed upon premiums and monitor compliance with the conspiracy. He also argues that he had no active and knowing participation in the enforcement of full supply agreements. Bos correctly argues that plaintiffs may not meet their burdenof establishing a triable issue of fact by pointing to the alleged conspiratorial intent and conduct of others.

In their response to Bos's motion, plaintiffs point to a host of "facts" [11] which they argue tend toestablish that Bos knowingly and actively participated in the alleged conspiracy. As best the Court can tell from the plaintiffs' filings, they allege the following in support of their claim that there is a triable issue of fact as to Bos:

• Bos **[**86]** testified that he was involved in all aspects of the planning and financing of operations of DFA and its joint ventures;
• Gregg Engles, Dean's CEO, testified that Bos and Hanman were always together and Bos was a "driving force" behind the financial aspects of DFA/Suiza/Dean dealings;

[*738] • Bos, Hanman and co-conspirators Engles, Schenkel, Beshears, Meyer and Noll have been close friends for decades;
• Bos, Hanman and the co-conspirators listed above have entered into business deals together, as executives, co-investors and competitors;
• Bos was typically with Hanman when business matters were discussed;
• Bos was paid well for his services, including his work for a processing venture jointly owned by DFA with Pete Schenkel, then president of Suiza and bonuses paid based upon joint venture profits and volume of milk marketed by DFA;
• Bos was familiar with a prior antitrust lawsuit filed by Lonestar against DFA in 2000 [12];
• Bos is familiar with DFA business in general;
• Bos participated in DFA's plan to convert farmers to DMS;
• Bos signed the guarantee and indemnity portion of the outsourcing agreement between DMS and Dean;

• Bos personally negotiated the amount of "efficiency rebates" between **[**87]** Dean and DFA/DMS;
• Bos never saw any studies calculating any actual "efficiencies" but he nevertheless authorized the payment of "efficiency rebates";

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[11] The Court loosely refers to plaintiffs' "facts." In reality, what plaintiffs often refer to as "facts" are simply inferences they seek to draw from other facts or conclusory statements, or they simply misstate the facts established.

[12] This "fact" offered by plaintiffs is a stark example of how plaintiffs misinterpret the facts which **[**88]** are established by the record. The fact relied upon by the plaintiffs in its statement of facts is: "In 2000, Lonestar sued DFA alleging that it, under Hanman's management and while Bos was CFO, unlawfully monopolized southeastern states, including Arkansas, Louisiana, Mississippi, and Missouri, and interfered with Lonestar's access to processing plants." From this "fact", plaintiffs argue that it is established that Bos was directly involved in every financial aspect of the conspiracy and his familiarity with this prior lawsuit "demonstrates that he knew that he was engaging in potential unlawful acts," a conclusion not even remotely justified by the "fact" offered by the plaintiffs. If such a conclusion were applicable, this would mean that any financial officer of any corporation which engaged in unlawful activity would be held responsible simply because of his or her knowledge of the financial aspects of the business. In addition, a conclusion that Bos knew of the unlawful nature of his acts cannot be established based on the fact that he knew that his employer had previously been sued.

- Bos participated in the DFA-Dean full requirements agreements [13];
- Bos helped to facilitate DFA's transfer of milk bottling plants to Suiza;
- Bos handled the financial and accounting aspects of the sale of DFA's interest in Suiza Dairy Group;
- Bos participated in the financial aspects of the acts related to the $28.5 million transaction related to "carve out" plants;
- Bos participated in the setting up of NDH, referred to by plaintiffs as a "FAUX competitor"
- Bos agreed with the multi-million dollar buyout of Noll's and Beshears's NDH ownership stake;
- Bos was motivated by the receipt of several million dollars in wages and bonuses by DFA, amounts that were significantly more than he had previously earned.

A review of these "facts" reveals very quickly why plaintiffs attempt to restate the Sixth Circuit's *Brown* standard. They **[*739]** repeatedly argue that Bos participated in financial aspects of the various dealings and agreements which they allege are part of the anticompetitive scheme. What they do not establish, however, is that Bos actively and knowingly participated in an anticompetitive scheme by at a minimum, demonstrating that he "exerted his influence so as to shape corporate intentions." Plaintiffs view the standard as requiring that they simply show participation, not that they are not required to show influence on corporate intentions. Even if the acts complained of by the plaintiffs can be proven to be acts in furtherance of an anticompetitive scheme, plaintiffs have simply shown that Bos, "participated," sometimes intimately, in the financial planning and arrangements related to those acts. They have not shown, however, that he did anything more than would have been expected from a chief financial officer of any corporation, much less that his actions somehow influenced the **[**90]** corporate decisions that were made. Plaintiffs have engaged in "guilt by association", and they argue inferences to be drawn from the evidence which are unfair and strained to the point of not being justified or reasonable. They have, at best, offered evidence from which equally balanced inferences of anticompetitive and pro-competitive activity are established. Under the *Matsushita* standard, plaintiffs therefore fail in their burden and Bos's motion for summary judgment will be GRANTED.

G. The Baird Motion, [Doc. 826]

James Baird ("Baird"), one of the individual defendants named by the plaintiffs, has also filed a separate motion for summary judgment raising issues not raised by the joint motion. In general, Baird alleges that he is entitled to summary judgment because the plaintiffs' circumstantial evidence regarding the formation and operation of SMA and the plaintiffs' claims of "sweetheart deals" merely show rational business decisions and that Baird had no rational economic motive to conspire. Plaintiffs predictably disagree and, on this motion, the Court agrees with the plaintiffs. Baird's supplemental motion for summary judgment will be DENIED.

Baird is a dairy farmer who was **[**91]** active in the formation of Lone Star Milk Producers ("LSMP") in 1997. LSMP is one of the fastest growing dairy cooperatives in the United States. Baird also has ownership interest in hauling companies and has contracted with other cooperatives to manage the marketing of their milk. LSMP became a member of SMA in April, 2002. Plaintiffs argue that Baird was instrumental in the formation of SMA and has managed SMA through VFC Management, LLC ("VFC"), a for profit company owned by Baird and his daughter-in-law. Baird served on the operations committee of SMA as a representative for LSMP. Baird was named interim manager of SMA in April, 2006, and became a paid manager on January 1, 2007. One of Baird's hauling companies, Lone Star Milk Transport hauls milk for SMA.

In 2000, LSMP sued DFA alleging that it unlawfully monopolized milk in the Southeast. The suit was settled in 2001 with DFA paying LSMP $2.1 million. At about the same time as the LSMP/DFA settlement, the Suiza/Dean merger was ongoing. Suiza and DFA agreed that DFA would supply milk to the new entity. Plaintiffs allege that defendant formed SMA, controlled by DFA, to carry out the agreement and force independent cooperatives **[**92]** to market milk through SMA to have access to bottling plants. They essentially argue that Baird's loyalty to DFA had been

[13] Once again, the Court notes that plaintiffs' attempt to state the standard as one that requires **[**89]** "participation," not one that requires that the individual defendant "actively and knowingly" participate.

acquired through the settlement of the prior lawsuit and that Baird used threats and coercion to induce various cooperatives to join SMA. Plaintiffs further claim that Baird has been paid millions of dollars in fees for his participation in the **[*740]** conspiracy and has made additional millions of dollars through his hauling companies and management fees.

Plaintiffs allege that Baird participated in the formation of SMA, threatened and coerced other cooperatives to join SMA and personally engaged in price fixing. The fact that he participated in the formation of SMA and persuaded others to join is not disputed. What does appear to be disputed is that Baird and DFA jointly maintained SMA through coercion and threats or that Baird colluded with DFA, Dean and DMS to fix prices and not to compete. Plaintiffs argue that Baird was motivated to conspire by greed and that his actions increased his revenues and profits from managing cooperatives, protected his milk hauling revenues and profits and allowed him to diversify his business and earn millions of dollars through the use **[**93]** of VFC, his for profit management company.

Baird argues that his involvement in the formation and operation of SMA does not create an inference of involvement in an illegal antitrust conspiracy but rather that he was motivated to do what he did "so that all cooperatives could share in the access to bottlers without an erosion of the over order prices." He further argues that he was exercising wise business judgement and acted in the best interest of those he represented. Baird also claims that the personal financial reward to him resulted from rational business decisions and do not give rise to an inference of conspiratorial intent to harm dairy farmers. Lastly, Baird alleges that plaintiffs lack standing to pursue the alleged antitrust allegations against him.

The Court will not discuss in detail the competing views of the evidence between plaintiffs and Baird. They are clearly set out in the record. Nor will the Court discuss in detail the competing inferences which the parties consider reasonable for the jury to draw from the proof. Suffice it to say that the Court finds the record contains evidence which, if believed by the jury, would be sufficient evidence from which the jury could **[**94]** find that an illegal conspiracy existed, that Baird joined it, and that he personally participated in acts in furtherance of the conspiracy. The jury could also conclude that Baird took actions contrary to his own self interest absent a conspiracy and that he was motivated to conspire by the prospect of huge monetary gains.

The Court will briefly discuss, however, Baird's standing argument. Baird argues, without citation to any on-point authority, that any harm from any of Baird's conduct is too remote for a claim to be asserted by a cooperative member dairy farmer. That is so, he argues, because the direct victim is the cooperative itself. To the extent dairy farmers desire relief, he asserts they should seek it through their cooperatives.

As noted above, Baird cites no authority for his argument that cooperative dairy farmer members are required to seek relief derivatively and the Court has found none. Indeed the only authority at the Circuit Court level which addresses the issue is the case cited by plaintiffs, *Alexander v. National Farmers Org., 687 F.2d 1173, 1208-09 (8th Cir. 1982)*, in which the Eighth Circuit found that dairy cooperative members have standing to pursue damages **[**95]** resulting from suppressed prices received for milk because such damages belong to members of dairy cooperatives, not the cooperative itself. [14] The Court finds the rationale of ***Alexander*** persuasive.

[*741] H. The Hanman Motion, [Doc. 836]

Gary Hanman ("Hanman"), another of the individual defendants named by the plaintiffs, has, like Bos and Baird joined the joint motion of all other defendants for summary judgment and has also filed a motion for summary judgment raising issues not raised in the joint motion. Hanman raises two arguments in his motion for summary judgment. First, he argues that there is no basis for individual liability against him and, secondly, he argues that plaintiffs' claim for attempted monopoly/monopsony against him fails because he lacked market power. Given the

[14] Plaintiffs state in their brief that many other cases reach the same conclusion. They do not, however, cite a single one of them.

Court's ruling with respect to the attempted monopoly/monopsony claim, the Court need not decide the second of the issues raised by Hanman. [15]

Hanman was president and CEO of DFA from 1998 through 2005 and supervised and was responsible for managing DFA staff and management personnel. Under plaintiffs' theory, Hanman was one of the two individuals responsible for designing, initiating and driving the conspiracy alleged in this case. He developed the business plan of DFA which led to DFA doing various acts which are alleged to be in furtherance of the conspiracy; signed the full supply agreements and the amendments thereto; authorized and participated in the creation of NDH, alleged by plaintiffs to be a sham competitor which permitted Dean to merge with Suiza; authorized and participated in the creation of SMA; and made millions of dollars participating in the conspiracy. Hanman's salary while CEO of DFA ranged from approximately $850,000 in 1999 to more than $17 million in 2005. After his term as CEO ended, Hanman was a consultant for DFA for three years with a pay salary **[**97]** of $500,000 per year and the potential for making well in excess of $1,000,000.

The standard for individual liability for corporate officers is, as discussed above, set forth in *Brown v. Donco Enterprises, Inc.* Under the Sixth Circuit's holding, officers and agents may be held individually liable for corporate actions that violate the antitrust laws if they "actively and knowingly engaged in a scheme designed to achieve anti-competitive ends." *Brown, 783 F.2d at 646*. "[T]he evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions." *Id.* As discussed in the section on the Bos motion above, plaintiffs once again misstate the holding of *Brown* here; however, there are genuine issues of material fact with respect to Hanman's participation even under the correct statement of the *Brown* standard. Hanman's supplemental motion for summary judgment will, therefore, be DENIED.

I. The SMA Motion, [Doc. 829]

SMA, in its supplemental motion for summary judgment, argues that there is no genuine issue of material fact as to whether SMA joined in a conspiracy to suppress prices, even assuming the existence of such a conspiracy involving others. [16] According to **[**98]** SMA, "[p]laintiffs' price fixing claims are rooted in the allegation that defendants conspired to fix and **[*742]** depress over order prices charged to dairy processors in the Southeast at artificially low levels." SMA argues that its formation led to the preservation of over order prices at levels higher than would otherwise have been the case and that it has no role in the establishment of over order premiums, a process carried out by DCMA, an 11-member cooperative organization not named as a defendant in this litigation. SMA also argues that its procurement of supplemental milk is consistent with industry standards and does not result in "flooding" of the Southeastern market.

The following statement of relevant facts is taken from the brief of the plaintiffs. SMA is a marketing agency of dairy cooperatives, including DFA. The day-to-day operations of SMA are handled by the "operations committee," which consists of non-farmer managers from the SMA cooperative members. Baird **[**99]** has been a member of the operations committee since SMA's inception in April, 2002, until the present. In April, 2006, Baird was formally appointed general manager of SMA. Since January 1, 2007, Baird has managed SMA through VFC Management, a for-profit company owned by Baird and his daughter-in-law. VFC charges a $.09/cwt. fee on all SMA cooperative member milk, which is used to fund a 15% profit guarantee to Baird on all milk marketed through SMA—approximately $9,000,000.00 in 2008 alone.

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[15] Plaintiffs have, in response to Hanman's claim with respect to lack of market power for the claim of attempted monopoly/monopsony, responded **[**96]** that a showing of market power is not necessary to their ***conspiracy*** claim. This further bolsters the Court's prior decision that, in reality, plaintiffs claim is one for conspiracy to monopolize/monopsonize rather than attempt to monopolize/monopsonize.

[16] SMA's supplemental motion relates only to Count Five, the *§ 2* claim. SMA does not separately address the *§ 2* claims regarding monopolization and monopsonation which are addressed in the joint motions for summary judgment.

Defendants, including Dean Foods, formed and controlled SMA and forced previously independent cooperatives to market their milk through SMA in order to access bottling plants covered by DFA full-supply agreements. Because nearly all milk produced in the southeast is funneled through SMA (including the milk of DFA-controlled DMS, which is pooled in SMA), defendants used SMA to monitor and enforce their conspiracy, to flood the market with unneeded milk to further suppress prices, and to engage in other unlawful activities designed to eliminate competition and artificially reduce and fix milk prices.

Plaintiffs respond to SMA's argument by accusing SMA of misunderstanding fundamental rules of antitrust **[**100]** claim construction by viewing plaintiffs' "price-fixing" and "flooding" claims "in isolation of the seven other overt acts alleged in Count V" of plaintiffs' complaint. They also correctly argue that SMA, at least for the purpose of its supplemental motion, cannot show an absence of genuine issue of material fact as to the other five overt acts since the moving party bears the burden of showing that it is entitled to judgment as a matter of law. On this point, the Court agrees with plaintiffs. Defendants are accused of participation in a conspiracy. Assuming that plaintiffs can establish the existence of a conspiracy, a coconspirator is liable for all acts performed in furtherance of the conspiracy. *United States v. Hayter Oil Co., 51 F.3d 1265, 1271 (6th Cir. 1995)* (citing *Pinkerton v. United States, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946))*. Each conspirator is liable for the overt acts committed by any member of the conspiracy, even if the defendant did not personally commit the acts. *United States v. Murphy, 937 F.2d 1032, 1041 (6th Cir. 1991)* (citing *Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956)* (Engle, J., dissenting)). It is not necessary that each conspirator know all the **[**101]** details of the conspiracy or all the participants involved. *Hooks v. Hooks, 771 F.2d 935, 944 (6th Cir. 1985)*.

Furthermore, SMA's claim also falls victim to the Supreme Court's admonition that a conspiracy case is to be judged by viewing it as a whole, not "by dismembering it and viewing its separate parts." *Continental Ore Co. v. Union **[*743]** Carbide & Carbon Corp., 370 U.S. 690, 698-99, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. Viewing the evidence as a whole, and not in isolation, the cumulative effect of all the evidence creates a genuine issue of material fact, even though some of the specific acts in furtherance of the conspiracy may not be illegal in themselves. *See* *American Tobacco Co. v. United States, 147 F.2d 93, 107 (6th Cir. 1945)* ("Acts done to give effect to the conspiracy may be, in themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.").

The evidence presented by plaintiffs, when viewed as a whole, creates a genuine issue of material fact. The evidence, if believed by the jury, will establish that the defendants designed SMA with the goal of controlling 100% of the milk produced **[**102]** to eliminate the "independent" option, farmers were required to join SMA by coercion and threats, DFA controls SMA, SMA's pricing guidelines require its member cooperatives to charge customers the DCMA set over-order premiums, DCMA is DFA controlled, SMA monitors and enforces prices among its member cooperatives, and SMA provided price compilations to competitors.

The supplemental motion of SMA for summary judgment is DENIED.

So ordered.

/s/ J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

In re Digital Music Antitrust Litig.

United States District Court for the Southern District of New York

July 18, 2011, Decided; July 18, 2011, Filed

No. 06 MD 1780 (LAP)

Reporter

812 F. Supp. 2d 390 *; 2011 U.S. Dist. LEXIS 77442 **; 2011-1 Trade Cas. (CCH) P77,536

IN RE DIGITAL MUSIC ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTION

Subsequent History: Motion denied by, Motion denied by, Without prejudice, Dismissed by, in part *In re Dig. Music Antitrust Litig., 2015 U.S. Dist. LEXIS 195055 (S.D.N.Y., Mar. 2, 2015)*

Motion denied by, Motion granted by, Class certification denied by *In re Dig. Music Antitrust Litig., 321 F.R.D. 64, 2017 U.S. Dist. LEXIS 111403 (S.D.N.Y., July 18, 2017)*

Prior History: *In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 2008 U.S. Dist. LEXIS 79764 (S.D.N.Y., Oct. 9, 2008)*

Core Terms

Music, allegations, antitrust, purchasers, Defendants', prices, indirect, parent company, unjust enrichment, motion to dismiss, Plaintiffs', conspiracy, class action, intrastate, subsidiary, deceptive, cases, consumer protection, anti trust law, joint venture, restitution, class certification, parasitic, state-law, unfair, supracompetitive, consumers, damages, named plaintiff, quotation

LexisNexis® Headnotes

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

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

In assessing a motion to dismiss, the court must accept all non-conclusory factual allegations as true and draw all reasonable inferences in the plaintiff's favor. To survive such a motion, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A complaint that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. In other words, where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, dismissal is appropriate. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

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

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

HN2[] **Cartels & Horizontal Restraints, Sherman Act**

In analyzing a motion to dismiss a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the court is mindful that a plaintiff needs to allege only enough factual matter to suggest that an agreement was made but he need not, unlike in the summary judgment context, rule out the possibility that the defendants were acting independently. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. Thus, an allegation of parallel conduct coupled with only a bare assertion of conspiracy is not sufficient to state a *§ 1* claim. Instead, allegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Releases

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

HN3[] **Class Actions, Compromise & Settlement**

A court in approving a class action settlement may release not only those claims alleged in the complaint and before the court but also claims which could have been alleged in connection with any matter or fact set forth or referred to in the complaint. However, a release applies only as long as the released conduct arises out of the identical factual predicate as the settled conduct. In other words, a settlement may be framed to prevent future suits depending on the very same set of facts, but future claims are barred only where there is a realistic identity of issues between the former and future cases and where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members.

Antitrust & Trade Law > Clayton Act > Claims

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN4[] **Clayton Act, Claims**

In addition to U.S. Const. art. III standing, an antitrust plaintiff must also establish antitrust standing. Antitrust standing is analyzed using two metrics. First, a plaintiff must demonstrate antitrust injury, which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants acts unlawful. Second, a plaintiff must show that he is a proper plaintiff in light of these factors: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. In addition, the existence of an improper motive is a relevant consideration, but it is not a panacea that will enable any complaint to withstand a motion to dismiss.

Antitrust & Trade Law > Clayton Act > Claims

Torts > ... > Causation > Proximate Cause > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Clayton Act, Claims**

Ultimately, antitrust standing is about the question of which persons have sustained injuries too remote from an antitrust violation to give them standing to sue. Just as in common-law tort and contract litigation, concepts such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract circumscribe a party's right to recovery, so in antitrust actions the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them, can limit the right to sue. In considering the question of antitrust standing, the Supreme Court likens the analysis to that of proximate cause.

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

HN6[] **Private Actions, Remedies**

Being forced to pay supra-competitive prices as a result of the defendants' anticompetitive conduct plainly is of the type the antitrust laws were intended to prevent.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Clayton Act, Claims**

Absent a physical and economic nexus between the alleged violation and the harm to the plaintiff, antitrust standing is difficult to come by.

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

HN8[] **Private Actions, Remedies**

Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained.

Governments > Courts > Judicial Precedent

HN9[] **Courts, Judicial Precedent**

In considering substantive state-law claims, the court follows a decision of the highest state court unless there are very persuasive grounds for believing that the state's highest court no longer would adhere to it. In the absence of a ruling by the state's highest court, the court considers and may follow intermediate court rulings unless it is convinced that the state's highest court would decide otherwise.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN10[] **Class Actions, Prerequisites for Class Action**

Although a U.S. Const. art. III court must ordinarily assure itself that it has jurisdiction before proceeding, there is an exception to that rule when class certification issues are logically antecedent to U.S. Const. art. III concerns. The logically antecedent exception is not exactly defined. The cases indicate that where class certification is the source of the potential standing problems, class certification should precede the standing inquiry and the standing inquiry is deferred until after the class certification decision because the alleged problems of standing will not arise unless class certification is granted. This is particularly true where U.S. Const. art. III concerns pertain to statutory standing. Cases holding otherwise are situations where the standing of the named plaintiffs is in question or where the standing of each plaintiff involves nuances in the conduct affecting each plaintiff. Generally, this occurs in securities cases where plaintiffs brought claims related to securities they did not purchase on the theory that proposed class members had purchased them and would establish standing once joined.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

Michigan's antitrust statute explicitly requires an unlawful restraint of trade to be in a relevant market, *Mich. Comp. Laws Ann. § 445.771*, which it defines as an area of competition, all or any part of which is within the state. *Mich. Comp. Laws Ann. § 445.772*.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

West Virginia and South Dakota have antitrust statutes that courts have held to be ambiguous as to whether the conspiracy or the conduct must be alleged to have been within the state. *S.D. Codified Laws § 37-1-3.1* provides that a conspiracy in restraint of trade or commerce any part of which is within this state is unlawful. *W. Va. Code § 47-18-3* is a similar provision. In light of this potential ambiguity, courts hold that the states intended to cover as broad a range of activities as possible and that the statutes require allegations of some conduct within the state.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

HN13[] **Interstate Commerce, Tests**

States may not regulate wholly interstate activity, but they are not limited to regulating wholly intrastate activity.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN14[] Trade Practices & Unfair Competition, State Regulation

A claim under California's Unfair Competition Law for damages is not allowed. Restitution is a permissible claim. This statute prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The California law covers a wide range of conduct.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN15[] State Regulation, Claims

Federal courts have generally permitted claims under the New Mexico Unfair Practices Act, *N.M. Stat. Ann. § 57-12-2(E)(2)*, in price fixing cases if the plaintiff alleges a gross disparity between the price paid for the product and the value received.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN16[] State Regulation, Claims

The New York consumer protection statute, *N.Y. Gen. Bus. Law § 349(a)*, requires a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof. The deceptive practice, whether a representation or an omission, must be likely to mislead a reasonable consumer acting reasonably under the circumstances. Although the New York statute is based upon § 5 of the Federal Trade Commission Act, New York has chosen not to include unfair competition or unfair practices in its consumer protection statute, language that bespeaks a significantly broader reach. Accordingly, anticompetitive conduct that is not premised on consumer deception is not within the ambit of the statute because the statute seeks to secure an honest market place where trust, and not deception, prevails. An antitrust violation may violate *N.Y. Gen. Bus. Law § 349*, but only if it is deceptive.

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

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN17[] Cartels & Horizontal Restraints, Price Fixing

Price fixing is an unfair practice under the North Carolina consumer protection statute. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Price-fixing efforts in combination with other dishonest conduct suffices under the North Carolina law.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

***HN18*[]** **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

Like the New York consumer protection statute, *N.Y. Gen. Bus. Law § 349(a)*, the North Carolina consumer protection statute is based upon § 5 of the Federal Trade Commission Act. However, unlike the New York statute, the North Carolina law contains a provision prohibiting "unfair" practices and thus fully mirrors § 5 of the Federal Trade Commission Act. Because of that similarity, decisions construing the Federal Trade Commission Act are appropriate guidance. It is an accepted tenet of basic ***antitrust law*** that § 5 of the Federal Trade Commission Act sweeps within its prohibitory scope conduct also condemned by *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Contracts Law > Remedies > Restitution

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

***HN19*[]** **Trade Practices & Unfair Competition, State Regulation**

Although the requirements to plead unjust enrichment vary by state, almost all states at minimum require plaintiffs to allege that they conferred a benefit or enrichment upon defendant and that it would be inequitable or unjust for defendant to accept and retain the benefit. In contemporary United States common law, restitution based upon unjust enrichment takes at least two forms; it may be "autonomous" or "parasitic." Parasitic claims are where the unjust enrichment is based upon a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation. Conversely, unjust enrichment may provide an independent ground for restitution, and this is known as autonomous restitution. Autonomous claims in an area regulated by an independent body of law are more problematic than parasitic claims because the premise for such a claim must be that, even if the defendants' conduct is blameless under the substantive requirements of federal and state antitrust statutes and state consumer protection statutes, the plaintiffs nevertheless can still obtain restitution.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

***HN20*[]** **Pleading & Practice, Pleadings**

Plaintiffs may plead in the alternative.

Contracts Law > Remedies > Restitution

HN21[] **Remedies, Restitution**

Unjust enrichment ordinarily does not furnish a basis for liability where parties voluntarily have negotiated, entered into and fully performed their bargain.

Contracts Law > Remedies > Restitution

HN22[] **Remedies, Restitution**

Because autonomous restitution only exists in the absence of a violation of law, the court will not inquire into the terms of the sale where a relatively comprehensive state and federal statutory and common-law scheme exists to proscribe the conduct of which plaintiffs complain.

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

Contracts Law > Remedies > Restitution

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

HN23[] **Purchasers, Direct Purchasers**

As to parasitic unjust enrichment claims premised on a violation of federal law, it is beyond peradventure that indirect purchasers may not employ unjust enrichment to skirt the limitation on recovery imposed by Illinois Brick. Moreover, there is no clearly established federal common law of restitution for a federal antitrust violation. Therefore, absent a basis for restitution in federal law both direct and indirect purchasers may not bring unjust enrichment claims premised solely on a violation of federal law.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Contracts Law > Remedies > Restitution

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

HN24[] **State Regulation, Claims**

Indirect purchaser antitrust plaintiffs face a further limitation. They may not recover restitution in states and the Commonwealth of Puerto Rico that follow the rule of Illinois Brick, including Illinois, Virginia, Montana, Kentucky, Maryland, and Oklahoma. In Illinois, only the Illinois state attorney general may bring a class action on behalf of indirect purchasers under *740 Ill. Comp. Stat. 10/7(2)*. Many states have not expressly adopted or rejected Illinois Brick, but they have antitrust laws that are harmonized with federal law or overwhelmingly look to federal law for guidance. Therefore, any state that has not expressly passed Illinois Brick repealer legislation or interpreted its law in such a way as to override the rule of Illinois Brick is presumed to have decided to follow federal law, including the Illinois Brick limitation on indirect purchaser claims.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

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

HN25[] State Regulation, Claims

Arizona, California, the District of Columbia, Kansas, Maine, Michigan, Minnesota, Nevada, New Mexico, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin are among jurisdictions that have passed Illinois Brick repealer laws or their courts have held that state law permits indirect purchaser suits by individuals. *Cal. Bus. & Prof. Code § 16750(a)*; *D.C. Code § 28-4509(a)*; *Kan. Stat. Ann. § 50-161*; *Me. Rev. Stat. tit. 10, § 1104(1)*; *Mich. Comp. Laws § 445.778(2)*; *Minn. Stat. § 325D.57*; *Nev. Rev. Stat § 598A.210(2)*; *N.M. Stat. Ann. § 57-1-3(A)*; *S.D. Codified Laws § 37-1-33*; *Vt. Stat. Ann. tit. 9, § 2465*; *W. Va. CSR § 142-9-2*; *Wis. Stat. § 133.18(1)(a)*

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

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

HN26[] State Regulation, Claims

Only direct purchasers may maintain a cause of action under Massachusett's antitrust act, *Mass. Gen. Laws ch. 93, § 1 et seq.*, but both direct and indirect purchasers may maintain a cause of action under the state consumer protection act, *Mass. Gen. Laws ch. 93A, § 1 et seq.*

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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

HN27[] State Regulation, Claims

Illinois law clearly provides for an individual remedy for indirect purchasers, yet it limits those who may maintain a class action for the same alleged violation to only the state attorney general. *740 ILCS 10/7(2)* states that no provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.

Governments > Courts > Judicial Precedent

HN28[] Courts, Judicial Precedent

When a fragmented Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. This rule is not a carte blanche; it only applies in instances where one opinion can meaningfully be regarded as narrower than another; that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

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

HN29[] State Regulation, Claims

See *740 ILCS 10/7(2)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

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

HN30[] **State Regulation, Claims**

740 ILCS 10/7(2) provides a procedure that is so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. Therefore, applying the federal rule allowing class actions to override the process of allowing individual indirect purchaser actions but actions only by the Illinois Attorney General for a class of indirect purchasers would be an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy and is disallowed. Because the indirect purchaser restrictions of the Illinois law are intertwined with the underlying substantive right, application of *Fed. R. Civ. P. 23* would abridge, enlarge or modify Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court.

Antitrust & Trade Law > Sherman Act > Claims

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

HN31[] **Sherman Act, Claims**

An antitrust conspiracy complaint must assert enough factual matter to suggest plausibly a preceding agreement.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Illegal Purposes & Interests of Justice

HN32[] **Piercing the Corporate Veil, Illegal Purposes & Interests of Justice**

It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation is not liable for the acts of its subsidiaries. But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

HN33[] **Shareholder Duties & Liabilities, Piercing the Corporate Veil**

Under New York choice-of-law principles, the issue of whether the corporate veil may be pierced is determined under the law of the state of incorporation.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Illegal Purposes & Interests of Justice

HN34[] **Piercing the Corporate Veil, Illegal Purposes & Interests of Justice**

In Delaware, a court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner. Likewise, in New York, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. In determining whether to pierce the corporate veil in either state, courts consider allegations of disregarding corporate formalities, siphoning or intermingling of funds, inadequate capitalization, or that the corporation is a mere sham acting for the shareholder, among others.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Fraud & Misrepresentation

HN35[] **Alter Ego, Fraud & Misrepresentation**

In neither New York nor Delaware may liability be imposed merely based on a parent's ownership of a controlling interest in its subsidiary. The separate corporate existences of parent and subsidiary will not be set aside merely on a showing of common management of the two entities nor on a showing that the parent owned all the stock of the subsidiary. Indeed, a showing that a fraud would be perpetrated through misuse of the corporate form generally is required in both states. In both states, the corporation's separate identity is generally respected and the proponent of disregarding a corporation's separate identity bears a heavy burden.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

HN36[] **Alter Ego, Corporate Formalities**

New York law provides that a subsidiary has to be the "mere dummy" of its parent for its corporate veil to be pierced.

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

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Business & Corporate Law > Joint Ventures > General Overview

HN37[] **Cartels & Horizontal Restraints, Sherman Act**

A mere ownership stake in a joint venture is not grounds for a presumption of wrongdoing or fraud on the part of its owners. Joint ventures and other cooperative arrangements are also not usually unlawful where the agreement on price is necessary to market the product at all. Per se Sherman Act *§ 1*, *15 U.S.C.S. § 1*, liability for a joint venture is not imposed unless the joint venture is a complete sham.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

HN38[] **Alter Ego, Corporate Formalities**

Simply owning, even wholly owning, a subsidiary is insufficient to pierce the corporate veil.

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For Kiana F. Sarraf, Individually and on behalf of all others similarly situated, Plaintiff: Tracy Diana Rezvani, LEAD ATTORNEY, PRO HAC VICE, Finkelstein Thompson LLP, Washington, DC; Christopher Lovell, Imtiaz A. Siddiqui, Lovell Stewart Halebian Jacobson LLP, New York, NY.

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For Claire Barker, Andrew Edenbaum, Rachael Hall, Plaintiffs: Christopher Lovell, Imtiaz A. Siddiqui, Lovell Stewart Halebian Jacobson LLP, New York, NY; Tracy Diana Rezvani, PRO HAC VICE, Finkelstein Thompson LLP, Washington, DC.

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For EMI Group North America, Inc., Capitol-EMI Music, Inc., Virgin Records America, Inc., Defendants: Michael Orth Ware, LEAD ATTORNEY, Mayer Brown LLP, New York, NY; Matthew Stephen Carrico, Richard Marc Steuer, Mayer Brown LLP(DC), Washington, DC.

Judges: LORETTA A. PRESKA, Chief United States District Judge.

Opinion by: LORETTA A. PRESKA

Opinion

[*396] Opinion & Order

LORETTA A. PRESKA, Chief United States District Judge:

Before the Court is a joint motion to dismiss a class-action **[**17]** complaint alleging federal and state antitrust violations by major record labels in the distribution of music over the Internet. Defendants include Bertelsmann, Inc.; Sony BMG Music Entertainment; Sony Corporation of America; Capitol Records, Inc. d/b/a EMI Music North America; EMI Group North America, Inc.; Capitol-EMI Music, Inc.; Virgin Records America, Inc.; Time Warner Inc.; UMG Recordings, Inc.; and Warner Music Group Corp. [1] Several individual plaintiffs seek to represent a putative nationwide class of digital music purchasers. The operative complaint before the Court is the Third Consolidated Amended Complaint ("TCAC"), filed June 2, 2010. The Court's previous judgment dismissing the Second Consolidated Amended Complaint was vacated, and the case returned on remand from the Court of Appeals. *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 327 (2d Cir. 2010)*, cert. denied, *131 S. Ct. 901, 178 L. Ed. 2d 803 (2011)*.

[1] Because Bertelsmann, Inc., Sony Corporation of America, and Time Warner, Inc., are parent companies of other named defendants, the analysis proceeds somewhat differently for these three defendants. Therefore, the Court will refer to the named entities other than the three parent companies **[**18]** as "Defendants," and the parent company defendants will be called the "Parent Companies" with their arguments analyzed separately.

I. BACKGROUND

Because the allegations in the TCAC are, with certain exceptions, the same as those previously considered in published opinions both here and in the Court of Appeals, [2] the Court assumes familiarity **[*397]** with the factual allegations in the TCAC. *Starr, 592 F.3d at 317-22*; *In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 437-39 (S.D.N.Y. 2008)*. To situate this discussion, a summary of the alleged facts follows. The Court assumes that all nonconclusory facts alleged are true for present purposes. *Starr, 592 F.3d at 317 & n.1*.

Defendants produce, license, and distribute music sold online ("Internet Music") and on compact discs ("CDs"). They control eighty percent of the market for digital music in the United States. Defendants Bertlesmann, Inc., Warner Music Group Corp., and EMI launched an online service called MusicNet, a joint venture entity owned and controlled by various Defendants. (TCAC ¶ 67.) Defendants UMG and Sony Corporation of America launched a similar online music service called Duet, later renamed pressplay. (TCAC ¶ 67.) It too was a joint venture. All Defendants signed distribution agreements with MusicNet and pressplay. (TCAC ¶ 67.) These joint ventures, along with the Recording Industry Association of America, provided a forum for Defendants to exchange pricing information, terms of sale, and use restrictions. (TCAC ¶¶ 34, 67-68, 87-88.)

Plaintiffs allege that Defendants conspired to fix the price, terms of sale, and restrictions on the use of Internet Music through these joint ventures. (TCAC ¶¶ 72, 98.) Defendants used these joint ventures as a forum to discuss their desire to engage in the alleged conduct, to share licensing **[**20]** terms and pricing information, and to police the alleged agreements, among other things. (TCAC ¶¶ 67-68, 98.) Through the use of Most Favored Nation ("MFN") clauses in Defendants' licensing agreements, a licensor would receive at least equivalent licensing terms as another licensor. (TCAC ¶¶ 92, 99.) The alleged effect of the MFN agreements was to set a wholesale price floor for Internet Music of seventy cents per song. (TCAC ¶¶ 99-100.) Plaintiffs allege that despite the fact that the price of distributing Internet Music fell to essentially zero, the wholesale price of Internet Music increased uniformly. (TCAC ¶¶ 99-100.) This was due in material part to Defendants' enforcement of the MFN clauses, which Defendants attempted to hide. (TCAC ¶¶ 93, 99-100.) In addition, Defendants included digital rights management ("DRM"), which restricted transfer of songs to portable players, among other things. (TCAC ¶ 76.) Plaintiffs allege that but for the conspiracy, a defendant may have removed DRM to gain market share. (TCAC ¶ 76.) Allegedly, both the wholesale price and DRM included with Defendants' music was fixed among Defendants because of Defendants' collusion, even when they sold to unaffiliated **[**21]** retailers. (TCAC ¶ 69.)

The core allegation is that Defendants' behavior sustained high prices for Internet Music, which made it less attractive to consumers and hampered the growth of Internet Music services generally. (TCAC ¶¶ 81-82.) Plaintiffs point to eMusic, an independent competitor in the online music business, as an example of competitive pricing. It is the second-largest online retailer and charges - at retail - less than half of Defendants' wholesale price, and Defendants refuse to do business with it. (TCAC ¶¶ 103-104.) Plaintiffs allege that Defendants' motive to conspire was to support their ability to charge supracompetitive prices for CDs; they could do so because Internet Music was priced, through the alleged conspiracy, so as to be an unattractive or economically uncompetitive substitute. (TCAC ¶ 83.)

[*398] The procedural history of this case is also well-described in the earlier opinions in this case. E.g., *Starr, 592 F.3d at 320-21*. The Court of Appeals remanded for further proceedings consistent with its opinion, and Defendants have again moved to dismiss the action, relying mainly on arguments made but not addressed in their original motion to dismiss.

II. DISCUSSION

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[2] There are two salient exceptions. The first is an amendment to paragraph 99, which was proposed but denied as futile in the now-vacated order dismissing the complaint. The TCAC contains the amended language, which was considered by the Court of Appeals in its analysis, *Starr, 592 F.3d at 323 n.3*, and is considered here. The second exception is that the TCAC contains paragraphs 146-153, which were not included in the Second Consolidated Amended Complaint. Those paragraphs allege violations of the Illinois and New York **[**19]** state antitrust laws, and they are discussed in this opinion.

In **[**22]** evaluating this motion, the Court first will discuss the Sherman Act claims, beginning with a brief discussion of the Twombly analysis by the Court of Appeals. Then the Court will turn to the arguments made regarding the Sherman Act claims but not addressed in the original motion to dismiss and renewed in the motion to dismiss sub judice. Next, the Court will analyze Defendants' arguments relating to the state claims, aside from the Twombly-related argument, made in the original motion to dismiss but not addressed previously. The Court will also discuss new arguments raised in relation to newly added claims under the Illinois and New York antitrust laws. Following the state-law discussion, the Court will analyze Defendants' motion to dismiss claims against the Parent Companies. Finally, the Court will discuss the associated motion to strike portions of the TCAC. Before delving into these matters, the Court sets out the applicable legal standard.

A. Legal Standard for Motions to Dismiss

HN1[] In assessing a motion to dismiss, the Court must accept all non-conclusory factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008)* **[**23]** (internal quotation marks omitted). To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A complaint that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." Id. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 557*) (internal quotation marks omitted). In other words, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," dismissal is appropriate. *Id. at 1950*. "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly, 550 U.S. at 555* **[**24]** (citations omitted).

HN2[] In analyzing a motion to dismiss a claim under *section 1 of the Sherman Act*, the Court is mindful that a plaintiff needs to allege only "enough factual matter . . . to suggest that an agreement was made," *id. at 556*, but he need not, unlike in the summary judgment context, "rule out the possibility that the defendants were acting independently," *id. at 554*. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Id. at 556*. "Thus, an allegation of parallel conduct coupled with only a bare assertion of conspiracy **[*399]** is not sufficient to state a *Section 1* claim." *Starr, 592 F.3d at 322*. "Instead, allegations of parallel conduct 'must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'" Id. (quoting *Twombly, 550 U.S. at 557*).

B. Pleading of Sherman Act Claims

In its opinion vacating the judgment entered in this case, the Court of Appeals concluded that the Second Consolidated Amended Complaint **[**25]** "alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants." *Id. at 323*. The TCAC being the same in material part, Defendants do not argue their motion to dismiss on Twombly grounds. In light of the Court of Appeals clarification of the importance of context in claims under *section 1* of the Sherman Act and its conclusion that the allegations above suffice, Plaintiffs' section 1 claims may proceed because the TCAC meets Twombly's pleading standards. *Id. at 323-24*.

C. Other Sherman Act Arguments

In their original motion to dismiss, Defendants made two arguments with respect to the federal claims that were not addressed. First, Defendants argue that Plaintiffs' claims through February 1, 2005, were settled and released because of a state class action settlement in Ottinger v. EMI Music Distrib., Civ. Action No. 24885-II (Tenn. Cir. Ct.). (Declaration of Helena Almeida in Support of Defendants' Motion to Dismiss dated July 30, 2007 ("Almeida Decl."), Ex. E.) Second, Defendants argue that Plaintiffs' claims involving CDs cannot survive because the TCAC does not state a claim of anticompetitive conduct involving **[**26]** CDs, which deprives Plaintiffs of antitrust standing for CD purchases. The Court considers these arguments in this section.

1. Settlement and Release

Defendants argue that the Ottinger case involved an alleged conspiracy that Defendants conspired to elevate the price of CDs despite cost reductions. Because the Ottinger settlement released all claims that the settlement class "alleged or could have alleged" (Defendants' October 2007 Reply Brief ("Def. 2007 Reply Br.") at 11) based on the allegations in that case, the argument is that the instant claims, which Defendants argue could have been alleged, were released.

Defendants correctly note that ***HN3***[] "[a] court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged . . . in connection with any matter or fact set forth or referred to in the complaint." *Wal-Mart Stores, Inc. v. Visa, 396 F.3d 96, 107 n.13 (2d Cir. 2005)* (quoting *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 221 (5th Cir. 1981))* (internal quotation marks omitted). However, they fail to appreciate that a release applies only "as long as the released conduct arises out of the 'identical factual **[**27]** predicate' as the settled conduct." *Id. at 107*. In other words, a settlement may be framed to prevent future suits "depending on the very same set of facts," *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 18 n.7 (2d Cir. 1981)*, but future claims are barred only "where there is a realistic identity of issues" between the former and future cases and "where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members." *TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 461 (2d Cir. 1982)*.

Here, the claims do not arise out of the "identical factual predicate" as the Ottinger claims. Ottinger involved allegations that record-company defendants used various schemes to maintain higher CD profit **[*400]** margins than they could achieve for vinyl records and cassette tapes, despite cost reductions in the price of CD production. (Almeida Decl. Ex. G ¶ 1.) The alleged schemes had to do with the ways CDs were priced at wholesale and marketed to retailers, and the schemes involved allegations of direct price agreements and price signaling for CDs. (Id. ¶ 2.) The allegations simply have nothing to do with Internet Music, the interplay **[**28]** between the online music market and the CD market, or the related allegations here. This complaint involves allegations that the market for online music downloads was priced at set, artificially high levels. It involves a different factual predicate from the Ottinger complaint. That this complaint, like the complaint in Ottinger, also alleges anticompetitive effects in the CD market or a motive to maintain higher CD prices is insufficient; a release bars future suits that depend on "the very same set of facts." *Nat'l Super Spuds, 660 F.2d at 18 n.7*; see *Wal-Mart Stores, 396 F.3d at 107*. The source of the alleged antitrust conspiracy here is wholly different from the source of the alleged antitrust conspiracy in Ottinger. Thus, the Ottinger release does not bar these claims. [3]

2. Standing to Assert CD-Purchaser Claims

Defendants next argue that the TCAC does not allege **[**29]** antitrust injury to purchasers of CDs but, rather, only to Internet Music purchasers. This is an argument about antitrust standing. Defendants say that the TCAC is insufficient to confer standing on a CD purchaser class because it does not allege that any CD purchaser would have bought Internet Music instead of CDs absent the alleged conspiracy. They also argue that the complaint does not specify how restricting Internet Music affected the price of CDs. In sum, Defendants' argument is that the CD-purchaser plaintiffs may not recover for an antitrust injury in a separate market.

HN4[] In addition to Article III standing, "an antitrust plaintiff must also establish antitrust standing." *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009)*. Antitrust standing is analyzed using two metrics. First, a plaintiff must demonstrate "antitrust injury, which is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" Id. (quoting *Brunswick Corp. v. Pueblo*

[3] Even if the Ottinger release were to bar these claims, it would be effective only for claims through September 29, 2003. The release by its terms only applies to members of the Ottinger class, which includes claims arising from CD purchases from June 1, 1991 to September 23, 2003. (Almeida Decl. Ex. E, §§ 1.5, 1.16, 1.19.)

Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). Second, a plaintiff must show that he is a proper plaintiff in light of the factors discussed in Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 540-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). **[**30]** These include:

> (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

In re DDAVP, 585 F.3d at 688. In addition, the existence of an improper motive is a relevant consideration, but it "is not a panacea that will enable any complaint to withstand a motion to dismiss." Associated Gen., 459 U.S. at 537; **[*401]** Balaklaw v. Lovell, 14 F.3d 793, 797 n.9 (2d Cir. 1994).

HN5[] Ultimately, antitrust standing is about the question of "which persons have sustained injuries too remote [from an antitrust violation] to give them standing to sue." Blue Shield of Va. v. McCready, 457 U.S. 465, 476, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982) (alteration and emphasis in original). "Just as in common-law tort and contract litigation, concepts such as 'foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract' circumscribe a party's right to recovery, so in antitrust **[**31]** actions 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them,' can limit the right to sue." Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 437 (2d Cir. 2005) (quoting Associated Gen., 459 U.S. at 532-33, 535-36); Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 316 n.8 (S.D.N.Y. 2003) ("In considering the question of antitrust standing, the Supreme Court has likened the analysis to that of proximate cause.").

As to the first part of the analysis, there is little doubt that the CD-purchaser plaintiffs' alleged injury is an antitrust injury. The CD-purchaser plaintiffs allege that they bought Defendants' CDs but were **HN6**[] "forced to pay supra-competitive prices as a result of the defendants' anticompetitive conduct. Such an injury plainly is 'of the type the antitrust laws were intended to prevent.'" In re DDAVP, 585 F.3d at 688 (quoting Brunswick, 429 U.S. at 489).

The second part of the analysis is less straightforward, however. Defendants argue that there are several infirmities in the CD-purchaser plaintiffs' antitrust standing: (1) the allegedly unlawful conduct has only to do with Internet Music; (2) no plaintiff **[**32]** alleges he would have bought Internet Music instead of CDs but for the allegedly unlawful conduct; and (3) there is no alleged connection between the allegedly unlawful conduct and its effect on the CD market. Plaintiffs counter that "injuries to different groups of consumers of related products can be inflicted by a single antitrust conspiracy." (Plaintiffs' September 2007 Opposition Memorandum ("Pl. 2007 Opp.") at 21.) Neither side cites a case directly on point.

The Court begins by laying out the allegations relevant to the CD market in the TCAC. It states:

- "Internet Music and CDs are viewed as substitutes by both record labels and consumers as evidenced by the inverse relationship between sales of CDs and Internet Music." (TCAC ¶ 41.)
- "Defendants' collusion in setting high prices for Internet Music . . . made Internet Music less attractive to consumers, allowing Defendants to sell CDs at supracompetitive prices." (TCAC ¶ 82.)
- "Acting alone, no defendant could sustain the supracompetitive prices prevailing in the CD market. This inability to charge high CD prices, as market factors made consumer demand for CDs more elastic over time at the prices charged by Defendants during the **[**33]** conspiracy, gave Defendants motive to conspire." (TCAC ¶ 83.)
- "In consequence, Defendants' conspiracy to restrain the availability and distribution of Internet Music, and to fix and maintain the price of Internet Music, has protected the sale of CDs and enables Defendants to maintain CD prices at supracompetitive levels." (TCAC ¶ 126.)

Otherwise, the TCAC has substantially similar allegations in a few other paragraphs, **[*402]** but no allegations that add materially to these.

The allegations in the TCAC do not suffice to establish the antitrust standing of CD purchasers. Although Plaintiffs argue that the "supracompetitive price that CD purchasers pay for CDs 'flows from' Defendants' anticompetitive conduct" (id. at 22), this argument is nothing more than ipse dixit. The allegations either (1) are insufficient to allege antitrust standing because they do not demonstrate an adequate connection between the alleged misconduct and an effect on the CD market or (2) do not allege cognizable antitrust standing because the alleged injury is too attenuated from the source of the alleged misconduct.

As to the first point, all of the allegations of misconduct in the TCAC involve fixing prices of Internet **[**34]** Music. Without saying more than that CDs and Internet Music are "substitutes," the TCAC goes on to assert that Defendants' conduct in the Internet Music market "allow[ed] Defendants to sell CDs at supracompetitive prices." (TCAC ¶¶ 41, 82.) The TCAC contains no nonconclusory allegations about how the pricing of Internet Music affected CD pricing, how the CD market operated generally, what considerations affected CD pricing, or any kind of tie - contractual, historical, or correlative, for example - between CD pricing and Internet Music pricing. ***HN7***[] Absent a "physical and economic nexus between the alleged violation and the harm to the plaintiff," antitrust standing is difficult to come by. See *Blue Shield, 457 U.S. at 478*; see also *Associated Gen., 459 U.S. at 545-46*.

Allegations of this type of linkage are important. The cases Plaintiffs rely upon have a much closer link between the allegedly unlawful conduct and the antitrust standing of the plaintiff. For example, in Loeb Industries, Inc. v. Sumitomo Corp., defendants allegedly fixed prices on the copper futures market, but claims by purchasers of physical copper proceeded because "the price of physical copper . . . is directly linked **[**35]** to the . . . price for copper futures." *306 F.3d 469, 476 (7th Cir. 2002)*. In part, that was due to the fact that "dealers in all forms of physical copper quote prices based on rigid formulas related to [copper futures]." Id. Here, there is no alleged "direct link" between Internet Music pricing and CD pricing. [4] Likewise, In re Linerboard Antitrust Litigation involved a situation where vertically integrated producers restricted production of linerboard, which was a component of the end product, corrugated packaging. *305 F.3d 145, 159 (3d Cir. 2002)*. Plaintiffs, buyers of corrugated materials, had antitrust standing because restricting linerboard output necessarily increased the price of the corrugated packaging, as it was a required component. See *id. at 148-49, 159-60*. In this case, there is no necessary link alleged between the price of Internet Music, the market where the alleged misconduct occurred, and the price of CDs, which could be affected by totally distinct market forces or costs of production. Moreover, the TCAC does not explain any alleged link. Similarly, in Blue Shield of Virginia v. McCready, patients of psychologists who were allegedly damaged by conspiracy between **[**36]** psychiatrists and health insurers had standing because **[*403]** the patients' injury was "inextricably intertwined" with the psychologists' injury. *457 U.S. at 479, 482-84*. This case created a limited exception to the rule that an antitrust claim must be asserted by a market participant; it applies when injuries are "inextricably intertwined" with a market participant's. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Ca., 190 F.3d 1051, 1057 n.5 (9th Cir. 1999)*. *Blue Shield* is inapposite because here, both CD purchasers and Internet Music purchasers allegedly were harmed by higher prices of CDs and Internet Music, respectively, and CD purchasers' alleged injury is thus distinct from and not intertwined with Internet Music purchasers' injury. Finally, Plaintiffs allude to *Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983)*, as supporting authority. That case involved an alleged conspiracy to boycott a trade show that allowed television producers to sell programming directly to cable television systems, rather than having producers go through middlemen who packaged programming together and sold it to the cable systems. *Id. at 294*. Crimpers involved conduct directly affecting **[**37]** the group defendants allegedly conspired to harm. *724 F.2d at 294*. Here, the conduct was directed at an entirely separate group of plaintiffs, and any effect on CD purchasers was at best indirect.

Although in Crimpers and in this case, the complaints alleged a motive of the conspiracy to harm the plaintiffs, intent alone is insufficient. *Associated Gen., 459 U.S. at 537*; see *Blue Shield, 457 U.S. at 479* (stating that antitrust liability "is not a question of the specific intent of the conspirators"). Yet Plaintiffs appear to rely on only the "motive, purpose and intended effect of the conspiracy" (Pl. 2007 Opp. at 21) to support their CD-related claims. The thrust of the TCAC is that Defendants were motivated **[**38]** to engage in this conspiracy in order to continue selling CDs

[4] Other futures-market cases Plaintiffs rely upon are similarly distinguishable; in all of those cases, allegations of contractual or highly correlated price movements were at issue. E.g., *Sanner v. Bd. of Trade of Chi., 62 F.3d 918, 929 (7th Cir. 1995)*; *Ice Cream Liquidation, Inc. v. Land O' Lakes, Inc., 253 F. Supp. 2d 262, 274 (D. Conn. 2003)* ("Defendants concede that plaintiff has alleged a causal link between the CME butter price and the wholesale price of milk, cream, and butter.").

at higher prices, but the TCAC goes no further. (E.g., TCAC ¶¶ 3, 41, 126.) At best, it could be read to say that Defendants' motivation supported some unstated, preexisting, and parallel conspiracy to keep CD prices high. (TCAC ¶ 126 (stating that object of conspiracy was to "maintain CD prices at supracompetitive levels" (emphasis added)).) But such an allegation does not exist in the TCAC, and there is nothing in the TCAC to show how any conduct was directed at the CD market or how other conduct affected the CD market beyond conclusory allegations that Defendants could continue selling CDs at higher prices. The CD-purchaser plaintiffs do not have antitrust standing. *Associated Gen., 459 U.S. at 540, 545*.

Were the above not enough, the TCAC also alleges an injury that is too attenuated from the source of the alleged misconduct. The TCAC alleges that Defendants' price-fixing in the Internet Music market caused prices of Internet Music to be supracompetitive. (TCAC ¶¶ 98-99, 103, 105, 126.) This allegation is sufficient. As a side-effect, and with no conduct directed at the CD market, the TCAC asserts that the Internet Music **[**39]** price-fixing scheme allowed Defendants to continue selling CDs at supracompetitive prices. (TCAC ¶ 126.) This allegation is not sufficient. Not only is there no nonconclusory connection alleged between the Internet Music and CD markets, but the CD market could have been affected by supply and demand, cost of production, or other economic factors wholly unrelated to Internet Music. (See, e.g., TCAC ¶ 71 (discussing factors involved in CD pricing that are absent in Internet Music distribution).) Absent allegations of some conduct directed at the CD market or a direct linkage between the two markets, an allegation of wrongdoing in the Internet Music market bears little connection to the CD market. Cf. *Associated Gen., 459 U.S. at 542-43* **[*404]** (listing independent factors that could have been at play). This alleged injury is simply too attenuated from the source of the alleged malfeasance. See id.; see also *Am. Ad Mgmt., 190 F.3d at 1057* (***HN8***[] "Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained."); *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 79 (2d Cir. 1998)* (similar).

Indeed, looking to the antitrust **[**40]** standing factors, the CD-purchaser plaintiffs' standing fails in several regards. See *In re DDAVP, 585 F.3d at 688*. First, the cause of any injury to CD purchasers is from an indirect source; the direct cause of any injury is from machinations in the Internet Music market. *Associated Gen., 459 U.S. at 540*. Second, there is a class of persons - those who purchased Internet Music directly - whose self-interest would motivate them to vindicate the public interest. *Id. at 542*. Third, allowing CD purchasers to bring an antitrust suit involves more speculative injuries than those alleged to Internet Music purchasers, especially in light of the dearth of allegations about the linkage between the CD market and the Internet Music market, as explained above. *Id. at 542-43*. Because the CD market is separate, as the Court explains infra, "the alleged effects on the [CD market] may have been produced by independent factors." *Id. at 542*. And fourth, there is strong potential for duplicative recoveries here because the CD purchasers' claims are hard to disentangle from the Internet Music purchasers' claims, and the injury they seek to remedy arises from the same alleged misconduct. *Id. at 544-45*. **[**41]** Given these additional factors, the CD-purchaser plaintiffs are not the proper plaintiffs to bring this action. The most they allege is malfeasance in the Internet Music market with no hard link to the CD market. [5]

Plaintiffs appear to argue that no distinction between the CD market and the Internet Music market is warranted. (Pl. 2007 Opp. at 21-22.) Although Plaintiffs have structured their complaint to define the relevant market as the market for music generally, their allegations involve only conduct related to the Internet Music market and not the CD market. Moreover, Plaintiffs themselves divide the market by referring to two separate classes of purchasers: Internet Music purchasers and CD purchasers. (TCAC ¶¶ 44-45.) The TCAC itself explains **[**42]** how Internet Music differs from CDs. For example, Internet Music is "well below CD-quality" and "further hampered by DRM." (TCAC ¶ 74.) In addition, CD pricing includes costs for many features that distinguish the product: it includes costs for producing the discs, cases, packaging, antishoplifting mechanisms, shipping, distribution, and so forth. (TCAC ¶ 71.) Most tellingly, the TCAC alleges that while Internet Music "has the potential to transform the market" by

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[5] It is illustrative that the Court of Appeals hardly mentioned CDs in its opinion vacating this Court's earlier judgment dismissing the case. Its explanation for why the complaint survives focused instead on the Internet Music-related allegations. Only once did the Court of Appeals mention CDs in that discussion, and that mention referenced the lack of any reduction in the price for Internet Music "as compared to CDs." *Starr, 592 F.3d at 323*.

increasing selection (TCAC ¶ 70), Defendants' conduct hampered its development and "forestalled the time by which Internet Music would emerge as a reasonable consumer substitute for CDs." (TCAC ¶ 79.) Thus, the TCAC acknowledges that Internet Music is not the same as or a substitute for CDs. Even Plaintiffs' memorandum implicitly understands that CDs and Internet Music are different; it calls them "related products." (Pl. 2007 **[*405]** Opp. at 21.) Finally, it takes no special training to understand that a CD is a physical product, while Internet Music is not. These attributes could be meaningful to one set of consumers over another.

To summarize: the TCAC does not allege a sufficient linkage between the CD market and the Internet **[**43]** Music market to make its allegations regarding the CD market cognizable for antitrust purposes. In addition, the TCAC alleges an injury that is too attenuated from the source of the alleged malfeasance to confer antitrust standing on the CD-purchaser plaintiffs. The TCAC merely pairs an allegation of a motive with an allegation of consequential harm to assert antitrust standing. The Supreme Court held specifically that this approach, combined with the other factors present here, is insufficient to confer antitrust standing. *Associated Gen., 459 U.S. at 545* ("We conclude, therefore, that [plaintiff]'s allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm [plaintiff], are insufficient as a matter of law."). This being the third amended complaint involving factual allegations that do not involve the CD-purchaser plaintiffs, these claims are DISMISSED with prejudice.

D. State-Law Claims

Defendants reassert three state-law-based arguments that were made but not addressed previously: they argue that (1) Plaintiffs lack standing to assert claims on behalf of residents of states not included in this action; **[**44]** (2) Plaintiffs claims fail under state-law pleading requirements; and (3) Plaintiffs' unjust enrichment claims are barred under the Illinois Brick doctrine. Defendants also argue that Plaintiffs' newly added claims under Illinois and New York antitrust statutes are barred. The Court addresses these arguments in turn.

HN9[↑] In considering substantive state-law claims, the Court "follow[s] a decision of the highest state court 'unless there are very persuasive grounds for believing that the state's highest court no longer would adhere to it.'" *In re New Motor Vehicles Can. Exp. Antitrust Litig. (In re NMV), 350 F. Supp. 2d 160, 169 (D. Me. 2004)* (quoting 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4507). "In the absence of a ruling by the state's highest court, [the Court] consider[s] and may follow intermediate court rulings unless [it is] convinced that the state's highest court would decide otherwise." Id. However, the standing argument, which the Court addresses first, is a matter of federal law.

1. Standing on Behalf of Other State Residents

The named Plaintiffs are residents of California, Florida, Hawaii, Massachusetts, Michigan, Minnesota, **[**45]** New Mexico, New York, and Oregon; they assert state-law claims under those states' laws. (TCAC ¶¶ 5-19, 44.) The TCAC also asserts state-law claims under the laws of fourteen other states and the District of Columbia, where no named plaintiffs reside. [6] (TCAC ¶ 44.) Because the TCAC does not identify class representatives from those fourteen other states and the District of Columbia, Defendants argue that Plaintiffs have no Article III standing to assert these claims. Plaintiffs disagree, saying that, in this case, class certification issues are "logically antecedent" to standing issues. See *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*.

[*406] ***HN10***[↑] Although an Article III court must ordinarily assure itself that it has jurisdiction before proceeding, there is an exception to that rule when class certification issues are "logically antecedent to Article III concerns." Id. (internal quotation marks **[**46]** omitted). The "logically antecedent" exception is not exactly defined. See *Blessing v. Sirius XM Radio Inc., 756 F. Supp. 2d 445, 451 (S.D.N.Y. 2010)*. The cases indicate that where "class certification is the source of the potential standing problems," class certification should precede the standing inquiry. *In re Grand Theft Auto Video Game Litig., No. 06 MD 1739, 2006 U.S. Dist. LEXIS 78064, 2006 WL 3039993, at *2*

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[6] The TCAC amends its allegations to include violations of Illinois state law. (TCAC ¶¶ 146-149.) Illinois is a state from which no named plaintiff hails, making the total fourteen states, a one-state increase from the thirteen states identified in the parties' papers. (Pl. 2007 Opp. at 25 n.23.)

(S.D.N.Y. Oct. 25, 2006) (emphasis added); accord Blessing, 756 F. Supp. 2d at 451; see In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002) (deferring standing inquiry until after class certification decision because "these alleged problems of standing will not arise unless class certification is granted"). This is particularly true where, as here, Article III concerns "pertain to statutory standing." Salsitz v. Peltz, 210 F.R.D. 95, 97 (S.D.N.Y. 2002) (quoting Ortiz, 527 U.S. at 831). Cases holding otherwise have been situations where the standing of the named plaintiffs is in question or where the standing of each plaintiff involves nuances in the conduct affecting each plaintiff. E.g., Gunther v. Capital One, N.A., 703 F. Supp. 2d 264, 274 (E.D.N.Y. 2010) (named plaintiff had **[**47]** no standing); *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 533-34 (E.D. Pa. 2010)* (similar, declining to defer standing inquiry where defendant "attack[ed] the standing only of the named plaintiffs"); Marshall v. Milberg, LLP, No. 07 Civ. 6950, 2009 U.S. Dist. LEXIS 121208, 2009 WL 5177975, at *8 (S.D.N.Y. Dec. 23, 2009) (nuanced conduct determines standing of each plaintiff); see Clark v. McDonald's Corp., 213 F.R.D. 198, 204 (D.N.J. 2003) ("Stated differently, the Ortiz exception . . . does not apply if the standing issue would exist regardless of whether the named plaintiff filed his claim alone or as part of a class."). Generally, this occurs in securities cases where "plaintiffs brought claims related to securities they did not purchase on the theory that proposed class members had purchased them and would establish standing once joined." Blessing, 756 F. Supp. 2d at 451 n.1.

The Court concludes that this case is one where class certification issues are the source of any standing problems, making it appropriate to defer consideration of standing until the class certification stage. Defendants do not dispute that the named Plaintiffs have standing to bring class actions in the states where they reside **[**48]** and purchased Internet Music. See, e.g., *In re Flonase, 692 F. Supp. 2d at 533-34*. Thus, there is no risk that the named Plaintiffs are attempting to "to piggyback on the injuries of the unnamed class members." In re Grand Theft Auto, 2006 U.S. Dist. LEXIS 78064, 2006 WL 3039993, at *3 (quoting Payton v. Cnty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002)). Plaintiffs claim that they, along with a class of many more individuals, were all injured in similar ways by the same conduct of the Defendants: price-fixing of Internet Music. This conduct is alleged to be the same no matter where any plaintiff resides. This is not a case where nuances in the facts of each alleged injury suggest that standing must be determined first. "The relevant question, therefore, is not whether the Named Plaintiffs have standing to sue Defendants - they most certainly do - but whether their injuries are sufficiently similar to those of the purported Class to justify the prosecution of a [larger] class action." Id.; accord Blessing, 756 F. Supp. 2d at 452; Sheet Metal Workers Nat'l Health Fund v. Amgen Inc., No. 07 Civ. 5295, 2008 U.S. Dist. LEXIS 62181, 2008 WL 3833577, at *9 (D.N.J. Aug. 13, 2008).

Therefore, class certification issues are the source of any standing **[**49]** problems identified **[*407]** by Defendants at this stage of the litigation. Here, moreover, statutory standing is generally at issue with respect to the state claims. Salsitz, 210 F.R.D. at 97. Class certification is logically antecedent to standing in this case, and the Court will consider standing after class certification has been resolved. See Blessing, 756 F. Supp. 2d at 452; In re Buspirone, 185 F. Supp. 2d at 377.

2. State-Law Statutory Claims

Defendants make two basic arguments as to the pleading of state-law claims. First, they claim that the TCAC contains insufficient allegations of intrastate conduct in states requiring such allegations and that in states without such a requirement, a lack of an intrastate connection fails under the dormant Commerce Clause. Second, they say that Plaintiffs do not properly allege state-law consumer protection claims.

a. Intrastate Conduct Defendants argue that the TCAC insufficiently alleges state claims under the antitrust laws of the District of Columbia, Michigan, South Dakota, Tennessee, West Virginia, and Wisconsin, as well as the consumer protection laws of North Carolina. Defendants focus on a single common denominator: they say that because each **[**50]** of those states' statutes require an allegation of conduct or substantial effects within the state, the absence of such an allegation is fatal. [7] In large part, Plaintiffs accept the proposition that these states require

[7] In supplemental briefing, Defendants state that the state statutes "apply exclusively to intrastate - not interstate - conduct." (Def. Response to Pl. Supp. Auth. Dated June 10, 2010, at 5.) If this argument is that relief under these statutes is exclusive of any applicable federal relief for interstate activity, the Court rejects it. "[T]he Court does not interpret the statutes to be

allegations of intrastate conduct or substantial effects within the states, but they say that the TCAC sufficiently pleads intrastate activity. [8]

Drawing all **[**52]** inferences in favor of Plaintiffs, as the Court must, the TCAC's allegations are sufficient to satisfy state statutes requiring either allegations of intrastate conduct or substantial effects within the state. The TCAC alleges that Defendants "produced, licensed, distributed and/or sold" Internet Music in all of the listed states. (TCAC ¶¶ 39, 44, 57-59, 127, 136.) The TCAC alleges that Defendants' conduct was "in a continuous and uninterrupted flow of intrastate and interstate **[*408]** commerce throughout the United States." (TCAC ¶ 39.) Pleadings involving similar allegations of intrastate conduct along with conduct throughout the United States in nationwide class actions have survived motions to dismiss in the face of this very argument. E.g., *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 581 (M.D. Pa. 2009)* (similar pleading sufficient to allege intrastate conduct in Wisconsin); *In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 411-14 (D. Del. 2007)* (District of Columbia); *In re NMV, 350 F. Supp. 2d at 171-75* (South Dakota, Tennessee & West Virginia). The Court cautions that "[t]he allegations of the [TCAC] certainly could have been more fulsome **[**53]** on this subject." [9] *In re NMV, 350 F. Supp. 2d at 171*. Nevertheless, the Court must construe the pleadings in a light favorable to Plaintiffs and thus considers allegations of nationwide sales and distribution on essentially the same terms in both intrastate and interstate commerce to be sufficient. See id. Defendants cite California v. Infineon Technologies AG, which they argue holds that similar language is insufficient to plead interstate activity. *531 F. Supp. 2d 1124, 1156 (N.D. Cal. 2007)*. That case, unlike this one and others similar to it, does not contain specific allegations of "intrastate" conduct along with allegations of conduct "throughout the United States" and therefore is not persuasive. See *In re Chocolate, 602 F. Supp. 2d at 581 n.53* (coming to the same conclusion).

Defendants also argue that the antitrust laws of Arizona, Iowa, Minnesota, North Carolina, North Dakota, and Vermont have not been determined **[**54]** to require an intrastate connection and that allegations that lack such a connection would violate the prohibition on state regulation that unduly burdens interstate commerce. See, e.g., *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433, 125 S. Ct. 2419, 162 L. Ed. 2d 407 (2005)*. The Court need not tarry here because, as discussed above, reading the TCAC in a light most favorable to Plaintiffs, it contains sufficient allegations of intrastate conduct or effects to pass Constitutional muster without having to construe the limitations on those state laws, if any. Moreover, without getting to the details of the jurisprudence, it suffices to say that ***HN13***[] states may not regulate wholly interstate activity, but they are not limited to regulating wholly intrastate activity. See id.; *Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 169-72 (2d Cir. 2005)*. The Court rejects Defendants' argument as to pleading under the laws of these six states. The motion as to the state-law antitrust claims is DENIED.

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inapplicable where the anticompetitive conduct may have both interstate effects and, as concerns the particular state in question, intrastate impact." *Sheet Metal Workers, 2008 U.S. Dist. LEXIS 62181, 2008 WL 3833577, at *12* (collecting cases).

[8] Plaintiffs dispute that Michigan, West Virginia, and South Dakota require intrastate allegations. ***HN11***[] The Michigan statute explicitly requires the unlawful restraint of trade to be in "a relevant market," *Mich. Comp. Laws Ann. § 445.771*, **[**51]** which it defines as an area of competition, "all or any part of which is within the state," Id. *§ 445.772*. Thus, the Court assumes that an allegation of intrastate conduct is required in Michigan. ***HN12***[] West Virginia and South Dakota have statutes that courts have held to be ambiguous as to whether the conspiracy or the conduct must be alleged to have been within the state. *S.D. Codified Laws § 37-1-3.1* ("[A] conspiracy . . . in restraint of trade or commerce any part of which is within this state is unlawful."); *W. Va. Code § 47-18-3* (similar); see, e.g., *In re NMV, 350 F. Supp. 2d at 172, 175* (holding statutes ambiguous). In light of this potential ambiguity, courts have held that the states intended to cover as broad a range of activities as possible and that the statutes require allegations of some conduct within the state. *In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 414 (D. Del. 2007)*; *In re NMV, 350 F. Supp. 2d at 172, 175*. Accordingly, Plaintiffs' objections to having to allege intrastate conduct or effects as to South Dakota and West Virginia are meritless, and the Court assumes that those states require an allegation of intrastate conduct.

[9] "It would have been helpful if the plaintiffs had added allegations of state-directed activity." *In re NMV, 350 F. Supp. 2d at 169 n.2*. For example, simply adding an allegation of conduct throughout the United States "and in each listed state" would be superior pleading.

b. Consumer Protection Laws

Defendants argue that the TCAC insufficiently pleads violations of the consumer protection laws of California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, **[**55]** Nebraska, New Mexico, New York, and North Carolina because the TCAC does not plead the requisite deceptive or fraudulent conduct under those statutes. [10] As a general matter, **[*409]** whether the TCAC contains allegations of deception or fraud affects the analysis of allegations under each state's consumer protection laws. Thus, the Court first addresses this issue.

The TCAC does not contain allegations of fraudulent or deceptive conduct. First of all, the TCAC does not purport to comply with *Federal Rule of Civil Procedure 9(b)* and plead any allegation of fraud with particularity (and, in fairness, Defendants do not make this argument). The Court cannot find in the TCAC any cognizable allegations of fraud. Secondly, there is no deception alleged about the nature of the product Plaintiffs purchased or the terms and conditions under which it was **[**56]** sold. This is not a case like In re Intel, where the product was secretly altered to underperform when joined with complementary technology offered by a competitor and where the defendant threatened and retaliated against customers who dealt with its competitor. *496 F. Supp. 2d at 418*. Instead, Plaintiffs rely only on allegations that Defendants concealed a price fixing conspiracy in attempting to parry Defendants' argument. (Pl. 2007 Opp. at 34 n.39.) However, if "failure to disclose participation in a purported antitrust conspiracy were sufficient to state a consumer-protection claim, then any *Section 1* antitrust case would automatically become a consumer-protection case. That is not the law." *In re NMV, 350 F. Supp. 2d at 177 n.22*; accord *Leider v. Ralfe, 387 F. Supp. 2d 283, 295-96 (S.D.N.Y. 2005)*. Finally, although Plaintiffs assert that two other nationwide antitrust cases determined that allegations of price fixing or monopolization alone are enough to allege deceptive or unconscionable conduct, that is not true. In both of those cases, the courts undertook a detailed, fact-intensive analysis of the allegations to determine whether the complaints alleged such conduct. *In re NMV, 350 F. Supp. 2d at 176-77, 196*; **[**57]** see *In re Intel, 496 F. Supp. 2d at 418*. Without such allegations here, the Court can do no more and disagrees with Plaintiffs' characterization of the law.

These preliminary matters determined, the Court proceeds to discuss state consumer protection law claims about which Defendants make arguments. It has been observed that different state consumer protection statutes contain "not only nuances, but differing standards of proof, procedure, substance, and remedies." *Tylka v. Gerber Prods. Co., 178 F.R.D. 493, 499 (N.D. Ill. 1998)*. The Court thus discusses Defendants' arguments with respect to each state because there is no unifying theme.

i. California

Plaintiffs agree with Defendants that they do not bring ***HN14***[] a claim under California Unfair Competition Law for damages because such a claim is not allowed. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 943 (Cal. 2003)*. Instead, Plaintiffs seek restitution, which is a permissible claim. Id. This statute "prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The [California law] covers a wide range of conduct." Id. Defendants make no other argument about why this claim should be dismissed. Their motion **[**58]** is DENIED.

ii. Kansas

The parties agree that Plaintiffs do not assert a claim under the Kansas Consumer Protection Act, *Kan. Stat. Ann. § 50-623 et seq.*, but, rather, under the "Restraint of Trade" statute, id. *§ 50-101 et seq.* Defendants' motion is therefore DENIED as moot on this point.

iii. New Mexico

Defendants argue that the TCAC insufficiently alleges "unconscionable trade practices." *N.M. Stat. Ann. § 57-12-2(E)(2)*. ***HN15***[] **[*410]** "Federal courts have generally permitted claims under the New Mexico Unfair Practices

[10] Defendants offer no developed argument or legal authority for their claim that the TCAC is insufficient under the District of Columbia, Florida, Maine, Massachusetts, or Nebraska consumer protection laws. Absent Defendants' invocation of some legal basis to dismiss these claims, the Court will not do so. The claims under these states' laws may proceed.

Act in price fixing cases if the plaintiff alleges a gross disparity between the price paid for the product and the value received." *In re Aftermarket Filters Antitrust Litig., No. 08 Civ. 4883, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at *9 (N.D. Ill. Nov. 5, 2009)*. Here, as in Aftermarket Filters, the TCAC's allegation that Plaintiffs paid supracompetitive prices for the music they purchased "is sufficient to allege gross disparity." Id. Defendants' motion is DENIED as to the New Mexico Unfair Practices Act.

iv. New York

Defendants argue that Plaintiffs' *New York General Business Law § 349(a)* claim is deficient because the TCAC does not allege any deceptive conduct. ***HN16***[] The New York statute requires "a showing **[**59]** that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." *Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 774 N.E.2d 1190, 1195, 746 N.Y.S.2d 858 (N.Y. 2002)*. "The deceptive practice, whether a representation or an omission, must be likely to mislead a reasonable consumer acting reasonably under the circumstances. *Morrissey v. Nextel Partners, Inc., 72 A.D.3d 209, 895 N.Y.S.2d 580, 585 (N.Y. App. Div. 2010)*. Although the New York statute is based upon *section 5 of the Federal Trade Commission Act* ("FTCA"), "New York has chosen not to include 'unfair competition' or 'unfair' practices in its consumer protection statute, language that bespeaks a significantly broader reach." *Leider, 387 F. Supp. 2d at 296*. Accordingly, "anticompetitive conduct that is not premised on consumer deception is not within the ambit of the statute," *id. at 295*, because "[t]he statute seeks to secure an honest market place where trust, and not deception, prevails," *Goshen, 774 N.E.2d at 1195* (internal quotation marks omitted). See also *In re NMV, 350 F. Supp. 2d at 197* ("An antitrust violation may violate *section 349*, but only if it is deceptive.").

The TCAC **[**60]** does not contain antitrust allegations that "were imbued with a degree of subterfuge," *Leider, 387 F. Supp. 2d at 295*, as has been the case when courts uphold *section 349* claims based on anticompetitive conduct. As the Court found, the TCAC does not allege deception. Plaintiffs' reliance on cases like *In re TFT-LCD (Flat Panel) Antitrust Litigation (In re TFT I), 586 F. Supp. 2d 1109, 1127-28 (N.D. Cal. 2008)*, is unpersuasive in this case because those cases deal with an argument about whether defendants made misrepresentations to plaintiffs. Therefore, Defendants' motion to dismiss the *section 349* claim is GRANTED.

v. North Carolina

Defendants argue that the North Carolina consumer protection statute prohibits "unfair or deceptive" commercial conduct, of which they argue the TCAC lacks allegations. *Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001)*. Plaintiffs argue that the TCAC contains sufficient allegations of at least unfair conduct. Having already determined that there are no allegations of deceptive conduct in the TCAC, the Court goes on to consider whether the TCAC contains allegations of unfair conduct.

The most persuasive authority arising under North Carolina law holds that ***HN17***[] price **[**61]** fixing is an unfair practice under that state's law. See *Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397, 403 (N.C. 1981)* ("A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."); see also *McDaniel v. Greensboro News Co., No. 81 Civ. 132, 1983 U.S. Dist. LEXIS 10678,* ***[*411]*** *1983 WL 1943, at *3 (M.D.N.C. Dec. 19, 1983)* (holding that price-fixing efforts in combination with other dishonest conduct suffices under the North Carolina law). Moreover, ***HN18***[] like the New York statute, the North Carolina law is based upon *section 5 of the FTCA*. *ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42, 48 (4th Cir. 1983)*. However, unlike the New York statute, the North Carolina law contains a provision prohibiting "unfair" practices and thus fully mirrors the FTCA. Id.; *Leider, 387 F. Supp. 2d at 295*. Because of that similarity, decisions construing the FTCA are appropriate guidance here. *ITCO, 722 F.2d at 48*. "[I]t is an accepted tenet of basic ***antitrust law*** that *§ 5 of the [FTCA*] sweeps within its prohibitory scope conduct also condemned by *§ 1 of the Sherman Act*." Id. Because the parties point to no reason to conclude that North **[**62]** Carolina courts would rule otherwise, the Court finds that the TCAC suffices to state a claim under the North Carolina law for the same reasons it states a federal antitrust claim. Defendants' motion as to the North Carolina consumer protection law is DENIED.

3. State-Law Unjust Enrichment Claims

Plaintiffs assert claims for restitution based on unjust enrichment under various state laws, stating that "Defendants' financial benefits resulting from their unlawful and inequitable conduct are traceable to overpayments for Internet Music and CDs stemming from Defendants' combination and conspiracy to restrain trade in Internet Music." (TCAC ¶ 139.) Defendants argue that these claims are nothing more than claims for damages for the alleged antitrust violations, which are barred because they seek duplicative recovery and because state antitrust laws should be the exclusive remedy for such violations. Plaintiffs argue first that they are entitled to plead alternative theories of relief and second that unjust enrichment claims are independent of antitrust claims and proceed on their own merits.

HN19[] Although the requirements to plead unjust enrichment vary by state, "almost all states at minimum require **[**63]** plaintiffs to allege that they conferred a benefit or enrichment upon defendant and that it would be inequitable or unjust for defendant to accept and retain the benefit." [11] *In re Flonase, 692 F. Supp. 2d at 541*; see also *Golden Pac. Bancorp v. FDIC, 273 F.3d 509, 519 (2d Cir. 2001)*. "In contemporary United States common law, restitution based upon unjust enrichment takes at least two forms"; it may be "autonomous" or "parasitic." *In re NMV, 350 F. Supp. 2d at 207-08*. Parasitic claims are "[w]here the unjust enrichment is based upon a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation." *In re Flonase, 692 F. Supp. 2d at 542 n.13*. "Conversely, unjust enrichment may provide an independent ground for restitution, and this is known as 'autonomous' restitution." Id. Autonomous claims in an area "regulated by an independent body of law" are more problematic than parasitic claims because the "premise for such a claim must be that, even if the defendants' conduct is **[*412]** blameless under the substantive requirements of federal and state antitrust statutes and state consumer protection statutes, the plaintiffs nevertheless can still obtain **[**64]** restitution." *In re NMV, 350 F. Supp. 2d at 209*. Plaintiffs do not clearly differentiate the type of restitution they seek. See *id. at 209 n.86*.

For purposes of this motion, the Court assumes that the TCAC alleges that Plaintiffs conferred a benefit (payment for music) on Defendants and that, at minimum, Defendants' conduct violated the federal antitrust laws.

The Court begins with the autonomous claims. On its own, ***HN21***[] "unjust enrichment ordinarily does not furnish **[**65]** a basis for liability where parties voluntarily have negotiated, entered into and fully performed their bargain . . . ." *In re NMV, 350 F. Supp. 2d at 210*. Here, Plaintiffs "paid their purchase prices and obtained their" products. Id. Plaintiffs do not seek rescission of the sales, and they do not "assert that purchasers failed to receive the benefit for which they bargained." Id. They only allege that they overpaid for the product for which they bargained. Although authority exists for the proposition that providing only "fair," not "any," consideration for a benefit defeats an autonomous unjust enrichment claim, see *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 545-46 (D.N.J. 2004)*, this case does not involve a situation, as in In re K-Dur, where the plaintiffs alleged that "they failed to receive the benefit of their bargain." *In re Intel, 496 F. Supp. 2d at 421* (rejecting unjust enrichment claims in an overpayment case). Indeed, Plaintiffs received the music they purchased. ***HN22***[] Because autonomous restitution only exists in the absence of a violation of law, the Court will not inquire into the terms of the sale where, as here, a relatively comprehensive state and federal statutory **[**66]** and common-law scheme exists to proscribe the conduct of which Plaintiffs complain. See id.; see also *U.S. East Telecomms., Inc. v. U.S. West Commc'ns Servs., Inc., 38 F.3d 1289, 1299 (2d Cir. 1994)*; *Ferguson v. Lion Holding, Inc., 312 F. Supp. 2d 484, 495 (S.D.N.Y. 2004)*. To do so would undermine that legal regime. *In re NMV, 350 F. Supp. 2d at 209* (citing *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 936-37 (3d Cir. 1999)*). Therefore, Plaintiffs "cannot prevail on a claim of restitution based upon [autonomous] unjust enrichment." *Id. at 210*; see *In re Flonase, 692 F. Supp. 2d at 542 n.13*.

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[11] The Court rejects Defendants' first argument: that unjust enrichment is disallowed where an adequate remedy at law exists. This argument is premature because ***HN20***[] Plaintiffs may plead in the alternative. *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 544 (D.N.J. 2004)*. Likewise, Defendants' argument that Plaintiffs' lack of privity with at least some defendants is groundless because, as Plaintiffs argue (without Defendants' refutation), no state at issue here has a privity requirement to plead unjust enrichment. Id.; see Pl. 2007 Mem. at 38 & n.47 (citing cases). Defendants' reliance on cases discussing incidental benefits is misplaced; this case may involve certain indirect benefits, but it does not involve incidental benefits.

Before proceeding to the "parasitic" claims, it must be noted that there are two types of plaintiffs here: direct purchasers and indirect purchasers. Direct purchasers are those who bought music directly from MusicNet or pressplay. (TCAC ¶ 44.) Indirect purchasers are those who bought music owned by Defendants from another source that is unrelated to Defendants. (Id.) Moreover, there are two categories of violations at issue: federal and state law.

HN23[] As to parasitic claims premised on a violation of federal law, it is beyond peradventure that indirect purchasers **[**67]** may not employ unjust enrichment to skirt the limitation on recovery imposed by *Illinois Brick Co. v. Illinois, 431 U.S. 720, 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. *In re NMV, 350 F. Supp. 2d at 211*. Moreover, there is no clearly established federal common law of restitution for a federal antitrust violation, and Plaintiffs do not suggest that the Court create one. *Id. at 211 n.90*. Therefore, absent a basis for restitution in federal law both direct and indirect purchasers may not bring unjust enrichment claims premised solely on a violation of federal law. Plaintiffs' claim for parasitic unjust enrichment is dismissed to the extent it is premised on a violation of federal law.

[*413] As to parasitic claims premised on a violation of state law, these claims boil down to an election of remedies, which the Court does "not have unlimited compass . . . to determine" because "the statute creating liability can override otherwise relevant common law restitution principles by permitting such relief, by prohibiting such relief or by limiting or enlarging the scope of restitutionary relief." *Id. at 210*. Plaintiffs have not sought an unjust enrichment remedy under Florida, Montana, North Carolina, or North Dakota law. The Court **[**68]** has dismissed the New York state claims, so they cannot be the basis for a parasitic claim. Without further direction from the parties about which other states disallow restitutionary relief, the Court will allow all direct purchaser parasitic unjust enrichment claims to proceed in states not named because they merely provide a different form of remedy.

HN24[] Indirect purchaser Plaintiffs, however, face a further limitation: they may not recover restitution in states that follow the rule of Illinois Brick. See *In re Flonase, 692 F. Supp. 2d at 544-45* (Illinois follows Illinois Brick for individual indirect purchasers); *In re TFT-LCD (Flat Panel) Antitrust Litig. (In re TFT II), 599 F. Supp. 2d 1179, 1185-87 (N.D. Cal. 2009)* (Virginia, Montana, and Puerto Rico); *In re Microsoft Corp. Antitrust Litig., 241 F. Supp. 2d 563, 565-66 (D. Md. 2003)* (Kentucky, Maryland, and Oklahoma); see also *740 Ill. Comp. Stat. 10/7(2)* (stating that only the Illinois state attorney general may bring a class action on behalf of indirect purchasers under Illinois law). Many states have not expressly adopted or rejected Illinois Brick, but they have antitrust laws that are harmonized with federal law or "overwhelmingly" **[**69]** look to federal law for guidance. *In re Digital Music, 592 F. Supp. 2d at 448 & nn.20-21*. Therefore, any state that has not expressly passed Illinois Brick repealer legislation or interpreted its law in such a way as to override the rule of Illinois Brick is presumed to have decided to follow federal law, including the Illinois Brick limitation on indirect purchaser claims. See, e.g., *In re TFT II, 599 F. Supp. 2d at 1185-87*; *FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 43 (D.D.C. 1999)*. In addition to claims (if any) brought under the laws of Florida, Illinois, Montana, New York, North Carolina, and North Dakota, all parasitic claims premised on the state laws of states that follow Illinois Brick are DISMISSED. [12]

[12] Of the other states in which plaintiffs purportedly reside as pleaded in this action, **HN25**[] Arizona, California, the District of Columbia, Kansas, Maine, Michigan, Minnesota, Nevada, New Mexico, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin have passed Illinois Brick repealer laws or their courts have held that state law permits indirect purchaser suits by individuals. The Court relies on the following authority from each state in holding that these states do **[**70]** not follow Illinois Brick: *Cal. Bus. & Prof. Code § 16750(a)*; *D.C. Code § 28-4509(a)*; *Kan. Stat. Ann. § 50-161*; *Me. Rev. Stat. tit. 10, § 1104(1)*; *Mich. Comp. Laws § 445.778(2)*; *Minn. Stat. § 325D.57*; *Nev. Rev. Stat § 598A.210(2)*; *N.M. Stat. Ann. § 57-1-3(A)*; *S.D. Codified Laws § 37-1-33*; *Vt. Stat. Ann. tit. 9, § 2465*; W. Va. Code R. 142-9-2; *Wis. Stat. § 133.18(1)(a)*; *Bunker's Glass Co. v. Pilkington PLC, 206 Ariz. 9, 75 P.3d 99, 102 (Ariz. 2003)*; *Comes v. Microsoft Corp., 646 N.W.2d 440, 441 (Iowa 2002)*; *Sherwood v. Microsoft Corp., No. M2000-01850, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at *29 (Tenn. Ct. App. July 31, 2003)*. Massachusetts is somewhat different in that **HN26**[] only direct purchasers may maintain a cause of action under the state antitrust act, but both direct and indirect purchasers may maintain a cause of action under the state consumer protection act. *Ciardi v. Hoffmann-LaRoche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 308-09, 312 (Mass. 2002)*. Plaintiffs do not assert a cause of action under the Massachusetts antitrust act, *Mass. Gen. Laws ch. 93, § 1 et seq.*, relying instead only on the

[*414] To summarize: Plaintiffs' autonomous unjust enrichment claims are dismissed, but their parasitic claims under the laws of many, but not all, states pleaded in the TCAC may proceed.

4. Newly Added State Law Claims

The TCAC adds state-law claims under Illinois and New York law. Plaintiffs argue that the Supreme Court's decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)* allows them to assert these claims. The Court addresses these newly added claims, beginning with claims under Illinois law.

i. Illinois

Defendants argue that Plaintiffs' claim under Illinois ***antitrust law*** on behalf of all Illinois-resident indirect purchasers fails because the law expressly precludes private parties from asserting class actions on behalf of indirect purchasers. They acknowledge that the Illinois law does not "deny any person who is an indirect purchaser the right to sue for damages," but they say that only the state attorney general may assert a class action under this law. *740 Ill. Comp. Stat. 10/7(2)*. They **[**72]** therefore argue that Plaintiffs lack standing under the Illinois statute or that Shady Grove does not permit them to assert a claim. The Court begins with Shady Grove because that analysis determines whether Plaintiffs have standing.

Shady Grove is a decision about the contours of the Erie doctrine, but it did not result in unanimity on all points. The Court considered whether a New York law prohibiting class actions in any suit seeking penalties or statutory minimum damages precluded a federal court from exercising diversity jurisdiction over a class action. *130 S. Ct. at 1436* (majority op.). The question for the Court was whether a suit for statutory damages could proceed in federal court as a class action notwithstanding the state statute's limitation. *Id. at 1437*. The same question exists here because the ***HN27***[] Illinois law clearly provides for an individual remedy for indirect purchasers, yet it limits those who may maintain a class action for the same alleged violation to only the state attorney general. *740 Ill. Comp. Stat. 10/7(2)* ("No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.").

Setting out the legal framework, the Court **[**73]** proceeded to analyze two questions: first, whether the applicable federal rule applies, and second, whether that rule "exceeds statutory authorization or Congress's rulemaking power." *130 S. Ct. at 1437* (majority op.). A majority of the Court concluded that *Rule 23* conflicted with the state statute because *Rule 23* "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id. at 1437-38*. The same analysis applies in this case: a diversity plaintiff in federal court may maintain a class action if he wishes; this rule conflicts with the Illinois statute, which places limits on who may maintain a class action in antitrust suits. Unless *Rule 23* exceeds statutory authority or Congress's rulemaking power, then, it - and not the state rule - applies. *Id. at 1437*.

The Supreme Court differed as to the proper analysis of this second question, even though the Justices agree that a federal rule may not "abridge, enlarge, or modify a substantive right." *Id. at 1442* (plurality op.); *id. at 1452* (Stevens, J., concurring in part and concurring in the **[*415]** judgment). Justice Scalia's plurality opinion contained a simple approach: "the **[**74]** validity of a Federal Rule depends entirely upon whether it regulates procedure." *Id. at 1444* (plurality op.). Justice Scalia thought that a "class action . . . merely enables a federal court to adjudicate claims of multiple parties at once" but doing so leaves "the parties' legal rights and duties intact and the rules of decision unchanged." *Id. at 1443*. This view garnered the support of only four Justices. Justice Stevens wrote separately. He explained a more nuanced view of a similar concept: "there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies." *Id. at 1448* (Stevens, J., concurring in part and concurring in the judgment). "A state procedural rule, though undeniably 'procedural' in the ordinary sense of the term, may exist to influence substantive

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consumer protection law, id. *ch. 93A, § 1 et seq.* Because the parties have not briefed whether the TCAC is sufficient to state a cause **[**71]** of action under the Massachusetts consumer protection law, the Court will allow a parasitic unjust enrichment claim to proceed for Massachusetts plaintiffs, if any.

outcomes and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Id. at 1450* (internal quotation marks and citation omitted). "When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts **[**75]** must consider whether the rule can reasonably be interpreted to avoid that impermissible result." *Id. at 1452*. Nevertheless, finding that a federal rule of procedure exceeds Congress's authority is a "high" bar. *Id. at 1457*. In Shady Grove, "Justice Stevens concluded that *§ 901(b)* was not intertwined with New York's definition of substantive rights because the rule is in New York's procedural code, it is applicable to class actions brought under any source of law, and the legislative history was ambiguous." *In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 674 (E.D. Pa. 2010)*.

HN28[] "'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003)* (quoting *Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977))* (internal quotation marks omitted). This rule is not a carte blanche; it only applies "in instances where one opinion can meaningfully be regarded as 'narrower' than another . . . that is to say, only when that narrow **[**76]** opinion is the common denominator representing the position approved by at least five justices." Id. (internal quotation marks and citation omitted). "Justice Stevens' approach does, however, form the 'narrowest grounds' in Shady Grove . . . ." *In re Wellbutrin, 756 F. Supp. 2d at 675*. "[T]he five justices in the concurrence and the dissent concluded that the validity of Federal Rules of Civil Procedure turns, in part, on the rights afforded by the state rule that the Federal Rule displaces." Id.; see also *In re Packaged Ice Antitrust Litig., No. 08 MD 1952, 779 F. Supp. 2d 642, 2011 U.S. Dist. LEXIS 26048, 2011 WL 891169, at *15 (E.D. Mich. Mar. 11, 2011)* ("Courts interpreting the Shady Grove decision . . . have concluded that Justice Stevens' concurrence is the controlling opinion by which interpreting courts are bound.").

The Illinois law, under Justice Stevens's controlling analysis, is "substantive" and therefore provides the rule of decision here. It states, in relevant part:

> ***HN29***[] Any person who has been injured in his business or property, or is threatened with such injury, by a violation of [the Illinois antitrust statute] may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who **[**77]** has committed such violation. . . . .
>
> No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. . . . Provided further that no person shall be **[*416]** authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection.

HN30[] *740 Ill. Comp. Stat. 10/7(2)*. This statute provides a procedure that is "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Shady Grove, 130 S. Ct. at 1450* (Stevens, J., concurring in part and concurring in the judgment). Therefore, applying the federal rule to override this process would be "an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy" and is disallowed. *Id. at 1451*. Unlike the New York law at issue in Shady Grove, its limitation is not contained in a generally applicable procedural rule but, rather, in the same paragraph of the same statute that creates the underlying substantive right. *In re Wellbutrin, 756 F. Supp. 2d at 677*. **[**78]** It applies only to that statute. Id. "Furthermore, courts have observed that the Illinois statute represents a policy judgment as to the feasibility of managing duplicative recovery, which the legislature has entrusted to the Attorney General but not to individual indirect purchasers." Id. That policy judgment is substantive. Indeed, the statute expressly cautions courts to take care to follow the Illinois Brick rule and avoid duplicate recoveries. "Because the indirect purchaser restrictions of the [Illinois law] IAA are 'intertwined' with the underlying substantive right, application of *Rule 23* would 'abridge, enlarge or modify' Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court." [13] Id.

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[13] This holding indicates that Plaintiffs have no standing to bring suit under the Illinois law.

Plaintiffs' claim on behalf of indirect purchasers under Illinois law is DISMISSED.

ii. New York

Plaintiffs have added a claim under New York's Donnelly Act, which is a New York antitrust statute. Defendants contend that, even though Shady Grove allows private class actions for statutory claims in federal court under New York law, **[**79]** Plaintiffs' claim fails because "federal antitrust laws preempt the Donnelly Act where the alleged conduct principally affects interstate commerce." *Conergy AG v. MEMC Elec. Materials, Inc., 651 F. Supp. 2d 51, 61 n.83 (S.D.N.Y. 2009)* (collecting cases). Plaintiffs argue that federal antitrust preemption obtains only when there is "little or no impact on local or intrastate commerce." *Two Queens, Inc. v. Scoza, 296 A.D.2d 302, 745 N.Y.S.2d 517, 519 (N.Y. App. Div. 2002)*.

Although the authorities quoted by the parties contain broad, categorical language, the state authorities suggest that New York requires an impact on intrastate commerce so as to avoid a dormant *Commerce Clause* issue. Compare id. ("The question is whether the burden on interstate commerce outweighs the States' interests." (internal quotation marks omitted)), with, e.g., *Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001)* ("A statute may violate the well-established 'dormant' aspect of the *Commerce Clause* . . . if it imposes a burden on interstate commerce incommensurate with the local benefits secured." (internal citations omitted)). As Plaintiffs point out, the cases on which Defendants rely involve situations where **[**80]** the defendants had only tangential connections to New York. And as the **[*417]** Court already determined, supra Part II.D.2.a., the TCAC alleges a sufficient intrastate connection to survive this type of argument. The TCAC alleges a "significant impact on intrastate commerce" in New York, *Conergy AG, 651 F. Supp. 2d at 61*, because the end purchasers presumably purchased Internet Music from New York and consumed the product in New York. Moreover, many of the Defendants are headquartered in New York City and/or incorporated in New York, and they clearly conduct significant business in New York. Federal ***antitrust law*** does not preempt the Donnelly Act in this case.

Defendants' motion to dismiss the newly added New York claim is DENIED.

E. Parent Company Motions to Dismiss

Three named defendants, Sony Corporation of America ("SCA"), Bertelsmann, Inc. ("Bertelsmann"), and Time Warner, Inc. ("Time Warner" and, collectively, the "Parent Companies"), move to dismiss the complaint against them because they are parent companies to the relevant actors named in the complaint. These defendants argue that absent allegations allowing the Court to pierce the corporate veil, their separate corporate form entitles **[**81]** them to dismissal. The Court agrees. The Parent Companies could be liable directly or as alter egos of entities they own or control. The complaint is insufficient under either theory.

Beginning with the straightforward, the complaint alleges no conduct by the Parent Companies that violates the law. The complaint alleges that each Parent Company is a parent of a subsidiary that owns the rights to musical copyrights, royalties, and licensing agreements and that runs the related music operations. (TCAC ¶¶ 21-23, 26.) The Parent Companies have no direct involvement in or ownership of the relevant music licenses. (See TCAC ¶¶ 21-23, 26.) The complaint alleges that the Parent Companies had ownership interests in MusicNet and pressplay, which sold music to customers, and that SCA sold music directly through its website. (TCAC ¶¶ 58-60, 67, 72.) None of this is actionable conduct; ***HN31***[] an antitrust conspiracy complaint must assert enough "factual matter" to suggest plausibly a preceding agreement. *Twombly, 550 U.S. at 555-57*; see *DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999)*. Although Plaintiffs argue that they alleged that the Parent Companies were directly involved **[**82]** in the alleged conspiracy (Pl. Mem. of Supp. Auth. Dated June 2, 2010, at 1), a reading of the complaint indicates otherwise. The complaint alleges direct involvement of the Parent Companies by way of generic references to "defendants." (Id. at 1-5.) This approach is insufficient. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *In re Elevator Antitrust Litig., 502 F.3d 47, 50-51 (2d Cir. 2007)*; *Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 101 (2d Cir. 1972)*; *Invamed, Inc. v. Barr Labs., Inc., 22 F. Supp. 2d 210, 221 (S.D.N.Y. 1998)*; see also *De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996)* (reiterating that related corporations are presumed to be separate).

Direct involvement aside, the thrust of the complaint is to impute the actions of the Parent Companies' subsidiaries or joint ventures (MusicNet and pressplay) to the Parent Companies. But the complaint does not allege a basis to disregard the separate corporate forms of these entities and impose liability on the Parent Companies. ***HN32***[] "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for **[**83]** the acts of its subsidiaries." *United States v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)* (internal quotation **[*418]** marks omitted); see, e.g., *Greene v. Long Island R.R. Co., 280 F.3d 224, 235-36 (2d Cir. 2002)*. "But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes . . . ." *Bestfoods, 524 U.S. at 62*.

HN33[] "Under New York choice-of-law principles, the issue of whether the corporate veil may be pierced is determined under the law of the state of incorporation." *Spagnola v. Chubb Corp., 264 F.R.D. 76, 85 n.10 (S.D.N.Y. 2010)* (citing *Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995))*. Here, Time Warner and Bertelsmann are Delaware corporations, [14] and SCA is a New York corporation. (TCAC ¶¶ 22-23.) ***HN34***[] In Delaware, "a court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner." *Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 793 (Del. Ch. 1992)*. **[**84]** Likewise, in New York, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 623 N.E.2d 1157, 1160, 603 N.Y.S.2d 807 (N.Y. 1993)*. In determining whether to pierce the corporate veil in either state, courts consider allegations of disregarding corporate formalities, siphoning or intermingling of funds, inadequate capitalization, or that the corporation is a mere sham acting for the shareholder, among others. *MicroStrategy Inc. v. Acacia Research Corp., Civ. A. No. 5735-VCP, 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, at *11 (Del. Ch. Dec. 30, 2010)*; *Fantazia Int'l Corp. v. CPL Furs N.Y., Inc., 67 A.D.3d 511, 889 N.Y.S.2d 28, 29 (N.Y. App. Div. 2009)*.

HN35[] In neither state may liability **[**85]** be imposed merely based on a parent's ownership of a controlling interest in the subsidiary. *Mabon, Nugent & Co. v. Tx. Am. Energy Corp., Civ. A. No. 8578, 1990 Del. Ch. LEXIS 46, 1990 WL 44267, at *5 (Del. Ch. Apr. 12, 1990)* ("[T]he separate corporate existences of parent and subsidiary will not be set aside merely on a showing of common management of the two entities, nor on a showing that the parent owned all the stock of the subsidiary."); *Sheridan Broad. Corp. v. Small, 19 A.D.3d 331, 798 N.Y.S.2d 45, 46 (N.Y. App. Div. 2005)*. Indeed, a showing that a fraud would be "perpetrated through misuse of the corporate form" generally is required in both states. *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical, No. Civ. A. 19760-NC, 2004 Del. Ch. LEXIS 21, 2004 WL 415251, at *7 (Del. Ch. Mar. 4, 2004)*; see *Morris, 623 N.E.2d at 1161*. Finally, in both states, the corporation's separate identity is generally respected, and the proponent of disregarding a corporation's separate identity bears a heavy burden. *TNS Holdings, Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 703 N.E.2d 749, 751, 680 N.Y.S.2d 891 (N.Y. 1998)*; see *MicroStrategy Inc., 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, at *11*.

The TCAC fails to allege circumstances that would allow the Court to pierce the Parent Companies' corporate veils. The complaint **[**86]** contains no allegations that the Parent Companies misused the corporate **[*419]** form, disregarded corporate formalities, commingled funds, or otherwise misused the separate identities of the entities. See, e.g., *De Jesus, 87 F.3d at 70*; *Miller v. Citicorp, No. 95 Civ. 9728, 1997 U.S. Dist. LEXIS 2395, 1997 WL 96569, at *9 (S.D.N.Y. Mar. 4, 1997)* (quoting ***HN36***[] New York law that subsidiary has to be the "mere dummy" of parent for veil to be pierced); *MicroStrategy Inc., 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, at *11*; *Fantazia Int'l Corp., 889 N.Y.S.2d at 29*. There is no allegation that the Parent Companies used the separate corporate form of the subsidiaries to perpetrate a fraud. The most the complaint alleges is that the Parent Companies own their

[14] Although the place of Time Warner's incorporation is not stated in the complaint, the Court takes judicial notice that Time Warner is a Delaware corporation. Time Warner, Inc., Quarterly Report (Form 10-Q) (May 4, 2011); see *Citadel Equity Fund Ltd. v. Aquila, Inc., 168 F. App'x 474, 476 (2d Cir. 2006)*.

respective subsidiaries and have ownership interests in the joint ventures. [15] (TCAC ¶¶ 21-23, 25-28, 57-58, 72.) But ***HN37***[] a mere ownership stake in a joint venture is not grounds for a presumption of wrongdoing or fraud on the part of its owners. See, e.g., *Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement on price is necessary to market the product at all."); see also *Texaco, Inc. v. Dagher, 547 U.S. 1, 5-6, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; **[**87]** *Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 52 (1st Cir. 1998)* (declining to adopt per se *section 1* liability for joint venture unless it is a "complete sham"). The joint ventures here are separate legal entities and enjoy a presumption of separateness. See *De Jesus, 87 F.3d at 70*. It is clear that ***HN38***[] simply owning, even wholly owning, a subsidiary is insufficient to pierce the corporate veil. See *Mabon, Nugent & Co., 1990 Del. Ch. LEXIS 46, 1990 WL 44267, at *5*; *Sheridan Broad. Corp., 798 N.Y.S.2d at 46*. And even though Plaintiffs challenge aspects of the joint ventures, see *Starr, 592 F.3d at 326*, there are no allegations about any involvement of the Parent Companies.

There are no allegations that any Parent Company did anything actionable in the alleged antitrust conspiracy. Whether the joint ventures or subsidiaries did anything actionable is not relevant with respect to the liability of the Parent Companies absent a basis to pierce the corporate veil, and none is alleged. Moreover, there is no allegation that the Parent Companies directed the subsidiaries to engage in an antitrust conspiracy. As stated in a case involving more significant allegations of "dominion and control" over subsidiaries, "[t]he unadorned invocation of dominion and control is simply not enough." *In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 426 (S.D.N.Y. 2003)*. Here, allegations of less pervasive control over the subsidiary entities, combined with the complete absence of any basis to infer the use of the subsidiary entities as a means to perpetrate a fraud, are likewise not enough. There being no basis in the complaint to impute liability to the Parent Companies, dismissal of the actions against them is appropriate.

F. Motion **[**89]** to Strike Portions of the TCAC

Defendants move to strike paragraphs 87, 106-112, and the last sentence of paragraph 38 of the TCAC. Defendant's motion is GRANTED except as to paragraph 38 because paragraphs 87 and 106-112 contain information that is only inflammatory **[*420]** and is based on investigations or litigation that is unconcluded, concluded with no resolution against Defendants, or concluded but wholly irrelevant to digital music.

III. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss [dkt. no. 132] is GRANTED in part and DENIED in part. The result is as follows: Plaintiffs' Sherman Act claims may proceed. The CD-purchaser class does not have antitrust standing, and its claims are DISMISSED with prejudice. The Court will conduct a standing inquiry on claims asserted in states in which no named plaintiff resides at the class certification stage. Defendants' motion to dismiss claims for violations of state consumer protection statutes is DENIED except as to New York, in which case it is GRANTED. Defendants' motion to dismiss the unjust enrichment claims is GRANTED in part and DENIED in part. Autonomous unjust enrichment claims are DISMISSED. Parasitic unjust enrichment **[**90]** claims are DISMISSED as to Illinois, Florida, Montana, New York, North Carolina, and North Dakota based claims, if any, but may proceed as to other states. Defendants' motion to dismiss the newly added Illinois and New York state antitrust claims is DENIED in part and GRANTED in part. The New York claim only may proceed. Defendants' motion to dismiss claims against the Parent Companies is GRANTED. Defendants' motion to strike portions of the TCAC is GRANTED in part and DENIED in part; paragraphs 87 and 106-112 are stricken.

The parties shall confer and inform the Court no later than August 1, 2 011, how they propose to proceed.

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[15] With respect to Bertlesmann, the TCAC states that Bertlesmann AG, not Bertlesmann, Inc., has an ownership in Sony BMG (TCAC ¶ 21), but Plaintiffs state in their memorandum of law that Bertlesmann, Inc., is the owner. Moreover, the TCAC alleges that Bertlesmann (and SCA) transferred their "musical copyrights, licensing agreements and royalty rights" to Sony BMG, a separate entity that "produces, licenses and distributes" the music involved in this lawsuit. (Id.) Whether Bertlesmann or Bertlesmann AG owns an interest in Sony BMG **[**88]** is thus not material for the purpose of this motion; in either case, there is no basis to pierce either entity's corporate veil.

SO ORDERED.

Dated: New York, New York

July 18, 2011

/s/ Loretta A. Preska

LORETTA A. PRESKA

Chief U.S. District Judge

End of Document

United States v. Am. Express Co.

United States District Court for the Eastern District of New York

July 20, 2011, Decided; July 20, 2011, Filed

10-CV-4496 (NGG) (RER)

Reporter

2011 U.S. Dist. LEXIS 78835 *; 2011-1 Trade Cas. (CCH) P77,528

UNITED STATES OF AMERICA, STATE OF CONNECTICUT, STATE OF IOWA, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF MISSOURI, STATE OF OHIO, STATE OF TEXAS, STATE OF ILLINOIS, STATE OF TENNESSEE, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF IDAHO, STATE OF VERMONT, STATE OF UTAH, STATE OF ARIZONA, STATE OF RHODE ISLAND, STATE OF HAWAII, and STATE OF NEW HAMPSHIRE, Plaintiffs, -against- AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., MASTERCARD INTERNATIONAL INCORPORATED, and VISA INC., Defendants.

Prior History: *United States v. Am. Express Co., 2011 U.S. Dist. LEXIS 83085 (E.D.N.Y., June 20, 2011)*

Core Terms

final judgment, merchants, public interest, proposed judgment, Consumer, discount, settlement, Card, public comment, credit card, anti-steering, comments, approve

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For Visa Inc., Defendant: Robert C. Mason, LEAD ATTORNEY, Arnold & Porter, New York, NY.

For Class Plaintiffs in 11-md-2221, Interested Party: Tracey L. Kitzman, Friedman Law Group, LLP, New York, NY.

For Individual Plaintiffs in 11-md-2221, also known as All Plaintiffs in 11-md-2221, Interested Party: Kenny Nachwalter, Miami, FL; Linda P. Nussbaum, Grant & Eisenhofer P.A., New York, NY; William Jay Blechman, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL.

Judges: NICHOLAS G. GARAUFIS, United States District Judge.

Opinion by: NICHOLAS G. GARAUFIS

Opinion

MEMORANDUM [*6] & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

Before the court is Plaintiffs' motion for entry of final judgment on consent as to claims against Defendants MasterCard International Incorporated ("MasterCard") and Visa Inc. ("Visa"). (Docket Entry # 134.) Under *15 U.S.C. § 16(e)*, the court must determine whether the Proposed Final Judgment (Docket Entry # 4) is in the public interest. For the reasons set forth below, the court finds that the Proposed Final Judgment is in the public interest.

I. BACKGROUND

The United States of America and several states bring this action against Defendants, several credit card companies, for various violations of ***antitrust law*** under the Sherman Act, *15 U.S.C. § 1*. (Am. Compl. (Docket Entry # 57).) Specifically, Plaintiffs allege that Defendants' anti-steering rules—rules that prohibit merchants who accept Defendants' credit cards from offering customers a discount for using cash or a credit card that is less costly to the merchant, or even informing customers about Defendants' credit cards' transaction fees—illegally restrain trade in interstate commerce. (Id. ¶ 4.)

The United States originally filed its action on October 4, 2010. (Compl. (Docket **[*7]** Entry # 1).) The same day, it filed a notice of settlement and a Proposed Final Judgment as to MasterCard and Visa. (Docket Entry # 4-1; see also Proposed Judgment (Docket Entry # 134-2).) As required by the Tunney Act, *15 U.S.C. § 16*, the United States published the Proposed Final Judgment in several newspapers—here, the Washington Post and the New York Post—as well as the *Federal Register. 75 Fed. Reg. 62858*-02 (Oct. 13, 2010); see also *15 U.S.C. § 16(b)*, *(c)*. In those notices, the United States informed the public that, pursuant to the Tunney Act, it was soliciting public comments concerning the Proposed Final Judgment for sixty days. See *15 U.S.C. § 16(d)*. During the sixty-day period, the United States received six comments. (See Public'n Order (Docket Entry # 121).) It filed its Response to those comments on June 14, 2011. (Response (Docket Entry # 119-1)); see also *15 U.S.C. § 16(d)*. On June 20, 2011, the court excused the United States from publishing those comments and its Response in the Federal Register, but directed the United States to publish a notice in the Federal Register containing a permanent website address of where those comments and the United States' Response **[*8]** would be available. (Public'n Order at 2.) The United States filed a certificate of compliance with that order on July 14, 2011. [1] (Docket Entry # 133.) The court must now review the proposed judgment pursuant to *15 U.S.C. § 16(e)*.

II. DISCUSSION

A. The Tunney Act Standard

Where the United States seeks to enter into a settlement in a civil antitrust action, the Tunney Act requires the court to affirmatively approve the settlement only if it finds that the settlement serves the "public interest." Id. *§ 16(e)*. In making its public interest finding under *15 U.S.C. § 16(e)(1)*, the court must consider:

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[1] In its certification of compliance, the United States listed the permanent website as *http://www.justice.gov/atr*/cases/americanexpress.html. (Docket Entry # 133.)

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the **[*9]** public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

The court may consider public comments to the proposed consent judgment and the United States' response to those comments as evidence in making this determination. Id. *§ 16(f)(4)*. Nonetheless, a "district court's 'public interest' inquiry into the merits of the consent decree is a narrow one." *Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1236, 362 U.S. App. D.C. 152 (D.C. Cir. 2004)*. "In making this determination, 'the court is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable. Rather, the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable.'" *United States v. Keyspan Corp., 763 F. Supp. 2d 633, 637-38 (S.D.N.Y. 2011)* (quoting *United States v. Abitibi-Consol. Inc., 584 F. Supp. 2d 162, 165 (D.D.C. 2008))* **[*10]** (internal alterations omitted).

B. The Proposed Judgment

The substance of the proposed judgment requires Visa and MasterCard to alter their contracts with merchants, allowing merchants to offer discounts to consumers if they use alternate forms of payment, including other credit cards, and letting merchants inform consumers of the transaction costs experienced by merchants in processing credit card transactions. (Proposed Judgment at IV.A.) Visa's and MasterCard's current contracts with merchants allow merchants to offer a form-of-payment discount, but only if such a discount is "[c]learly disclosed as a discount from the standard price," and "[n]on-discriminatory, as between a Cardholder who pays with a Visa Card [or MasterCard] and a cardholder who pays with a 'comparable card.'" (Id. at V.B.) The Proposed Final Judgment removes this language from Visa's and MasterCard's merchant contracts and includes broad language allowing merchants to, among other things, offer the consumer an immediate discount for paying with an alternate credit card and inform consumers about Visa's and MasterCard's transaction fees. (Id.)

Six groups submitted public comments to the proposed judgment: this action's **[*11]** Class Plaintiffs (Class Pls.' Comment (Docket Entry # 119-2)); this action's Individual Merchant Plaintiffs (Indiv. Pls.' Comment (Docket Entry # 119-3)); Consumer World, a public service consumer education website (Consumer World Comment (Docket Entry # 119-4)); the Retail Industry Leaders Association ("RILA"), an association of America's largest retailers (RILA Comment (Docket Entry # 119-5)); Sears Holding Corp. (Sears Comment (Docket Entry # 119-6)); and a group of individual merchant Plaintiffs whose cases have been consolidated by the Judicial Panel on Multidistrict Litigation (the "JPML Plaintiffs") (JPML Pls.' Comment (Docket Entry # 119-7)).

The public comments are overwhelmingly positive if not enthusiastic. The Individual Merchant Plaintiffs "urge[] the Court to approve the proposed Final Judgments because we believe that they are pro-competitive and in the public interest." (Indiv. Pls.' Comment at 1.) RILA "applauds the Antitrust Division's longstanding interest in the General Purpose Card network services market" and "welcomes the settlement reached by Plaintiffs . . . as it could help facilitate competition in the General Purpose Card market." (RILA Comment at 1.) Sears **[*12]** similarly "applauds the DOJ (and the participating Plaintiff Attorneys General) for their willingness to engage on these issues and work to remove some of the anti-competitive rules that VISA and MasterCard have imposed on merchants." [2] (Sears Comment at 2.)

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[2] Sears also raised several concerns over whether the proposed consent judgment would require Visa and MasterCard to identify, at the point of sale, which type of card, e.g., credit or debit, or "cash-back" or "reward points," the consumer wishes to use. (Sears Comment at 2-3.) As the United States has correctly pointed out in its Response, these concerns are "beyond the

The remaining commenters were lukewarm. The JPML Plaintiffs state that they "believe that the Proposed Final Judgment is procompetitive and furthers the public interest as required by the Tunney Act. . . . [but] may prove to be insufficient to remedy the harm to competition and market power that has resulted from the conduct of Visa, MasterCard, and their member banks over at least the last 30 years." (JPML Pls.' Comment at 3.) Consumer World does not disapprove of the Proposed Final Judgment but expresses concern over whether potential discounts would, in effect, become surcharges relative to items paid with more expensive forms of payment. (Consumer World Comment at 4.) Similarly, the Class Plaintiffs' only comment was in the form of a question concerning whether Visa's and MasterCard's anti-steering rules are coextensive, for antitrust purposes, with Visa's and MasterCard's "no-surcharge rules." [3] (Class Pls.' Comment at 1.)

All of these **[*14]** concerns, however, simply "make[] the observation, which is applicable to all settlements, that there is some uncertainty about the future impact and effectiveness of any proposed relief." (Response at 28.) But, as expressed by the United States, "[t]he proposed Final Judgment is not measured by how it resolves all of the concerns" raised by the Proposed Judgment but "whether the relief resolves the violation identified in the Amended Complaint in a manner that is within the reaches of the public interest." (Id.); see also *Keyspan Corp., 763 F. Supp. 2d at 637-38*. And it appears that the proposed judgment does just that. The Amended Complaint in this action simply alleges that Defendants' anti-steering practices illegally restrained trade. (Am. Compl. ¶ 4.) The Proposed Final Judgment, meanwhile, broadly prohibits Visa and MasterCard from any anti-steering practice with respect to alternate forms of payment (Proposed Judgment at IV.A, D), and affirmatively requires Visa and MasterCard to alter their contracts with merchants to effectuate true anti-anti-steering practices—even going so far as to supply the exact contract language Visa and MasterCard must use in this regard (id. at V.B, **[*15]** C). The proposed judgment also requires Visa and MasterCard to inform participating merchants about these changes, and to file notices of compliance with, and open themselves for inspection to the U.S. Department of Justice. (Id. at V.E, VI.)

While it is true that some of the public comments have raised potential concerns about the practical effects of the Judgment in the marketplace, it is safe to say that *not one* has expressed disapproval of the Proposed Final Judgment itself. Indeed, the issues raised by Class Plaintiffs and Consumer World—that one credit card company's "discount" is another's "surcharge"—may arise in the future, but these are issues for another day. The United States has demonstrated, and no public comment substantively contests, that the Proposed Final Judgment furthers the public interest by removing the anticompetitive impact of Visa's and MasterCard's anti-steering rules, see *15 U.S.C. § 16(e)(1)(A)*, and alleviates the public's "specific injury from the violations set forth in the complaint," see id. *§ 16(e)(1)(B)*. As such, the court finds that the public interest is best served by approving the proposed final judgment between Plaintiffs and Visa and MasterCard. **[*16]** The court will sign the Proposed Final Judgment separately.

C. Entry of Final Judgment Under ***Federal Rule of Civil Procedure 54***

Federal Rule of Civil Procedure 54(b) provides that in an action where "multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." The principal concern against doing so is the "historic federal policy against piecemeal appeals." *O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29, 41 (2d Cir. 2003)* (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980))*. As a general matter though, parties waive their right to appeal judgments on consent. *New York ex rel. Vacco v. Operation Rescue Nat'l, 80 F.3d 64, 69 (2d Cir. 1996)* (citing *Nashville, C. & St. Louis Ry. v. United States, 113 U.S. 261, 266, 5 S. Ct.*

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scope of the case" insofar as the "[t]he Amended Complaint alleges violations relating only to the General Purpose Card product market, a market that does not include debit cards." (Response at 25.) To the extent Sears's Comment seeks clarification on this issue as pertaining solely to the credit card market, the court notes that such concerns may be coextensive with the claims raised in Visa's and MasterCard's previous "honor all cards" litigation. See ***In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008)*** (Gleeson, **[*13]** J.); *In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003)* (Gleeson, J.).

[3] The "no-surcharge rules" prohibited merchants from charging consumers a "surcharge" above the normal price of a good for using a Visa or MasterCard.

460, 28 L. Ed. 971, 20 Ct. Cl. 526 (1885)). Here, because the final judgment to be entered is a judgment on consent, Visa and MasterCard will have effectively waived their right to appeal, thus obviating any possibility of piecemeal appeals. Further, judicial efficiencies would be better served in this litigation by entering judgment sooner **[*17]** rather than later so the court—and the parties—can continue to focus on Plaintiffs' claims against the remaining American Express Defendants. Therefore, the court directs the Clerk of Court to enter final judgment against Visa and MasterCard after the court approves the Proposed Final Judgment.

III. CONCLUSION

The court FINDS that the Proposed Final Judgment is in public interest pursuant to *15 U.S.C. § 16(e)*. The court will approve the Proposed Final Judgment separately. The court also FINDS, under *Federal Rule of Civil Procedure 54(b)*, that there is no just reason for delay in entry of the final judgment against Defendants MasterCard International Incorporated and Visa Inc., and directs the Clerk of Court to enter final judgment against these Defendants after the court has approved the Proposed Final Judgment.

SO ORDERED.

Dated: Brooklyn, New York

July 20, 2011

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

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In re Aftermarket Auto. Lighting Prods. Antitrust Litig.

United States District Court for the Central District of California

July 25, 2011, Decided; July 25, 2011, Filed

09 MDL 2007-GW(PJWx)

Reporter

276 F.R.D. 364 *; 2011 U.S. Dist. LEXIS 82452 **

In Re: Aftermarket Automotive Lighting Products Antitrust Litigation

Subsequent History: Motion granted by *In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 2013 U.S. Dist. LEXIS 125287 (C.D. Cal., Aug. 26, 2013)*

Motion granted by *In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 2013 U.S. Dist. LEXIS 126308 (C.D. Cal., Aug. 26, 2013)*

Prior History: *In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 2009 U.S. Dist. LEXIS 133088 (C.D. Cal., July 6, 2009)*

Disposition: Motion granted.

Core Terms

Plaintiffs', class certification, regression, products, prices, certification, antitrust, class-wide, purchasers, lights, alleged conspiracy, class action, class member, methodology, reliable, damages, purport, courts, merits, Reply, cases, predominance, variable, flawed, member of the class, question of law, expert report, substitutions, commonality, disparities

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN1[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23 provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court. Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of *Rule 23*. The proponent of the class bears the burden of demonstrating that class certification is appropriate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN2[] Prerequisites for Class Action, Adequacy of Representation

The party seeking certification must satisfy all requirements of *Fed. R. Civ. P. 23(a)* and one of the subsections of *Fed. R. Civ. P. 23(b)*. *Rule 23(a)* requires that the party seeking certification show: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN3[] Prerequisites for Class Action, Maintainability

A class may be certified under *Fed. R. Civ. P. 23(b)* where: (1) there is a risk of inconsistent of unfair adjudication; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief appropriate as to the class as a whole; or (3) questions of law or fact common to members of the class predominate and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] Class Actions, Prerequisites for Class Action

In determining whether a plaintiff has met his burden of demonstrating that each element of *Fed. R. Civ. P. 23* has been satisfied, the court generally does not consider the merits of plaintiff's claims. Rather, the court must take the substantive allegations of the complaint as true.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule; that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. Sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. Certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Fed. R. Civ. P. 23(a)* have been satisfied. Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN6[] Class Actions, Certification of Classes

Plaintiffs must show that the claims of the class depend upon a common contention of such a nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] Sherman Act, Claims

The essential elements of a *15 U.S.C.S. § 1* antitrust claim are: (1) violation of ***antitrust law***; (2) injury or impact resulting from that violation; and (3) measurable damages. *15 U.S.C.S. § 15*.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN8[] Cartels & Horizontal Restraints, Price Fixing

Cases involving horizontal price-fixing are, as a practical matter, often certified. However, this does not hold true when injury or impact can be shown only on an individualized basis.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN9[] Sherman Act, Claims

In antitrust cases, proof of injury must be distinguished from calculation of damages. The individual injury element is also known as antitrust impact, and to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. Impact often is critically important for the purpose of evaluating *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. The question at the class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. Accordingly, in determining whether plaintiffs have met their burden, the court must rigorously assess the available evidence and the method or methods by which the plaintiffs propose to use the evidence to prove impact at trial.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN10[] Cartels & Horizontal Restraints, Price Fixing

The United States Court of Appeals for the Fifth Circuit held that generalized proof of purchases at an inflated price is acceptable for purposes of showing the predominance of common issues at class certification.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN11[] Expert Witnesses, Daubert Standard

Fed. R. Evid. 702 provides that opinions relating to scientific, technical, or other specialized knowledge may be admitted if they will assist the trier of fact to understand the evidence or to determine a fact in issue. The testimony may only be admitted if (1) it is based on sufficient facts or data, (2) it is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The court has a duty to ensure that expert testimony is both relevant and reliable. To this end, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN12[] Expert Witnesses, Daubert Standard

Once a court finds that the proposed witness qualifies as an expert, it must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. The court's concern is not with what the experts say, but, rather what basis they have for saying it. The test under the Daubert standard is not the correctness of the expert's conclusions but the soundness of his methodology.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN13[] Expert Witnesses, Daubert Standard

While there is no definitive checklist or test under the Daubert standard, courts identify several non-exclusive and nondispositive factors as potentially relevant to the reliability inquiry, including: (1) whether a method can be (and has been) tested, (2) whether the method has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the method's operation, (5) a degree of acceptance of the method within a relevant community, (6) whether the expert is proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, (8) whether the expert has adequately accounted for obvious alternative explanations, (9) whether the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field, and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN14[] **Class Actions, Certification of Classes**

In situations where a court is confronted with two opposing expert analyses or econometric models of what the but for world would look like, the court is not supposed to decide at the certification stage which expert analysis or model is better. At the class certification stage, the court's inquiry is limited to determining whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate. On a motion for class certification, the court only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN15[] **Cartels & Horizontal Restraints, Price Fixing**

In an antitrust price fixing case in which the class representative has alleged a broad conspiracy, courts have not required that the representative has purchased from all of the defendants or that he has been adversely affected by all of the means and methods by which the alleged conspiracy was implemented.

Counsel: [1]** Attorneys Present for Plaintiffs: Jason S. Hartley, Bonny E. Sweeney, Jay L. Himes, Michael P. Lehmann.

Attorneys Present for Defendants: Thomas J. Lang, Brian M. Hom, Matthew P. Kanny, William C. Hsu, Peter E. Halle.

Judges: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE H. WU

Opinion

[*366] CIVIL MINUTES - GENERAL

PROCEEDINGS: DIRECT PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (filed 09/27/10)

Court hears oral argument and testimony from Gary J. Dorman and Russell Lamb. The tentative circulated and attached hereto, is hereby adopted as the Court's final ruling. Direct Purchaser Plaintiffs' Motion for Class Certification is **granted.**

A Scheduling Conference is set for **August 4, 2011 at 8:30 a.m.** A proposed scheduling will be filed by August 2, 2011.

Before the Court is the motion of Plaintiffs DJ's Autobody, Inc.; Dynacorn Autobody Parts, Inc.; Motoring Parts International; Prevatte Auto Supply, Inc; and Sioux Plating Co., Inc. (collectively "Plaintiffs") [1] for an Order certifying a Direct Purchaser Class ("Class") consisting of "All persons and entities that purchased Aftermarket Automotive Lighting Products ("AALPs") in the United States, and its territories and possessions, directly **[**2]** from a Defendant between July 15, 2001 and February 10, 2009 (the 'Class Period')." See Docket Item Numbers ("Doc. Nos.") 183, 194. As set forth below, the Court will grant Plaintiffs' request for class certification.

BACKGROUND

The Defendants in this action are four sets of Taiwanese or Hong Kong companies and their United States subsidiaries: (a) TYC Brother Industrial **[**3]** Co. Ltd. ("TYC") and its subsidiary Genera Corporation ("Genera"); (b) Depo Auto Parts Ind. Co., Ltd. ("Depo") and its subsidiary Maxzone Vehicle Lightmg Corp. ("Maxzone"); (c) Eagle Eyes Traffic Ind. Co. Ltd. ("Eagle Eyes") and its subsidiary E-Lite Automotive Inc. ("E-Lite"); and (d) Sabry Lee Limited and Sabry Lee (U.S.A.), Inc. ("Sabry Lee"), which was also partially owned by Eagle Eyes. The Complaint in this action asserts a single cause of action for violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. Plaintiffs allege that Defendants conspired to fix the prices of AALPs during the Class Period. AALPs are replacement lighting parts used in the repair of automobiles in lieu of Original Equipment Manufacturer ("OEM") lighting parts. Amended Consolidated Class Action Complaint ("ACAC") ¶ 1, Doc. No. 205.

Plaintiffs filed their motion for class certification ("Motion") and supporting documents on September 27, 2010. The Motion was accompanied by several hundred pages of supporting documents and the 306-page expert report, including exhibits, of Dr. Russell L. Lamb ("Lamb Rep."). See Doc. No. 195. On May 16, 2011, Defendants Genera and E-Lite filed a joint opposition to the Motion, **[**4]** which was accompanied by a number of declarations, over one thousand pages of supporting documents, and the 36-page expert report, including exhibits, of Dr. Gary Dornan ("Dornan Rep."). See Doc. No. 271. Defendant Sabry Lee filed a Notice of Joinder on May 16, 2011, which it later withdrew, informing the Court that, while it continues to contest the issues of service and personal jurisdiction, it does not oppose Plaintiffs' Motion. See Doc. No. 292. On June 27, 2011, Plaintiffs filed their Reply, which was accompanied by hundreds of pages of additional supporting documents and a 48-page reply expert report ("Lamb Reply Rep."), including exhibits.

[*367] The term "Aftermarket Automotive Lighting Products," as defined in the Complaint, includes such products as headlamps and bulbs, parking, tail and interior lights, spot lights, fog lights and auxiliary rights sold as aftermarket replacements for the OEM parts originally contained in a vehicle. In order to be effective, an AALP must conform to the specifications of the original part. To facilitate conformity, firms involved in the manufacture, distribution and sales of AALPs instituted a universal parts numbering system known as "PartsLink." **[**5]** Lamb Rep.¶ 13. Defendants all use such numbers so that their AALPs can be identified as replacements for use in specific makes, models and years of vehicles. Id. at ¶ 14. Since 2002, AALPs have also been certified by the Certified Automotive Parts Association ("CAPA"). Id. at ¶ 15.

From 2002 through 2008, Plaintiffs allege that Defendants TYC, Depo, and Eagle Eyes routinely exchanged pricing information and set prices together. Defendants' products constitute 90% of AALPs sold in the United States and, "as a consequence, their Distributor Defendant affiliates also control the vast majority (over 90%) of the Aftermarket Automotive Lighting Product market in the United States." CAC ¶ 35; see Lamb Rep. ¶ 9(c), 38-44. After Plaintiffs filed their initial cases, the United States Department of Justice ("DOJ") intervened to separately investigate the

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[1] This action was originally consolidated with other cases, resulting in eight potential class representatives. Two of these class representatives, Harolds Autobody and Flash Sales, Inc., are listed on the docket sheet as plaintiffs but were not mentioned in Plaintiffs' Amended Consolidated Class Action Complaint. See Doc. No. 205. Moreover, Defendants indicate that Nu-Parts Automotive Products, Inc., although an alleged class representative, "was never actively involved in this litigation." Opp. 4 n.4. Three other class representatives, Prevatte Auto Supply, DJ's Autobody, and Dynacorn Auto Body Parts, have been voluntarily dismissed from the lawsuit after the filing of the class certification motion. See Doc. Nos. 239, 240 (dismissing Prevatte); Nos. 228, 230 (dismissing Dynacom); and Nos. 231, 234 (dismissing DJ's Autobody).

alleged conspiracy. Since Plaintiffs' initial class certification motion was filed, the DOJ has indicted and obtained guilty pleas from executives of Depo/Maxzone and Eagle Eyes' United States distributor. United States v. Chen, No. CR11-0166 (N.D. Cal.); United States v. Hsu, No. CR11-0061 (N.D. Cal.).

LEGAL STANDARD

HN1[] *Rule 23* provides district **[**6]** courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court. See *Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001)*. Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of *Rule 23 of the Federal Rules of Civil Procedure*. *Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)*. The proponent of the class bears the burden of demonstrating that class certification is appropriate. *In re N.D. Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 854 (9th Cir. 1982)*. *HN2*[] The party seeking certification must satisfy all requirements of *Rule 23(a)* and one of the subsections of *Rule 23(b)*. *Valentino, 97 F.3d at 1234*. *Rule 23(a)* requires that the party seeking certification show:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and **[**7]** adequately protect the interests of the class.

HN3[] A class may be certified under *Rule 23(b)* where: (1) there is a risk of inconsistent of unfair adjudication; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief appropriate as to the class as a whole; or (3) questions of law or fact common to members of the class predominate and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

HN4[] In determining whether a plaintiff has met his burden of demonstrating that each element of *Rule 23* has been satisfied, the court generally does not consider the merits of plaintiff's claims. See *Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991)*. Rather, the court must take the substantive allegations of the complaint as true. See *Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975)*. Nevertheless, as the Supreme Court has noted:

> *HN5*[] *Rule 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there **[**8]** are in fact sufficiently numerous parties, common questions of law or fact, etc. We recognized **[*368]** in [*General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n. 13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)]* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," *457 U.S., at 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740*, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23(a)* have been satisfied," *id., at 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740*; see *id., at 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740* ("[A]ctual, not presumed, conformance with *Rule 23(a)* remains... indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "'[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon, supra, at 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740* (quoting *Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)*; some internal **[**9]** quotation marks omitted). Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation. See *Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676-677 (CA7 2001)* (Easterbrook, J.).

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 390-91 (2011). [2]

ANALYSIS

HN7[] The essential elements of Plaintiffs' antitrust claim are: (1) violation of ***antitrust law***; (2) injury - or "impact" - resulting from that violation; and (3) measurable damages. *15 U.S.C. § 15*; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008)*. **[**10]** The primary dispute regarding the present motion for class certification centers around the "commonality" requirement of *Rule 23(a)(2)* and, specifically, whether proof of impact and damages resulting from the alleged conspiracy can be presented on a class-wide basis.

A class may not be certified unless the question whether the class paid artificially inflated prices as a result of Defendants' alleged conspiracy to fix prices is amenable to common proof. See, e.g., *In re Flash Memory Antitrust Litig., 2010 U.S. Dist. LEXIS 59491 *44 (N.D. Cal. June 9, 2010)*. As noted in *State v. Infineon Techs. AG, 2008 U.S. Dist. LEXIS 81251 (N.D. Cal. Sept. 5, 2008)*, ***HN8***[] cases involving horizontal price-fixing are, as a practical matter, often certified. See *id. at * 26* (citing *Paper Sys., Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 612 (E.D. Wis. 2000)*; *In re Commercial Tissue Prods., 183 F.R.D. 589, 595 (N.D. Fla. 1998))*. "However, this does not hold true when injury or impact can be shown only on an individualized basis. See, e.g., *Robinson v. Texas Auto Dealers Ass'n, 387 F.3d 416, 424 (5th Cir. 2004)*; *In re Indust. Diamonds Antitrust Litig., 167 F.R.D. 374 (S.D.N.Y. 1996)*." Id.; see also *In re Methionine Antitrust Litig., 204 F.R.D. 161, 166 (N.D. Cal. 2001)* **[**11]** (denying class certification where plaintiffs lacked colorable method of determining injury in fact on a class-wide basis); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156, 167, n.12 (C.D. Cal. 2007)* (Pfaelzer, J.) ("Even in conspiracy cases courts have cautioned against simply presuming class-wide impact on the basis of speculative expert testimony without any consideration of whether the markets or the alleged conspiracy at issue ... actually operated in such a manner so as to justify that presumption.").

Also at issue in this motion is the question of the effect of the Supreme Court's recent **[*369]** decision in Wal-Mart Stores. To the extent that Defendants are arguing that Wal-Mart Stores categorically precludes certification in this case, they overreach. The appeal in that case raised the issue of whether a nationwide class should have been certified under *Rule 23(b)(2)* where the plaintiffs therein attempted to demonstrate the common issue of company-wide gender discrimination chiefly through "statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart's female **[**12]** employees, and the testimony of a sociologist... who conducted a "social framework analysis" of Wal-Mart's 'culture' and personnel practices, and concluded that the company was 'vulnerable' to gender discrimination. *180 L. Ed. 2d at 387*. The Supreme Court rejected this approach, holding that the plaintiffs were required to show either that Wal-Mart used a biased testing procedure for employee advancement or operated under a general policy of discrimination, *Id. at 391-92*. Here, by contrast, the existence of a "general policy" of price-fixing is - at least for the purpose of this motion - undisputed. The question to be resolved is, once again, whether Plaintiffs will be able to present proof of impact and damages resulting from this alleged policy on a class-wide basis. Nothing in Wal-Mart Stores suggests that Plaintiffs will inevitably be unable to present such evidence in this case.

A. Can antitrust impact be proved through common evidence here?

As summarized in *In re Plastics Additives Antitrust Litigation, 2010 U.S. Dist. LEXIS 90135, *14-16 (E.D. Pa. Aug. 31, 2010)*:

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[2] To the extent that Defendants read the quoted language from Wal-Mart Stores as requiring plaintiffs to "prove common class-wide injury even at the class certification stage," Suppl. 4:4-5, this Court disagrees. Rather, ***HN6***[] Plaintiffs must show that the claims of the class "depend upon a common contention .... of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc., 180 L. Ed. 2d at 389-90*.

> HN9[] In antitrust cases, "[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation [**13] of damages (which determines the actual value of the injury)." [Citation]. The individual injury element is also known as antitrust impact, and "to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." [Citation]. Impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." [Citation]. "Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so." [Citation]. "Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." [Citation]. "[T]he question at [the] class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class." [Citation]. Accordingly, in determining whether Plaintiffs have met their burden, **[**14]** we must rigorously assess the "available evidence and the method or methods by which [P]laintiffs propose to use the evidence to prove impact at trial." [Citation].

In Robinson, HN10[] the Fifth Circuit held that generalized proof of purchases at an inflated price is acceptable for purposes of showing the predominance of common issues at class certification. *387 F.3d at 422-23*. See also *In re Static Random Access Memory (SRAM) Antitrust Litig., 2010 U.S. Dist. LEXIS 141809 (N.D. Cal. Dec. 13, 2010)*. Often in cases involving negotiated transactions, as opposed to purchases based on list prices, such common proof is elusive. See, e.g., *Robinson, 387 F.3d at 422*; *In re Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 382-84 (S.D.N.Y. 1996)*; *In re Flash Memory Antitrust Litig., 2010 U.S. Dist. LEXIS 59491 at *45*. Here, by contrast, where the amounts paid by class members were based on published catalogue prices, the question of impact is, at least in theory, easily susceptible to common proof. [3] Note, though, that **[*370]** the court in In re Plastic Additives Antitrust Litigation, found that the expert evidence relying on price listings, rather than "transactional data" without any empirical analysis, **[**15]** was too general to demonstrate class-wide impact due to price increase. *2010 U.S. Dist. LEXIS 90135 at *17-55*.

1. Expert Reports

In resolving the question of common impact, the expert reports are key. As noted in *Pecover v. Elec. Arts Inc., 2010 U.S. Dist. LEXIS 140632 (N.D. Cal. Dec. 21, 2010)*:

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[3] Defendants dispute whether Plaintiffs have established the existence of a "pricing structure" (i.e., "that the prices paid by different purchasers for the same product from a single seller, or for the same product from different sellers, tend to move together over time," Lamb Rep. ¶ 60), noting that graphs relied on by Plaintiffs' expert show that E-Lite, for example, charged "very disperse" prices to different customers for the same parts. Opp. 31:1-2. Defendants argue that "[t]he only possible explanation for such widespread price dispersion is that Eagle Eyes/E-Lite individually negotiated prices with these customers." Opp. 31:13-14.

Nevertheless, as observed by the court in *In re Dynamic Random Access Memory Antitrust Litig., 2006 U.S. Dist. LEXIS 39841 (N.D. Cal. June 5, 2006)*:

> In a number of price-fixing cases, courts have certified classes where plaintiffs have alleged that defendants conspired to set an artificially inflated base — or "benchmark" price — from which all other prices are triggered. See, e.g., *In re Vitamins Antitrust Litig., 209 F.R.D. at 266*; *In re Flat Glass Antitrust Litig., 191 F.R.D. at 486*; **[**16]** *In re Potash Antitrust Litig., 159 F.R.D. 682, 696 n. 19 (D. Minn. 1995)*; In re Domestic Air Transp. Antitrust Litig., *137 F.R.D. 677, 696 (N.D. Ga. 1991)*. Notably, classes were certified in these cases regardless whether some members of the class negotiated price individually, or whether — as here —differences among product type, customer class, and method of purchase existed. See, e.g., *In re Indus. Diamonds Antitrust Litig., 167 F.R.D. at 383*; *Arden Architectural Specialties v. Washington Mills Electro Minerals, 2002 U.S. Dist. LEXIS 21506, 2002 WL 31421915, *9 (W.D. N.Y. 2002)*.

*Id. at *47-48*. Thus, even if there were instances where class members separately negotiated prices on occasion, it would not necessarily preclude class certification.

> The admissibility of opinion testimony is governed by Article VII of the Federal Rules of Evidence ("FRE"). *HN11*[] *FRE 702* provides that opinions relating to "scientific, technical, or other specialized knowledge" may be admitted if they will "assist the trier of fact **[**17]** to understand the evidence or to determine a fact in issue." Id. The testimony may only be admitted if "(1) [it] is based on sufficient facts or data, (2) [it] is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of this case." Id. The court has a duty to ensure that expert testimony is both relevant and reliable. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* (citing *Daubert v Merrell Dow Pharms, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993))*. To this end, the trial judge must "determine whether the testimony has a "reliable basis in the knowledge and experience of [the relevant] discipline,'" *id. at 149* (citing *Daubert, 509 U.S. at 592*) (brackets in original).

Id. at 4-5*.

The Supreme Court has recently strongly indicated that Daubert should be applied to expert testimony at the certification stage of class action proceedings. See *Wal-Mart Stores, 180 L. Ed. 2d at 392* ("The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so...") (citation omitted). Accordingly, **[**18]** in order to grant class certification, this Court must first determine whether it may rely on the methodology used by Plaintiffs' expert to decide whether the claims in this case are amenable to common proof.

There is no dispute between the parties in this case regarding their respective experts' qualifications to serve as expert witnesses. *HN12*[] "Once a court finds that the proposed witness qualifies as an expert, it 'must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline. [Citation].'" *Pecover, 2010 U.S. Dist. LEXIS 140632 at *10*. As the court noted in Pecover, our concern is not with "what the experts say," but, rather "what basis they have for saying it." Id. (citing *Daubert v Merrell Dow Pharms, 43 F3d 1311, 1317 (9th Cir 1995)* (on remand) ("Daubert II")). "[T]he test under Daubert **[*371]** is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert II, 43 F.3d at 1318*.

> *HN13*[] While there is no definitive checklist or test, *Daubert, 509 U.S. at 593*, courts have identified several non-exclusive and non-dispositive factors as potentially relevant to the reliability inquiry, including: (1) "whether a [method] **[**19]** can be (and has been) tested," (2) "whether the [method] has been subjected to peer review and publication," (3) "the known or potential rate of error," (4) "the existence and maintenance of standards controlling the [method's] operation," (5) "a degree of acceptance" of the method within "a relevant community," *id. at 593-94*, (6) whether the expert is "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation," *Daubert II, 43 F3d at 1317*, (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, [citation], (8) whether the expert has adequately accounted for obvious alternative explanations, [citation], whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire, 526 U.S. at 152*, and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, see *id. at 151*.

*Pecover, 2010 U.S. Dist. LEXIS 140632 at *10* (ellipses omitted; all other alterations in original except for brackets indicating **[**20]** omitted citations).

Plaintiff's expert (Dr. Lamb) identifies the following seven factors in his report that support a finding of common classwide impact: (1) stable demand for AALPs arising from a mature market, (2) market dominance by Defendants, (3) lack of a competitive fringe during the proposed Class Period that could have effectively disciplined the effects of the proposed cartel, (4) the existence of a pricing structure adopted by Defendants, (5) interchangeability of AALPs, (6) barriers to entry, and (7) lack of economic substitutes for AALPs.

2. Regression Analysis

Dr. Lamb employs a regression analysis to demonstrate to demonstrate how overcharges attributable to the alleged conspiracy could be measured on a classwide basis by comparing pricing during and after the conspiracy period. "A regression is a statistical tool designed to express the relationship between one variable, such as price, and explanatory variables that may affect the first variable. Regression analysis can be used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors that might also influence price, like cost and demand." *In re Plastics Additives Antitrust Litig., 2010 U.S. Dist. LEXIS 90135 at *57-58 n.13*.

In **[**21]** a Supplemental Brief filed July 7, 2011, Defendants seem to argue that the Supreme Court's decision in Wal-Mart Stores prevents Plaintiffs from being able to rely on their regression analysis to prove commonality. The crux of that argument is as follows:

> As in Wal-Mart, Plaintiffs here proffer a regression purporting to show that - on average - prices of select products were impacted and therefore individual class members were impacted, and that the calculated average can be applied to determine injury and damages on a classwide basis. However, just as it was illogical in Wal-Mart to assume from a regression showing disparity in the number of men and women employed by Wal-Mart at the regional or national level that any particular proposed member of the class was the subject of discriminatory hiring practices, it is equally implausible to infer that an "average" of a group of selected products showing a net overcharge necessarily means that there was an overcharge for any particular product.

Suppl. 7:17-8:1. The comparison to Wal-Mart Stores is not compelling. In that case, the Supreme Court found that the plaintiffs' expert's statistical analysis was deficient because (1) "[i]nformation **[**22]** about disparities at the regional and national level does not establish the existence of disparities at individual **[*372]** stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level," *180 L. Ed. 2d at 393-394* (quoting *Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 637 (9th Cir. 2010)* (Ikuta, J., dissenting)), and (2) even assuming proof of a disparity "in all of Wal-Mart's 3,400 stores," plaintiffs had not identified any "specific employment practice" that might be responsible for it, *id. at 394*.

Even though these are obviously not the same types of deficiencies that Defendants purport to find with Plaintiffs' expert's reports in this case, this Court must still - for the reasons explained above - make a determination that the methodology employed by Plaintiffs' expert was sound.

3. Purported Flaws with Plaintiffs' Expert's Analysis

Plaintiffs assert that Defendants do not dispute four of the seven common factors identified by Dr. Lamb as supporting a finding of common classwide impact (viz., stable demand, market dominance, lack of competitive fringe during the Class Period, and existence of pricing **[**23]** structure). This is somewhat uncharitable, as Defendants do appear to at least question Plaintiffs' assertions regarding competition and pricing structure in the strict sense. In any event, Defendants purport to point out numerous flaws in Dr. Lamb's methodology.

First, they argue that the regression analysis employed in his report fails to take into account the entry of "an aggressively growing new-competitor," i.e., Vision, into the marketplace. This does not appear to be entirely accurate, as the Lamb report refers repeatedly to Vision and concludes that it was not a major competitive force during the Class Period or, presumably, thereafter. See, e.g., Lamb Rep. ¶ 51 (referring to Vision's "limited influence"), 55, ¶¶ 79-80 (referring to effect of emergence of "two small fringe competitors"), and ¶ 92 (insufficient quality of competitive fringe's products). The Lamb report uses Defendants' pricing from March 2009 to May 2009 as a benchmark for comparing prices during the alleged conspiracy. Defendants' expert, Dr. Dornan, purports to show the impact of Vision's entry into the market to show there was no overcharge on products where Vision did not compete, as compared to a decline **[**24]** of 34% on prices where there was competition. Plaintiffs note, however, that Dr. Dornan testified at his deposition that he was unaware of Vision' market share and made no analysis of the AALPs it sold. The Dornan Report does not establish that Vision was a significant competitor during the benchmark period, nor otherwise undermine Dr. Lamb's use of Defendants' pricing from March 2009 to May 2009 as a benchmark.

Next, Defendants argue that Plaintiffs' regression model is "unstable and implausible" because it employs an averaging method (averaging across products) that supposedly masks the need for individualized inquiry to determine whether any particular purchaser was overcharged. In particular, Dr. Dornan asserts that it was impermissible for Plaintiffs' expert to assume that the averaged regression for the 1,724 parts he chose to analyze could be applied to the 3,800 parts he did not analyze. Dornan Rep. 15-16.

Defendants urge that Dr. Lamb's regression model is similar to methodologies that have been rejected by various courts at the certification stage. See, e.g., *In re Plastic Additives, 2010 U.S. Dist LEXIS 90135 at *56-58* ("Plaintiffs' regressions cannot serve as proof of impact **[**25]** common to the class members."); *Flash Memory, 2010 U.S. Dist. LEXIS 59491 at *59-60* (noting that plaintiffs' expert's analysis "fails to take into account the fact the wide range of different types of products with equally varied attributes"); *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 494 (N.D. Cal. 2008)* ("GPU") ("While averaging may be tolerable in some situations, the record here shows that it has in fact masked important differences between products and purchasers."). Plaintiffs argue that this case is at least distinguishable from In re Plastics Additives, in which the court found that plaintiffs had "done no empirical analysis of the actual effect of the price increases upon which they rely," *2010 U.S. Dist. LEXIS 90135 at *19*, because, **[*373]** here, Dr. Lamb actually analyzed a large number of specific transactions. Moreover, there is actual evidence of a collusive price structure.

Plaintiffs further observe that courts have distinguished the ruling in GPU by noting that it involved highly customized products or that the expert regression analysis therein was flawed in certain basic ways. See *In re TFT-LCD Antitrust Litig., 267 F.R.D. 583, 605 (N.D. Cal. 2010)* **[**26]** ("LCD II"). Moreover, the court in GPU actually certified a class of direct purchasers. *253 F.R.D. at 497-98*. The decision in Flash Memory concerned the denial of certification of a class of indirect purchasers.

In addition to arguing that Plaintiffs' expert's use of averaging masks the need for individualized proof, Defendants make the more general argument that the volume of different products at issue in this case and the length of the Class Period both make it less likely that antitrust impact can be established by common proof. Defendants are at least correct that the Class Period is quite long. They do not, however, cite to any specific facts that would make it necessary for Plaintiffs to conduct a separate inquiry vis-a-vis distinct time periods, although this Court may eventually require such studies.

Defendants also dispute Plaintiffs' contentions regarding product interchangeability and lack of substitutions, two points (the latter one, certainly) going more or less directly to the question of market definition. While a faulty market definition might indeed call into question Plaintiffs' ability to offer common proof of an antitrust injury (more likely, though, it is a question **[**27]** on the merits), Defendants have not shown that Dr. Lamb's conceptions of interchangeability and market substitutions are so flawed as to preclude class certification. As to the first point, Defendants purport to refute Plaintiffs' contention that "the quality of all of the Defendants' products was sufficiently comparable that proposed class members would have been able to base their purchasing decisions on price rather than quality." Lamb Rep. ¶ 76. In particular, they cite the testimony of two class representatives who stated that TYC products were superior in quality to Eagle Eyes and Depo, as well as testimony of other putative class members. Nevertheless, it is not clear that the fact the products compete on dimensions of quality as well as price would defeat certification. Moreover, Plaintiffs make the argument that the fact of the price-fixing agreement itself shows that the products competed. As to the second point, Defendants argue that Plaintiffs' expert incorrectly contends that there are no economic substitutes for AALPs and that both OEM and recycled/refurbished auto lights should be treated as market substitutions. [4] This contention is addressed in some detail in Dr. Lamb's **[**28]** Reply Report and would not preclude certification.

Finally, Defendants dispute Dr. Lamb's conclusion that the amount of "fringe competition" was too small to affect Defendants' prices. Lamb Rep. ¶ 51. As with other points raised by Defendants, even assuming some error in Dr. Lamb's analysis in this regard, it is not clear that this dispute does not simply go to the ultimate merits of Plaintiffs' case rather than the question whether certification should be granted.

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[4] In his initial Report, Dr. Lamb wrote, "It is my opinion that small changes in the price of aftermarket auto lights would not have an impact on the demand for either OEM or recycled/refurbished auto lights." Lamb Rept. ¶ 46. He further stated, "This means that while aftermarket auto lights might have certain functional substitutes, no economic substitutes exist for them." Id. (emphasis in original).

4. Courts Need Not Chose Between Experts

Dr. Lamb's report essentially tries to demonstrate commonality as to the issues of impact and damages by considering the "but for" world unaffected by Defendants' purported collusion, asserting that a regression analysis is a standard way to do this. Defendants do not necessarily dispute **[**29]** this contention, they simply argue that Dr. Lamb's regression analysis is flawed. As Plaintiffs point out in their Reply, ***HN14***[] in situations where a court is confronted with two opposing expert analyses or econometric models of what the "but for" world would look like, the Court is not supposed to decide at the certification **[*374]** stage which expert analysis or model is better. As set forth in *In re TFT-LCD Antitrust Litig., 267 F.R.D. 291, 313 (N.D. Cal. 2010)* ("LCDJ"):

> At the class certification stage, the Court's inquiry is limited to determining "whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate." DRAM [*In re Dynamic Random Access Memory Antitrust Litig.], 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *9*. "[O]n a motion for class certification, the Court only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact." *In re Magnetic Audiotape Antitrust Litig., No. 99 CIV 1580, 2001 U.S. Dist. LEXIS 7303, 2001 WL 619305, at *4 (S.D.N.Y. June 1, 2001)*; **[**30]** see also *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 660 (7th Cir. 2002)* (in certified direct purchaser class case, reversing grant of summary judgment in favor of defendants and holding that expert battle over regression variables was an issue for trial: "[t]he defendants presented a competing regression analysis done by one of their economic experts, who added a couple of variables to the analysis of the plaintiffs' expert and, presto, the [key] variable ceased to be statistically significant." n15); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Intern., Ltd., 247 F.R.D. 253, 270 (D. Mass. 2008)* ("To determine predominance, a court need not plunge into the weeds of an expert dispute about potential technical flaws in an expert methodology.").

While Defendants' arguments in their initial Opposition brief are obviously better than their arguments that rely on Wal-Mart Stores they are, for the most part, sufficiently rebutted by the arguments in Plaintiffs' Reply papers, their expert's responsive declaration, and relevant case law. Again, Defendants do not appear to dispute that a regression analysis is a "standard" way to develop a hypothetical "but for" world as **[**31]** a means of analyzing the impact of Defendants' alleged collusive practices. Thus, Plaintiffs argue, Defendants have conceded that there is a way to prove or disprove Plaintiffs' claims on a classwide basis "even if their experts disagree as to the application of that methodology." Reply 11:18. Hence the Court would tentatively conclude that Dr. Lamb's report provides a sufficient basis from which to conclude that Plaintiffs would adduce common proof concerning the effect of Defendants' alleged price-fixing conspiracy on prices class members paid for AALPs.

B. Adequacy of Representation

In addition to their arguments against commonality, Defendants also make two arguments regarding adequacy of representation under *Rule 23(a)(4)*. First, they contend that neither Plaintiffs Sioux Plating nor MPI are adequate because they bought most (or, in MPI's case, all) of their AALPs from Genera. Second, they contend that Sioux Plating is inadequate because it views Genera as a "preferred" vendor and is a warehouse distributor for Genera. As Plaintiffs note, however, ***HN15***[] "[i]n an antitrust price fixing case in which the class representative has alleged a broad conspiracy, courts have not required... that **[**32]** the representative ha[s] purchased from all of the defendants or that he ha[s] been adversely affected by all of the means and methods by which the alleged conspiracy was implemented." *In re S. Cen. States Bakery Prods. Antitrust Litig., 86 F.R.D. 407, 418 (M.D. La. 1980)*; accord *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 511 (S.D.N.Y. 1996)*. Similarly, the fact that Sioux Plating is a warehouse distributor for Genera does not render it inadequate as a class representative. See *Natchitoches Parish Hosp. Serv Dist. v. Tyco Int'l, Ltd., 247 F.R.D. 253, 265-66 (D. Mass. 2008)* (claim of distributor class representative who allegedly received benefits from defendant's conduct was not at odds with interests of claims by a class that included end-users). Thus, the Court would reject Defendants' arguments that Plaintiffs cannot demonstrate adequacy of representation.

[*375] C. Class Certification is Appropriate.

In light of the above discussion, the Court would conclude that class certification is warranted in this case. The requirements of *Rule 23(a)* are satisfied. First, the class is sufficiently numerous. Dr. Lamb estimates that Genera, Maxzone and E-Lite had, respectively, 406, **[**33]** 540 and 71 customer numbers associated with positive sales amounts in their transaction level data during the Class Period. Lamb Rep. ¶ 24. Thus, the proposed class numbers at least in the hundreds. Second, Plaintiffs have shown that there are questions of law or fact common to the class. Third, the claims of the representative plaintiffs are typical of those of the class. Although, in the above discussion of Plaintiffs' ability to demonstrate antitrust impact on a classwide basis, the requirements of commonality and typicality tend to merge, it is clear that both are satisfied. Finally, the proposed class representatives are adequate.

Certification is appropriate under *Rule 23(b)(3)*. Plaintiffs have established that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. They have also demonstrated that a class action would be a superior method of adjudication to numerous individual lawsuits. The matters pertinent to a finding that a class action is a superior method of adjudication include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the **[**34]** extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action. *Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1189 (9th Cir.)*, on rehearing, *273 F.3d 1266 (9th Cir. 2001)*; *In re Tableware Antitrust Litig., 241 F.R.D. 644, 651 (N.D. Cal. 2007)*.

"In antitrust cases such as this, the damages of individual direct purchasers are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress. A class action is the superior method of resolving this controversy." *In re Static Random Access Antitrust Litig., 2008 U.S. Dist. LEXIS 107523 (N.D. Cal. Sept. 29, 2008)*; accord *LCD I, 267 F.R.D. at 314-315*. Class certification in this case would be far superior to, and more manageable than, any other procedure available for the treatment of the factual and legal issues raised by Plaintiffs' claims.

D. Appointment of Class Counsel

Previously, the Court appointed four counsel **[**35]** as Interim Counsel in these cases. Their work in prosecuting this action has been effective and efficient. These counsel would therefore be appointed as Direct Purchaser Class Counsel.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification would be granted.

End of Document

[Lakeland Reg'l Med. Ctr., Inc. v. Astellas US LLC]

United States District Court for the Middle District of Florida, Tampa Division

July 25, 2011, Decided; July 25, 2011, Filed

Case No. 8:10-cv-2008-T-33TGW

Reporter

2011 U.S. Dist. LEXIS 80723 *; 2011-2 Trade Cas. (CCH) P77,544; 2011 WL 3035226

LAKELAND REGIONAL MEDICAL CENTER, INC., Plaintiff, v. ASTELLAS US LLC, and ASTELLAS PHARMA US, INC., Defendants.

Subsequent History: Motion granted by, Motion to strike denied by, As moot *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 2012 U.S. Dist. LEXIS 88053 (M.D. Fla., June 26, 2012)*

Prior History: *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 2011 U.S. Dist. LEXIS 16684 (M.D. Fla., Feb. 7, 2011)*

Core Terms

adenosine, antitrust, allegations, patent, Brick, amended complaint, purchaser, monopolize, anticompetitive, myocardial, imaging, stress, anti trust law, perfusion, motion to dismiss, injury in fact, patients, relevant market, competitors, products, effects, expiration, providers, indirect, monopoly, asserts, generic, cases, tortious interference, tied product

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Judges: VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE.

Opinion by: VIRGINIA M. HERNANDEZ COVINGTON

Opinion

ORDER

This matter comes before the Court pursuant to Astellas's Motion to Dismiss (Doc. # 16), which was filed on November 19, 2010. Lakeland Regional Medical Center filed a Response in Opposition to the Motion (Doc. # 34) on

January 21, 2011. **[*2]** Astellas filed a Reply Memorandum (Doc. # 42) on February 11, 2011. For the reasons that follow, the Court denies the Motion to Dismiss in this antitrust case.

I. Factual and Procedural Background

Lakeland Regional, a "full-service hospital," is a not-for-profit Florida corporation with its headquarters in Lakeland, Florida. (Doc. # 11 at ¶ 7). Defendants Astellas US, LLC and Astellas Pharma US, Inc. (collectively, "Astellas") are Delaware corporations with headquarters in Deerfield, Illinois. Id. at ¶ 8. Astellas is the exclusive licensee of two patents involving the administration of adenosine to patients undergoing cardiac stress tests. Lakeland Regional alleges that Astellas has engaged in unlawful, anticompetitive, monopolistic, and exclusionary activity with respect to adenosine in violation of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, the Clayton Antitrust Act, *15 U.S.C. § 14*, Florida ***antitrust law***, and Florida common law.

A. Stress Tests and Use of Adenosine

Physicians use a test known as myocardial perfusion imaging to diagnose a condition known as cardiac artery disease, one of the leading causes of death in the United States. Id. at ¶ 9. Myocardial perfusion imaging is **[*3]** usually done while the patient is placed under "stress" in order to maximize the accuracy of the test. Id. at ¶ 10. Physicians induce stress by requiring patients to exercise on a treadmill. Id. When patients are unable to exercise on a treadmill, physicians create "pharmacological stress" through the administration of adenosine. Id. Adenosine is a naturally occurring compound that induces the dilation of blood vessels. Id. at ¶ 12.

Even when patients are capable of exercise, physicians often use adenosine to further stress the heart, in order to increase the accuracy of the stress test. Id. Administration of adenosine is the medically recognized standard of care when pharmacologic stress is required to perform myocardial perfusion imaging. Id. When adenosine is required for myocardial perfusion imaging, more than 90% of the adenosine is suppled by Astellas. Id. Further, adenosine is administered to cardiac patients in more than 90% of cardiac stress tests conducted nationwide. Id. In addition to stress tests, adenosine is also used to treat a condition known as paroxysmal supraventricular tachycardia. Id.

Two patents are implicated here. The patents are owned by King Pharmaceuticals, **[*4]** Inc., but Astellas is the exclusive licensee of such patents: the 5,070,877 patent and the 5,731,296 patent. Id. at ¶¶ 17-18. The '877 Patent relates solely to the use of Astellas's adenosine product "Adenoscan®," for its vasodilative properties when used in conjunction with myocardial imaging. Id. at ¶ 18. The '877 Patent expired on May 18, 2009. Id. The '296 Patent covers a method of continuous adenosine infusion, and it will expire on March 24, 2015. Id. Both patents encompass the process of using adenosine during myocardial imaging. The patents do not cover Astellas's adenosine product, because adenosine is unpatentable. Id. at ¶ 22.

Several other companies sell an adenosine product that is not meaningfully distinguishable from Astellas's adenosine product. Id. Astellas charges $8.05 per ml. of Adenoscan, compared with $1.76 per ml. for generic adenosine—approximately 450% more per unit than its generic counterpart. Id. at ¶ 23.

It is Astellas's position that the '296 Patent grants Astellas exclusivity for the only medically recognized process to administer adenosine during myocardial perfusion imaging, even after the expiration of the '877 Patent. Id. at ¶ 19. The majority of all **[*5]** myocardial perfusion imaging stress tests are administered using the process patented by the '296 Patent. Id. No other medically recognized process for inducing stress for myocardial perfusion imaging is available. Id.

B. Astellas's Communications with Lakeland Regional

On July 31, 2008, Astellas transmitted a letter to Lakeland Regional indicating that Lakeland Regional must purchase Adenoscan for use in myocardial perfusion imaging procedures after expiration of the '877 Patent and that use of generic adenosine during such procedures would constitute infringement of the '296 Patent. Id. at ¶ 24. Among other things, the letter stated:

> [S]ale of . . . an Adenoscan® substitute for that use [in myocardial perfusion imaging] is currently protected by two independent United States patents . . . . When Adenoscan® is purchased from Astellas, the purchaser is given permission to use the drug as an adjunct for MPI. But when adenosine from an unauthorized source is used for MPI . . . the seller and the user are infringing both the '877 and the '296 patents and thus could be liable for patent infringement . . . . [E]ven after May 18, 2009, only Astellas . . . will be legally permitted to use adenosine **[*6]** as an adjunct for MPI.

Id. at ¶ 26.

In a letter dated September 14, 2009, Astellas explained to Lakeland Regional:

> While there is no patent that covers the *composition*, adenosine, this *method of use* patent precludes the use of generic adenosine for MPI as a substitute for Adenoscan®. Astellas is the only party that can authorize the patented use of an adenosine infusion for MPI studies. Such permission is **only** granted when Adenoscan® is purchased . . . from Astellas.

Id. at ¶ 28 (emphasis in original).

C. Lakeland Regional's Complaint

Lakeland Regional contends that Astellas "has attempted to effectively extend its '877 Patent beyond its expiration date by requiring the use of only Adenoscan®, or an Adenoscan® substitute, purchased through an Astellas-authorized company for use as an adjunct therapy to MPI." Id. at ¶ 35. Lakeland Regional characterizes Astellas's conduct as "anticompetive." Id. at ¶ 36.

Lakeland Regional initiated this action against Astellas on September 13, 2010, and filed an amended class action complaint on October 19, 2010. (Doc. ## 1, 11). Lakeland Regional's amended complaint arrays the following counts against Astellas: unlawful tying (count one), exclusive dealing **[*7]** (count two), attempted monopolize (count three), unreasonable restraint of trade (count four), attempted monopolization (count five), and tortious interference with a prospective economic advantage(count six).

Astellas responded to the amended complaint by filing a 55 page Motion to Dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. (Doc. # 16). Generally, Astellas asserts that dismissal is warranted because Lakeland Regional lacks standing, has failed to demonstrate an injury in fact, and has failed to state a claim upon which relief may be granted. The Court will address these arguments and others below.

II. Legal Standard

On a motion to dismiss, this Court accepts as true all the allegations in the complaint and construes them in the light most favorable to the plaintiff. *Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004)*. Further, this Court favors the plaintiff with all reasonable inferences from the allegations in the complaint. *Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990)* ("On a motion to dismiss, the facts stated in [the] complaint and all reasonable inferences therefrom are taken as true."). However, **[*8]** in Twombly, an antitrust case, the Supreme Court cautioned:

> While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and

> conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)(internal citations omitted). Further, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*.

This Court's analysis is confined to the four corners of the complaint. Astellas has filed an assortment of documents as exhibits to the Motion to Dismiss. The Court has not reviewed the exhibits and is therefore not required to convert the Motion to Dismiss into a motion for summary judgment pursuant to *Rule 12(d) of the Federal Rules of Civil Procedure*. Without the benefit of discovery, it would be premature for the Court to conduct summary judgment analysis.

Furthermore, the Eleventh Circuit has cautioned that "*Rule 12(b)(6)* **[*9]** dismissals are particularly disfavored in fact-intensive antitrust cases." *Spanish Broad. Sys. v. Clear Channel Commc'ns, 376 F.3d 1065, 1070 (11th Cir. 2004)*(citations omitted). Moreover, as explained in *Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985)*, "'summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.'" (quoting *Norfolk Monument Co. v. Woodlawn Mem'l Gardens, 394 U.S. 700, 704, 89 S. Ct. 1391, 22 L. Ed. 2d 658 (1969))*.

III.Analysis

A.Standing

As a threshold matter, this Court must determine whether Lakeland Regional has standing to bring this action. *Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F. Supp. 2d 1260, 1274 (M.D. Fla. 2009)*. Astellas challenges Lakeland Regional's standing by arguing that Lakeland Regional has not alleged an Article III "injury in fact," has not alleged an "antitrust injury" and has not satisfied the Illinois Brick rule.

1.Injury in Fact

As explained in *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*, "[T]he irreducible constitutional minimum of standing contains three elements. **[*10]** First, the plaintiff must have suffered an injury in fact . . . . [s]econd, there must be a causal connection between the injury and the conduct complained of . . . . [t]hird, it must be likely, as opposed to mere speculative, that the injury will be redressed by a favorable decision." Id. (internal citations and quotation marks omitted). Astellas contends that Lakeland Regional lacks Article III "case or controversy" standing because Lakeland Regional has failed to allege an "injury in fact." Under Lujan, an injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id. at 560* (internal citations and quotation marks omitted).

The Court finds that Lakeland Regional has alleged an injury in fact. In its amended complaint, Lakeland Regional alleges that it has suffered monetary damages resulting from Astellas's alleged exclusive dealing and unlawful tying of its patented process to its unpatentable adenosine drug. Lakeland Regional also alleges that Astellas has specifically threatened to sue Lakeland Regional if Lakeland Regional purchases alternatives to Adenoscan.

At this stage **[*11]** of the proceedings, the Court would be mistaken to dismiss the amended complaint for lack of Article III standing when the complaint alleges that Lakeland Regional has suffered a specific economic injury due to Astellas's alleged conduct and that Astellas has threatened to sue Lakeland Regional for patent infringement concerning Astellas's unpatentable drug. Astellas relies on a bounty of cases that affirm the dismissal of antitrust actions due to lack of standing. However, upon close inspection, these cases were decided at the summary judgment stage. [1] The Court will not make the misstep of deciding the intricate and factually complex matters before it prematurely.

Satisfied that Lakeland Regional meets the standing requirements of Article III, the Court must determine whether Lakeland Regional has suffered an antitrust injury and whether Lakeland Regional's amended complaint satisfies the Illinois Brick rule. "Harm to the antitrust plaintiff is sufficient **[*12]** to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Assoc. Gen. Contractors of Cal. v. Cal. State Council, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 at n.31 (1983)*.

2.Antitrust Injury

As explained by the Eleventh Circuit in *Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961, 966 (11th Cir. 2006)*, in addition to the Article III standing requirements that apply to all federal plaintiffs, those "challenging violations of the antitrust laws must also show that they have suffered [an] 'antitrust injury' or 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

The Eleventh Circuit defined the parameters of an antitrust injury in Midwestern Waffles: "The injury must reflect the anticompetitive effect of either the violation of ***antitrust law*** or of the anticompetitive acts made possible by the violation, and it should be the type of loss which a violation of ***antitrust law*** would be likely to cause." *734 F.2d at 710*. **[*13]** To have suffered an antitrust injury, "a person must be one against whom anticompetitive activity is directed, and not one who has merely suffered indirect, secondary, or remote injury." Id.

Although both parties have submitted voluminous pleadings, the Court must restrict its analysis to the complaint to determine whether Lakeland Regional has asserted an antitrust injury. In the amended complaint, Lakeland Regional claims that Astellas perpetrated an illegal tying arrangement. According to the amended complaint, Astellas has tied the purchase of an unpatented product with multiple uses to the patented license to perform a medical procedure. Lakeland Regional also alleges that Astellas has excluded potential competitors from the market for the tied product.

The amended complaint alleges a antitrust injury within its four corners. Without delving into whether Lakeland Regional has evidence necessary to support its amended complaint and without considering the voluminous documents attached to Astellas's Motion, the Court determines that Lakeland Regional has adequately alleged an antitrust injury in its amended complaint.

3.Illinois Brick Standing

At this preliminary stage, the Court is **[*14]** also satisfied that Lakeland Regional's amended complaint does not run afoul of the standards set forth in *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* curtailing relief in indirect injury cases. There, the Court addressed the issue of whether plaintiffs asserting "pass-on" damages have standing to bring an antitrust action under the Clayton Act. The plaintiffs were government entities alleging that defendant brick manufacturers conspired to engage in price fixing, thus raising the price of cement bricks and eventually leading to inflation of the prices paid for finished government buildings. The Court determined that the plaintiffs were "indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching [the plaintiffs]." *Id. at 726*. The Court ruled that the plaintiffs lacked

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[1] See E.g., *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)* and *Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir. 1982)*. Both cases involved review of antitrust claims at the summary judgment stage.

standing because "[t]he legislative purpose in creating a group of private attorneys general to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the fill extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Id. at 746* (citations **[*15]** omitted). Stated another way:

> An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of *Section 4* [of the Clayton Act] there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

Assoc. Gen. Contractors of Cal., 459 U.S. at 534-35.

The Court has recognized several rationales for the direct purchaser rule of Illinois Brick: (1) it eliminates the complication of apportioning overcharges among purchasers in the chain of distribution; (2) it eliminates a pass-on defense for manufacturers, which would reduce the effectiveness of Clayton Act actions by diminishing the recovery available to plaintiffs; and (3) it eliminates the risk of multiple recoveries. *Kan. v. Utilicorp United, Inc., 497 U.S. 199, 206-207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*.

However, as with many "brightline" rules, the Supreme Court has carved out exceptions to the Illinois Brick direct purchaser rule and has limited application of Illinois Brick **[*16]** under certain factual scenarios. See *UtiliCorp, 497 U.S. at 216* ("The rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in all cases."). This Court finds *Lowell v. Am. Cyanamid Co., 177 F.3d 1228 (11th Cir. 1999)* instructive. There, the district court dismissed an antitrust action under Illinois Brick due to the plaintiffs' failure to join various cyanamid distributors. The plaintiffs (a group of farmers) were not direct purchasers of the crop protection product at issue in the case, rather, the farmers purchased the products from a distributor. The Eleventh Circuit reversed the dismissal of the case holding "Illinois Brick has no application in this case." *177 F.3d at 1229*.

The Lowell court explained:

> Illinois Brick was an extension of the Court's earlier prohibition against the *defensive* use of passing on in *Hanover Shoe, Inc. v. United Shoe Machinery, Corp., 392 U.S. 481, 491-94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In concluding that the indirect government purchaser of a product may not sue distant manufacturers, Illinois Brick cited two rationales. The first of these was that allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability **[*17]** for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on. . . . Second, as in Hanover Shoe, the Court was worried about the uncertainties and difficulties in analyzing price and out-put decisions in the real economic world rather than an economist's hypothetical model and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.

Lowell, 177 F.3d at 1229 (internal quotation marks and citations omitted). In Lowell, the Eleventh Circuit determined that the aforementioned rationales underpinning Illinois Brick did not apply to the facts presented because the complaint did not contain allegations of "passing on," there were "no problems of double recovery" (because only one illegal act was alleged) and there was "only one set of potential plaintiffs." *177 F.3d at 1230*. Furthermore, the Eleventh Circuit determined that "the economic and legal complexities outlined in Illinois Brick **[*18]** [were] absent." Id.

Lakeland Regional's amended complaint contains allegations tending to describe direct purchase from Astellas, possibly eliminating the Illinois Brick inquiry. However, these allegations are somewhat tenuous. As to direct purchase, Lakeland Regional alleges: "Defendant Astellas has distributed and continues to distribute adenosine products valued in the millions of dollars annually from their headquarters in Illinois to plaintiff LRM's place of business in Florida, and to other purchasers throughout the country. Payments are remitted from across the country to the defendant." (Doc. # 11 at ¶ 6) Lakeland Regional also alleges that Astellas "manufactures and sells" its adenosine products. Id. at ¶ 22. Further Lakeland Regional alleges that it (along with other healthcare providers) has been forced to "agree to purchase their needed supplies of adenosine from defendant Astellas and not from competing adenosine providers, as they would prefer to do." Id. at ¶ 59. [2]

Although these allegations do not use the words "direct purchase" the Court accepts them as alleging direct purchase from Astellas at this preliminary stage of the proceedings. [3] However, even if these allegations were insufficient to support the direct purchase requirement of Illinois Brick, the Court is still justified in denying the Motion to Dismiss to the extent it is based on Illinois Brick because Lakeland Regional has argued that Illinois Brick is inapplicable, as was the case in Lowell. In addition, Lakeland Regional correctly points out that *Illinois Brick* applies only to antitrust damages and does not stand as a **[*20]** bar to any party seeking injunctive relief and attorney's fees, which Lakeland Regional seeks in its amended complaint.

At this point, the Court is satisfied that Lakeland Regional is the proper plaintiff to bring this action, and it does not find that *Illinois Brick* is a bar to pursuing this action. However, the parties are free to reassert their arguments during the summary judgment stage, after the completion of discovery.

B. Tying

Astellas seeks dismissal of Lakeland Regional's federal and state law tying claims asserted under the Sherman Act, the Clayton Act, and *Florida Statute Section 542.18*, as asserted in counts one and four of the amended complaint. The elements of a tying claim **[*21]** are:

> 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those products are in fact "tied" together - that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1574 (11th Cir. 1991)(internal citation omitted).

Astellas does not contend that Lakeland Regional failed to allege the essential elements for a tying claim in the amended complaint. Rather, Astellas argues that Lakeland Regional's tying claims are subject to dismissal because Lakeland Regional failed to allege "plausible relevant markets, two separate and distinct product markets, or anticompetitive effects in the tied product market." (Doc. # 16 at 50).

As explained in Thompson, "***antitrust law*** is concerned with abuses of power by private actors in the marketplace." *934 F.2d at 1572*. "The plaintiff bears an initial burden of demonstrating that the alleged agreement produced adverse, **[*22]** anti-competitive effects within the relevant product and geographic markets, i.e., market power." *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065 (11th Cir. 2005)*.

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[2] The Court rejects Astellas's argument, pursuant to *Warren Gen. Hosp. v. Amgen, Inc., Case No. 09-cv-4935, 2010 U.S. Dist. LEXIS 56220, 2010 WL 2326254 (D.N.J. June 7, 2010)*, that Lakeland Regional's allegations are insufficient. In Warren, **[*19]** the court dismissed the antitrust case pursuant to Illinois Brick because the complaint failed to allege direct purchase, alleged that the product at issue was purchased through a wholesaler, and attached to the complaint was a copy of the wholesale agreement. In stark contrast, Lakeland Regional's amended complaint does not mention a wholesaler. If it is Astellas's position that Lakeland Regional purchases its adenosine product from a wholesaler, Astellas may present that argument, along with evidence in support of such argument, in a motion for summary judgment.

[3] Furthermore, neither Astellas nor Lakeland Regional attempts to categorize the allegations contained in the amended complaint as a "horizontal" or a "vertical" antitrust violation. In Lowell, the Eleventh Circuit indicated that Illinois Brick does not apply to certain vertical antitrust conspiracies: "The inapplicability of Illinois Brick to vertical conspiracies with no allegations of pass-on (what some have called the 'vertical conspiracy exception') has long been recognized." *Lowell, 177 F.3d at 1231*.

Astellas contends that Lakeland Regional cannot prove market power because the FDA has not approved any drug other than Astellas's adenosine drugs for use in myocardial perfusion imaging. In addition, Astellas argues that Lakeland Regional cannot show that the patented license and the unpatentable adenosine product are separate products. Furthermore, Astellas remarks that Lakeland Regional cannot prove anticompetitive effects. However, Lakeland Regional adequately alleges:

> Defendant Astellas has monopoly power - the power to control price or exclude competition - in the market for adenosine used in MPI in the United States . . . . The defendant also controls greater than 60% of sales of adenosine for all purposes in the United States. Defendant Astellas, plaintiff LRMC, and other health care providers recognize and perceive that "adenosine used for MPI" is a relevant product submarket, which the defendant controls. The defendant, the plaintiff, and other health care providers also recognize and perceive that the process **[*23]** used to administer adenosine to patients during MPI is a relevant product market, which patent defendant Astellas controls in the United States. The relevant geographical market . . . is the United States of America and its territories. The patented process used to perform continuous adenosine infusion in MPI, and the unpatented product, adenosine, are recognized and perceived by providers and purchasers as two distinct products.

(Doc. # 11 at ¶¶ 13-16).

In *Gulfstream Park Racing Association v. Tampa Bay Downs, Inc., 294 F. Supp. 2d 1291, 1306-07 (M.D. Fla. 2003)*, the court explained, "In constructing a product market, an expert is to identify producers that provide customers of a defendant firm . . . with alternative sources for the defendant's product or services." This case has not reached the stage of the proceedings where expert testimony may be elicited. The Court rejects Astellas's argument that Lakeland Regional must provide the contours of the relevant markets at the complaint stage. At this stage, Lakeland Regional is not required to come forward with any evidence to prove that the allegations in its complaint are true. Here, Lakeland Regional has set forth adequate allegations **[*24]** to sustain a tying claim against Astellas, particularly with respect to the definition of plausible relevant markets and anticompetitive effects.

For the same reasons, the Court also declines to dismiss Lakeland Regional's state tying claim. State antitrust claims are generally governed by Federal ***antitrust law***, and Astellas has not asserted separate grounds for dismissal of the state law antitrust claims. "Florida ***antitrust law*** defers to federal interpretation of *Section 1* of the Sherman Antitrust Act in interpreting what conduct violates *Florida Statute Section 542.18*." *Gulfstream Park Racing, 294 F. Supp. 2d at 1306, n.38*; see also *Florida Statute Section 542.32* ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes. . . ."); *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1556 n.20 (11th Cir. 1996)*("the Florida courts held that the Florida legislature has, in effect, adopted as the law of Florida the body of anti-trust law developed by the federal courts under the Sherman Act.")(internal citation omitted).

C.Exclusive Dealing

In **[*25]** count two, Lakeland Regional asserts a claim for exclusive dealing under *Section 1* of the Sherman Act and *Section 3* of the Clayton Act. In an effort to vanquish this claim, Astellas asserts four distinct arguments. First, Astellas reasserts its argument that "Lakeland Regional has not alleged injury-in-fact, antitrust standing, or Illinois Brick standing." (Doc. # 16 at 40). However, the Court has determined that Lakeland Regional has alleged an injury-in-fact and has otherwise established standing to assert its antitrust claims. Accordingly, Astellas's first argument is unavailing.

Second, Astellas argues that Lakeland Regional's exclusive dealing count is "simply a re-packaging of its defective tying theory." Id. at 51. The Court rejects this argument because, as noted above, the Court has declined to dismiss Lakeland Regional's tying claims and does not find that such tying claims are "defective." Similarly, Astellas contends that the exclusive dealing count should be dismissed because Lakeland Regional has failed to "allege a plausible relevant market in which Adenoscan competes;" however, **[*26]** as noted above, the Court has determined that Lakeland Regional's market allegations are sufficient.

Fourth, Astellas argues that the exclusive dealing count must be dismissed because it fails the "rule of reason." As explained in Levine:

> Under the rule of reason, the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. Rule of reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification. In order to prove an anticompetitive effect on the market, the plaintiff may either prove that the defendant's behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition. In order to prove the latter, the plaintiff must define the relevant market and establish that the defendants possessed power in that market.

Levine, 72 F.3d at 1551 (internal citations omitted). In Spanish Broadcasting Systems of Florida, the Eleventh Circuit clarified that "in alleging **[*27]** the anticompetitive effect of the defendant's conduct, an antitrust plaintiff must show harm to competition rather than to competitors. That is, the anticompetitive effects are measured by their impact on the market rather than by their impact on competitors." *376 F.3d at 1072*. (internal citations omitted).

The Court is satisfied that Lakeland Regional has properly asserted its exclusive dealing claim. Among other allegations, Lakeland Regional alleged in the amended complaint:

> [A]s a result of the exclusive dealing agreement, actual and potential competitors in the adenosine market have been foreclosed from selling to the plaintiff and other of defendant's customers, which represent a majority of the purchasers for adenosine. Competition in the adenosine market has been unreasonably and dramatically reduced nationwide, and that market is controlled by defendant Astellas, which has the power to control price and exclude competition in the market for adenosine.

(Doc. # 11 at ¶ 61). Lakeland Regional also alleges, "as a result of defendant Astellas's unlawful conduct, health care costs among plaintiff LRMC's patients, within this District and nationwide, have increased unreasonably above **[*28]** what they would have been in a competitive market." Id. at ¶ 62. Nothing so far presented to the Court persuades the Court that Lakeland Regional's claim fails the rule of reason. Accordingly, the Court declines to dismiss Lakeland Regional's exclusive dealing count at this stage of the proceedings.

D. Attempt to Monopolize

"A patent gives its owner the right to grant licenses, if it so chooses, or it may ride its wave alone until the patent expires." *Schering-Plough Corp., 402 F.3d at 1067*. "What patent law does not do, however, is extend the patentee's monopoly beyond its statutory right to exclude." Id. In this case, Lakeland Regional alleges in count three that Astellas has attempted to monopolize in violation of *Section 2* of the Sherman Act, which states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or **[*29]** both said punishments, in the discretion of the court.

15 U.S.C. § 2. Likewise, in count five, Lakeland Regional alleges that Astellas has attempted to monopolize under *Florida Statute Section 542.19*, which states, "It is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state." Id.

The Eleventh Circuit has ruled that, "to establish a violation of *Section 2* for attempted monopolization, a plaintiff must show (1) an intent to bring about a monopoly and (2) a dangerous possibility of success." *Levine, 72 F.3d at 1555* (internal citation omitted). The Eleventh Circuit has further explained that "to have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Monopoly power is the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." *U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 994 (11th Cir. 1993)*.

The Court determines that Lakeland Regional's complaint **[*30]** allegations are sufficient to state a claim for attempted monopolization under the governing authorities. Lakeland Regional alleges, among other things, that: "[D]efendant Astellas charges customers, such as plaintiff LRMC, 450% more for its adenosine than customers would pay for adenosine from alternative providers. Defendant Astellas is able to control the cost for adenosine, and is able to foreclose competitors from customers for adenosine." (Doc. # 11 at ¶ 69).

Lakeland Regional also submits:

> There is a dangerous probability that defendant Astellas will successfully attain and retain monopoly power in the . . . market and submarket. This dangerous probability is demonstrated by defendant Astellas' high and sustaining market shares, by the perception in the health care community that use of defendant Astellas' process patent for administering adenosine is the medically accepted standard of care, which creates barriers to entry, and by defendant Astellas' threatening and misleading communications regarding its process patent and the alleged extension of the patent to the product, Adenoscan®.

Id. at ¶ 74.

These allegations are sufficient at this juncture to survive the Motion to Dismiss.

E.Tortious [*31] Interference with Prospective Economic Advantage

Astellas has asserted generalized and specific arguments in pursuit of the dismissal of count six, for tortious interference with a prospective economic advantage. Astellas suggests that the Court should decline to exercise supplemental jurisdiction over this state law claim. The Court; however, has an unflagging duty to address the cases before it, and it will not avoid this duty by declining to exercise jurisdiction over this count.

Astellas also maintains that Lakeland Regional has failed to properly allege two elements required to state a claim. The Florida Supreme Court has enumerated the following required elements to state such a claim: "(1) the existence of a business relationship . . . ; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994)*(alteration in original).

Specifically, Astellas asserts that Lakeland Regional has failed to sufficiently plead elements three and four. In **[*32]** the amended complaint Lakeland Regional alleges, inter alia, "Defendant Astellas' interference with contractual relations between plaintiff LRMC and generic adenosine manufacturers is unjustified. Any purported pro-competitive justification for the tie is substantially outweighed by the anticompetitive effects in the adenosine market. Defendant Astellas' conduct resulted in an economic loss to the Plaintiff." (Doc. # 11 at ¶¶ 105-06).

Astellas also asserts affirmative defenses to Lakeland Regional's tortious interference claim. Particularly, Astellas argues: "Astellas's alleged 'interference' amounts to nothing more than the lawful exercise of its patent right to protect its own business interests." (Doc. # 16 at 53). Justification or privilege to interfere with a contract is an affirmative defense to a tortious interference action. See *Abele v. Sawyer, 750 So. 2d 70, 75 (Fla. 4th DCA 1999)*. However, the mere presence of a possible affirmative defense, which has not yet been proven, does not present a basis for the dismissal of this claim.

IV.Conclusion

As adeptly stated in Schering-Plough Corp., "Although the exclusionary power of a patent may seem incongruous with the goals of ***antitrust*** **[*33]** ***law***, a delicate balance must be drawn between the two regulatory schemes." *402 F.3d at 1067*. In deciding the present Motion, the Court has attempted to strike an appropriate balance between the parties' conflicting interests. This Court has evaluated the parties' arguments and determines that dismissal of the complaint is not warranted.

Many of the arguments presented by Astellas are directed to matters outside of the four corners of the amended complaint. In passing on these arguments without delving into them, the Court has not determined that they are meritless. Rather, the Court finds that these arguments are prematurely asserted, and will be given due consideration at the appropriate stage of the proceedings if reasserted.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED:**

Astellas's Motion to Dismiss the Complaint (Doc. # 16) is **DENIED.**

DONE and **ORDERED** in Chambers in Tampa, Florida, this 25th day of July, 2011.

/s/ Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON

UNITED STATES DISTRICT JUDGE

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[CamSoft Data Sys. v. Southern Elecs. Supply, Inc.](#)

United States District Court for the Middle District of Louisiana

July 26, 2011, Decided; July 27, 2011, Filed

CIVIL ACTION NO. 09-1047-JJB

Reporter
2011 U.S. Dist. LEXIS 82263 *; 2011 WL 3204701

CAMSOFT DATA SYSTEMS, INC. versus SOUTHERN ELECTRONICS SUPPLY, INC., ET AL.

Subsequent History: Summary judgment granted by, Summary judgment denied by, Claim dismissed by *CamSoft Data Sys. v. Southern Elecs. Supply, Inc., 2012 U.S. Dist. LEXIS 59889 (M.D. La., Apr. 30, 2012)*

Prior History: *CamSoft Data Sys. v. Southern Elecs. Supply, Inc., 2011 U.S. Dist. LEXIS 72456 (M.D. La., July 5, 2011)*

Core Terms

conspiracy, unjust enrichment, allegations, plaintiff's claim, trade secret, factual allegations, cause of action, misappropriation, peremptive, employees, merits, fraudulent, antitrust claim, asserts, motion to dismiss, no determination, prescriptive, purported, misrepresentations, prescribed, omissions, fraud claim, three year, state law, one year, correctly, delictual, contends, tortious, unfair trade practice

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Judges: JAMES J. BRADY, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES J. BRADY

Opinion

RULING

This matter is before the Court on numerous motions to dismiss filed by various defendants in this matter. Defendants Active Solutions, LLC, Brian Fitzpatrick, Henry J. Burkhardt, Ignace **[*5]** A. Perrin III, and Southerns Electronics Supply, Inc. ("Southern") (collectively, the "Active-Southern Defendants") have filed a motion to dismiss (doc. 233), which plaintiff CamSoft Data Systems, Inc. ("CamSoft") has opposed (doc. 249). CIBER, Inc. ("CIBER") (doc. 234) and Mark Kurt (doc. 238) have also filed motions to dismiss, which plaintiff has opposed (doc. 251). Defendants Dell Inc. and Dell Marketing, L.P. ("Dell") have filed a motion to dismiss (doc. 239), which plaintiff has opposed (doc. 250). Defendants Steve Reneker (doc. 240), Billy Ridge (doc. 241), and Heather Smith (doc. 242) have each filed motions to dismiss, which plaintiff has opposed (doc. 250). Defendant EarthLink, Inc. ("EarthLink") has filed a motion to dismiss (doc. 243), which plaintiff has opposed (doc. 253). Defendants Donald Berryman and Bill Tolpegin ("EarthLink Employee Defendants") have filed a motion to dismiss (doc. 245), which plaintiff has opposed (doc. 253). Defendant Motorola Solutions, Inc. ("Motorola") has filed a motion to dismiss (doc. 244), which plaintiff has opposed (doc. 253). Defendant MMR Constructors, Inc. ("MMR") has also filed a motion to dismiss (doc. 246), which plaintiff has opposed **[*6]** (doc. 251).

Plaintiff has requested oral argument (doc. 281). The Active-Southern Defendants (doc. 282) and CIBER (doc. 283) have opposed plaintiff's request for oral argument. After the filing of the aforementioned motions, the court granted CamSoft's request to file another amended complaint. The amendment was limited to CamSoft's claims under Sherman Act, Robinson-Patman, RICO, and state ***antitrust law***. This ruling, therefore, does not address the merits of defendants' arguments regarding dismissal of plaintiff's Sherman Act, Robinson-Patman, RICO, or state ***antitrust law*** claims.

Rule 12(b)(6) provides for dismissal for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In reviewing the complaint, courts accept all well-pleaded facts in the complaint as true. *C.C. Port, Ltd. v. Davis-Penn Mortg. Co., 61 F.3d 288, 289 (5th Cir. 1995)*. Courts do not, however, accept as true all legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. Instead, "the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. **[*7]** That is, a plaintiff must provide sufficient factual content for the court to reasonably infer that the plaintiff is entitled to relief based upon the context of the case and the court's "judicial experience and common sense." *Id. at 1949-50*.

Courts, therefore, must first identify the conclusory allegations, which do not receive a presumption of truth, and then determine whether the remaining factual allegations plausibly give rise to an entitlement of relief. *Id. at 1950*.

Active-Southern Defendants

The Active-Southern Defendants have moved to dismiss CamSoft's Second Supplemental and Amended Complaint (doc. 205) (hereinafter "Complaint" [1]). First, the Active-Southern Defendants contend that "all delictual actions [2] have prescribed," citing the one year liberative prescriptive period applicable under Louisiana law. These defendants contend that CamSoft knew of its state law tort causes of action by January 10, 2006 and thus these claims have prescribed. However, the portions of the complaint cited by the Active-Southern Defendants do not support this argument and are mischaracterized by the defendants. Paragraphs 173, 184, and 191 show that CamSoft likely knew it had been excluded or "pushed **[*8]** aside" by the City of New Orleans and possibly others, but not necessarily the Active-Southern Defendants.

[1] Although plaintiff has filed a subsequent amended complaint (doc. 308), the amendment is limited to its Sherman, Robinson-Patman, RICO and state antitrust claims. As such, the third amended complaint (doc. 308) does not affect the outcome of this ruling.

[2] Referring to CamSoft's claims for fraud, tortious interference with business relations, breach of duty of confidential business relations, promissory estoppel, and violations of state antitrust laws.

In opposition, CamSoft asserts that its state law delictual causes of action did not accrue until September of 2009 when CamSoft asserts that it first learned of the Active-Southern Defendant's participation in the July 8, 2004 meeting and subsequent agreements with Dell and city employees. (Complaint, ¶ 86). *See* *Jordan v. Emp. Transfer Corp., 509 So.2d 420 (La. 1987)*; *Griffin v. Kinberger, 507 So.2d 821 (La. 1987)*. Accepting as true the factual allegations of the Complaint, the court presently declines to find that these delictual causes of action have prescribed.

Next, the Active-Southern Defendants seek dismissal of plaintiff's claim **[*9]** under the Louisiana Unfair Trade Practices Act (LUTPA), *La. R.S. 51:1409*, based on peremption. In opposition, CamSoft contends that its LUTPA claims involve the continuing violation doctrine and are limited in damages to one year before filing suit and thereafter. In support, CamSoft cites *Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp., 292 F.3d 471, 481-82 (5th Cir. 2002)*, for the proposition that Louisiana's one year peremptive period for unfair trade practices is subject to the continuing violation doctrine. However, this Court is also aware of *Glod v. Baker, 899 So.2d 642, 647 (La. App. 3d Cir. 2005)*, which distinguishes *Tubos* and notes that a "strong line of Louisiana jurisprudence" holds that the continuing tort doctrine does not apply to suspend a peremptive period, including the peremptive period applicable in Louisiana unfair trade practices claims. *See* *Canal Marine Supply, Inc. v. Outboard Marine Corp., 522 So.2d 1201 (La. App. 4th Cir. 1988)*. This court is persuaded by the reasoning and authorities cited in *Glod*. As such, we hold that CamSoft's LUTPA claims against the Active-Southern defendants are prescribed and should therefore be dismissed.

The Active-Southern **[*10]** Defendants also seek dismissal of plaintiff's claims for misappropriation of trade secrets. *Louisiana Revised Statute § 51:1436* provides, "[a]n action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." CamSoft alleges that Active-Southern Defendants misappropriated plaintiff's trade secrets by disclosing them to city employees and Dell at a meeting on July 8, 2004. However, CamSoft alleges that it was not aware of this action until September 2009 (Complaint, ¶ 86). Whether or not the Active-Southern Defendants can eventually produce evidence regarding when plaintiff actually knew or should have known of the misappropriation of trade secrets is not presently before the court. Accepting as true the factual allegations in the Complaint, compared with the language of *§ 51:1436*, the court declines to hold that plaintiff's misappropriation of trade secrets claim against the Active-Southern Defendants has prescribed.

Defendants also assert that plaintiff has disclosed its trade secrets to third parties with no obligation to maintain the confidentiality of the information. **[*11]** However, the court finds that plaintiff has alleged sufficient factual allegations to assert that it reasonably attempted to prevent disclosure of its trade secrets. As such, the court will not presently grant dismissal on this basis.

Defendants next contend that all claims asserted against them are time-barred under *La. R.S. § 12:1502*, which is entitled "Actions against persons who control business organizations." CamSoft alleges that CamSoft, Active, and Southern were involved in a joint venture. *Louisiana Revised Statute § 12:1502(B)* notes that the statute specifically applies to partnerships, and as defendants correctly assert, joint ventures are governed by Louisiana partnership law. *Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Auth., 867 So.2d 651, 663 (La. 2004)*. As such, the time periods of *§12:1502* are applicable to certain specified claims by CamSoft against the Active-Southern Defendants.

Subsection (C) of §12:1502 establishes a one year prescriptive period for claims including breach of fiduciary duty and gross negligence. *Subsection (D)* provides a two year prescriptive period for claims of intentional tortious misconduct, intentional breach of duty of loyalty, **[*12]** intentional unlawful distribution, and acts or omissions in bad faith or involving fraud or a knowing and intentional violation of law. *Subsections (C)* and *(D)* also establish a three year peremptive period that runs from the date of the alleged act or omission. *La. R.S. §12:1502* ("but in no event shall an action covered by the provisions of this Subsection be brought more than three years from the date of the alleged act or omission"). Because the three year peremptive period runs from the date of the alleged act or omission, the Active-Southern Defendants assert that the acts or omissions alleged against the Active-Southern

Defendants largely occurred in 2004 and 2005 and, according to the Complaint, no later than January 2006. CamSoft did not file suit until September 2009.

In opposition, CamSoft attempts to invoke the continuing tort theory, asserting that Active-Southern Defendants believed they were still participating in the complained of conspiracy in February of 2007. CamSoft asserts that the prescriptive periods should run from either February 5, 2007 (the date of involuntary termination of the alleged conspiracy) or April 13, 2009 ("the timeframe after the Active-Defendants **[*13]** last direct, concerted and fraudulent concealment of facts tending to cover up their involvement in the conspiracy"). However, the court is persuaded by a recent Louisiana appellate court decision, which addressed this matter.

> We agree . . . as to the hybrid prescriptive and peremptive nature of *La. R.S. 12:1502*. This statute is a prescriptive statute that is subject to time limitations that have peremptive attributes. Nevertheless, the time limitations contained within this statute do not allow for plaintiffs . . . to levy claims under the continuous tort doctrine.
>
> Albeit that the statute at issue is not a strictly peremptive statute, the peremptive elements of the subject liberative prescription statute still do not permit the application of a continuing tort theory. . . . The application of [the continuing tort] doctrine stands in direct opposition, however, to the specific wording of this statute, which provides in *La. R.S. 12:1502(E)* that actions brought under *La. R.S. 12:1502* are not subject to suspension or interruption, unless a suit is timely filed. The continuing tort doctrine is a suspension principle based on *contra non valentem.*

Suhren v. Gibert, 55 So.3d 941, 947 (La. App. 4th Cir. 2011).

The **[*14]** plain language of *§12:1502(E)* makes clear that the three year limitation period in *§12:1502* "shall not be subject to suspension on any grounds or interruption except by timely suit." This court adopts the reasoning set forth in *Suhren, 55 So.3d at 945-47*. Accordingly, the court finds that the three year period has expired and any state law claims asserted by CamSoft against the Active-Southern Defendants based on breach of fiduciary duty, applicable gross negligence, intentional tortious misconduct, intentional breach of duty of loyalty, intentional unlawful distribution, and acts or omissions in bad faith or involving fraud or a knowing and intentional violation of law should be dismissed. (Hereinafter, these claims are collectively referred to as "business torts based on joint venture.") The court does not find that *§12:1502* applies to bar any federal law claims nor state law claims other than those specified.

The Active-Southern Defendants also assert that plaintiff's claims should be dismissed pursuant to the *Noerr-Pennington* doctrine. However, the court presently defers ruling on the merits of the *Noerr-Pennington* assertions because we find that this matter turns on factual issues inappropriate **[*15]** for a *12(b)(6)* motion.

Defendants also contend that plaintiff has not alleged an actionable conspiracy under *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The basis for defendants' argument is that plaintiff's characterization of the purported conspiracy is "nonsensical," noting that *Twombly* "requires a complaint with enough factual information (taken as true) to suggest that an agreement was made." *550 U.S. at 556*. According to defendants, "[w]here Camsoft further alleges that the other participants in the July 8, 2004 meeting were actively conspiring against the Active-Southern Defendants," the claim for conspiracy must fail as a matter of law because "the Active-Southern Defendants could not be both perpetrators and victims of the same conspiracy." The court disagrees with defendants and finds that plaintiff has alleged sufficient facts to suggest that an agreement was made involving these defendants. That some purported co-conspirators are later alleged to have turned on the Active-Southern Defendants does not warrant dismissal of plaintiff's Complaint.

Finally, defendants contend, and CamSoft agrees, that plaintiff's unjust enrichment claim fails as a matter of law. **[*16]** As such, plaintiff's unjust enrichment claim against the Active-Southern Defendants should be dismissed.

CIBER

CIBER seeks dismissal of the allegations against it pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. CIBER contends, and CamSoft does not dispute, that plaintiff's claim arising under Louisiana's Unfair Trade Practices Act (LUTPA) is perempted. Therefore, the LUPTA claim against CIBER should be dismissed. [3]

CIBER also seeks dismissal of plaintiff's claim under Louisiana Uniform Trade Secrets Act (LUTSA). On this matter, the court agrees with CIBER that plaintiff has not alleged sufficient facts indicating that CIBER engaged in any activity to misappropriate [4] CamSoft's trade secrets, nor that CIBER was involved in a conspiracy to misappropriate CamSoft's trade secrets. In other words, CamSoft has not adequately alleged **[*17]** that CIBER either acquired its trade secret with knowledge it was acquired through improper means, or disclosed or used CamSoft's trade secret without express or implied consent. The closest the Complaint comes to making such an allegation is in paragraph 346, however this paragraph only alleges that CIBER knew or should have known of what other actors were doing, combined with the conclusory allegation that CIBER is "imported with the MOT Employees' knowledge . . . given their employment as subcontractors to Ciber." Mere knowledge does not constitute an agreement, and CIBER's actions in furtherance of a conspiracy to violate other laws does not mean that CIBER agreed to misappropriate plaintiff's trade secrets. The court is not persuaded by plaintiff's attempt to use vicarious liability to establish CIBER's liability under LUTSA. Though plaintiff has made one non-factual, conclusory allegation that MOT Employees "were working within the course and scope of their employment with Ciber," [5] plaintiff's own Complaint generally characterizes the MOT Employees and their privately held companies as independent subcontractors of CIBER. *See* Complaint, ¶¶ 299, 300, 306. Moreover, plaintiff **[*18]** has pointed to no *factual* allegations in the Complaint that would justify the conclusion that the MOT Employees and/or their privately held companies were controlled by or employed by CIBER, nor that they were anything other than independent subcontractors. As such, plaintiff's LUTSA claim against CIBER should be dismissed.

CIBER also seeks dismissal of CamSoft's fraud claim against it. CIBER correctly points to the statement in the Complaint where CamSoft "admits that no direct Ciber employee made any affirmative material misrepresentations to either MacDonald or CamSoft." (Complaint, ¶355). However, CamSoft asserts (in conclusory language) that CIBER "is vicariously liable for the MOT Employees' fraudulent misrepresentations," and that CIBER "either knew or **[*19]** should have known of CamSoft, and accordingly conspired with the MOT Employees, Active Solutions and Southern Electronics, who did in fact make delictual and fraudulent misrepresentations." *Id.* Given the court's previous determination regarding CIBER's purported vicarious liability for MOT Employees, and considering the law cited by CIBER, [6] the court finds these allegations insufficient. Regarding CIBER, CamSoft has not adequately alleged misrepresentation of a material fact, nor has it adequately alleged fraudulent intent. As such, plaintiff's claim against CIBER for fraud should be dismissed.

CIBER seeks dismissal of plaintiff's claim for unjust enrichment. Plaintiff does not dispute dismissal of its unjust enrichment claim against CIBER. As such, the unjust enrichment claim against CIBER should be dismissed.

Finally, CIBER seeks dismissal of CamSoft's conspiracy claim against it. While CIBER is correct that conspiracy is not an independent tort under Louisiana law, Louisiana law does impose liability for conspiracy to commit an underlying tort. *Aranyosi v. Delchamps, Inc., 739 So.2d 911, 917 (La. App. 1st Cir. 1999)*. As correctly noted by CIBER, **[*20]** it is the underlying tort that constitutes the actionable element of the claim. *Id.* Plaintiff has alleged sufficient factual allegations to constitute a conspiracy involving CIBER. While the court will not recognize an

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[3] Plaintiff requests that the dismissal be without prejudice in the event discovery produces additional relevant facts. However, plaintiff has already been given the opportunity to amend its Complaint in light of discovery. As such, the dismissal of the LUTPA claims—along with the other claims dismissed in this ruling—is *with prejudice.*

[4] *See* La. R.S. 51:1431(2) for the definition of misappropriation under LUTSA.

[5] Complaint, ¶ 355. While plaintiff's Complaint does allege that Kurt eventually came to be employed by CIBER, this employment did not begin, according to the Complaint, until May 2007.

[6] *See* Opposition, doc. 234-5, page 38.

independent tort of conspiracy under Louisiana law, insofar as plaintiff has other remaining causes of actions related to the purported conspiracy, its conspiracy allegations are not dismissed.

Mark Kurt

First, Kurt seeks dismissal of plaintiff's Complaint for violations of *Rule 8*. Kurt contends that the Complaint is "overly verbose and confusing" (doc. 238-1, p. 5). While Kurt cites examples where courts have chosen to dismiss complaints under *Rule 8*, the cases also indicate that a district court is vested with much discretion in the matter. This court finds that plaintiff's Complaint should not be dismissed under *Rule 8*.

Kurt also seeks dismissal of the claims against him pursuant to qualified immunity based on his role as Chief Technology Officer of the MOT for the City of New Orleans. Kurt cites *La. R.S. 9:2798.1(B)*, which states: "Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to **[*21]** exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." CamSoft cites also to *subsection C* of the same statute, which provides, in part, that *subsection B* immunity does not apply to "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct." The court presently declines to reach the merits of Kurt's immunity argument because resolution would require factual determinations more appropriate for summary judgment or trial.

Kurt also seeks dismissal of plaintiff's claims against him pursuant to *Rule 12(b)(6)*. According to Kurt's motion, Kurt is "improperly lumped in" with his alleged co-conspirators and the Complaint does not detail the role Kurt played in plaintiff's causes of action. However, a review of plaintiff's Complaint reveals otherwise. Paragraphs 218, 222, 231, 235, 280, and 300, among others, detail the role specifically played by Kurt in the overall conspiracy and causes of action (doc. 205). These allegations are in addition to other allegations throughout the Complaint in which plaintiff discusses actions by groups **[*22]** of defendants collectively.

Kurt also seeks dismissal of plaintiff's claim under LUTPA. The court agrees with Kurt that CamSoft's claims has prescribed under the one year time period of *La. R.S. 51:1409(E)*. As such, CamSoft's state law claim against Kurt for unfair trade practices under LUTPA should be dismissed.

Kurt seeks dismissal of plaintiff's claim under LUTSA as well. However, Kurt's primary arguments in this regard are more appropriate for summary judgment or trial than the present motion. Kurt claims plaintiff's purported trade secret was revealed in the public record and thus cannot support a LUTSA claim. However, for purposes of the present motion, the court assumes the factual allegations of the Complaint are true and finds that plaintiff has properly asserted a claim under LUTSA. Plaintiff has alleged facts to indicate that Kurt was involved in the conspiracy to misappropriate plaintiff's wireless network designs. Whether plaintiff can eventually prevail on the merits of its LUTSA claim is not presently before the court.

Kurt seeks dismissal of plaintiff's claims against Kurt for declaration of ownership interest under Louisiana law, breach of fiduciary duty, breach of confidential **[*23]** relations, promissory estoppel, breach of contract, and unjust enrichment. Plaintiff concedes that it has no claim against Kurt for these causes of action. With the exception of the unjust enrichment claim, plaintiff correctly asserts that its Complaint does not attempt to state causes of action for the aforementioned claims against Kurt. The court agrees with both plaintiff and defendant that CamSoft's claim against Kurt for unjust enrichment should be dismissed.

Kurt seeks dismissal of plaintiff's fraud claim against him. CamSoft's opposition in no way responds to Kurt's assertion that the Complaint fails to comply with *Rule 9(b)*'s heightened pleading requirements for fraud. As such, the court finds that CamSoft's state law fraud claim against Kurt should be dismissed.

Kurt also seeks dismissal of plaintiff's claim for tortious interference with business relations. Kurt claims that the allegations against Kurt do not constitute a cognizable claim for tortious interference with business relations. In its opposition, CamSoft focuses on the roles played by other actors. However, CamSoft does not sufficiently address why its allegations are sufficient to state a cognizable claim for relief **[*24]** against Kurt for tortious interference with business relations. As such, the court finds this claim against Kurt should be dismissed.

Kurt contends that CamSoft has failed to state a claim for conspiracy under Louisiana law. The court has already addressed that conspiracy is not an independent tort under Louisiana law and that the actionable element in a conspiracy claim is not the conspiracy itself but the underlying tort. In this case, as we have cited to numerous allegations in the Complaint related to Kurt and his involvement in a conspiracy to engage in purported violations of law, the court finds that plaintiff has adequately alleged Kurt was involved in a civil conspiracy under Louisiana law. Plaintiff cannot recover for an independent state law tort based solely on this conspiracy, but as plaintiff has other causes of action remaining which serve as an underlying tort, the conspiracy claim should not presently be dismissed.

Finally, Kurt contends that CamSoft fails to state a claim for fraudulent concealment. However, plaintiff's Complaint does not attempt to state a cause of action for fraudulent concealment, but only seeks to raise the issue of fraudulent concealment as a defense **[*25]** against prescription. The court thus finds it unnecessary at present to address Kurt's arguments in this regard.

Dell, Steve Reneker, Billy Ridge and Heather Smith

Dell seeks dismissal of all claims against it and its named employees. Reneker, Ridge, and Smith ("Dell employees") each contend that the state law claims for LUTPA violations, fraud, unjust enrichment, and conspiracy should be dismissed because the allegations are based on actions committed within the scope of their employment with Dell. These defendants correctly assert that under Louisiana law, an employee will not be held personally liable for the delictual or contractual obligations of his or her employer unless the employee acts outside the scope of his employment. *See* *Korson v. Independence Mall I, Ltd., 595 So.2d 1174, 1177-78 (La. App. 5th Cir. 1992)*. Accepting as true the factual allegations of the Complaint, CamSoft has failed to state a claim against the Dell employees on these causes of action. As such, the LUTPA, fraud, unjust enrichment, and conspiracy claims against the Dell employees should be dismissed.

Dell contends that plaintiff's LUTPA claim should be dismissed because the claim is perempted. This ruling **[*26]** has already addressed the peremptive nature of the one year LUTPA period. Dell also argues that CamSoft's LUTPA claim against Dell is perempted even if the continuing violation doctrine applies because, based on the factual allegations of the Complaint, Dell's "continual unlawful acts" stopped in January 2007. The court is persuaded by Dell's analysis in this regard and finds that CamSoft's claim against Dell for violations of LUTPA should be dismissed.

Dell also seeks dismissal of CamSoft's LUTSA claim. To establish a claim under LUTSA, CamSoft must allege: (1) the existence of a trade secret; (2) a misappropriation of the trade secret, and (3) actual loss caused by the misappropriation. Some of Dell's LUTSA arguments—such as whether plaintiff destroyed its trade secret by voluntarily disclosing it to third parties—are more appropriate for a later motion for summary judgment or a trial on the merits. For purposes of this motion, the court assumes the factual allegations of the Complaint are true. The court finds that the Complaint adequately states a claim for relief under LUTSA; plaintiff has alleged the existence of its purported trade secret and has alleged misappropriation of the **[*27]** trade secret as well as actual loss. Specifically, regarding Dell's arguments related to misappropriation, the court finds that paragraph 345 of the Complaint, combined with the other factual allegations, alleges sufficient facts to state a claim for misappropriation of trade secrets. This ruling has already addressed why plaintiff's LUTSA claim has not necessarily prescribed. As such, CamSoft's LUTSA claim against Dell should not be dismissed.

Dell also seeks dismissal of CamSoft's state law fraud claim. To state a claim for fraud, CamSoft must allege that Dell made a misrepresentation of material fact to CamSoft with the intent to deceive and that CamSoft justifiably relied on the misrepresentation and suffered injury as a result. *Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1068 (5th Cir. 1993)*. CamSoft concedes that it has "alleged no facts suggesting that any representative of Dell made any false statements to CamSoft" (doc. 250, p. 49). Instead, CamSoft relies on the effects of conspiracy law to hold Dell liable for the fraudulent conduct of other defendants.

Separating the factual allegations, which are entitled to a presumption of truth, from the legal conclusions which **[*28]** are not entitled to such a presumption, reveals that plaintiff has not properly alleged that Dell engaged in a conspiracy to defraud CamSoft. Paragraph 354 of the Complaint provides one illustration of the conclusory nature of CamSoft's allegations regarding Dell's involvement with the purported conspiracy to defraud ("CamSoft alleges that Dell either knew or should have known of CamSoft, and accordingly conspired with the MOT Employees, Active Solutions and Southern Electronics, who did in fact make delictual and fraudulent misrepresentations, for the purpose of benefitting all Dell Alliance Members"). In short, the factual allegations related to Dell's involvement in the conspiracy to defraud do not state claim to relief that is plausible on its face. For instance, plaintiff appears to propose that the agreement forming the basis of the conspiracy was entered into at the July 8, 2004 meeting. However, the factual allegations later in the Complaint directly contradict that Dell reached such an agreement in 2004 or at all. *See, e.g.*, Complaint, ¶¶ 129, 138, 210. As such, the court finds that plaintiff's fraud claim against Dell should be dismissed.

Dell also seeks dismissal of plaintiff's **[*29]** claim for unjust enrichment. CamSoft does not oppose Dell's request in this regard. Accordingly, plaintiff's unjust enrichment claim against Dell should be dismissed. Finally, Dell seeks dismissal of CamSoft's conspiracy claim. However, CamSoft readily admits that it does not seek to allege an independent cause of action for conspiracy. As such, there is no need to dismiss the conspiracy "claim" because it does not represent a separate cause of action.

EarthLink and EarthLink Employee Defendants

EarthLink and the EarthLink Employee defendants (collectively, "EarthLink defendants") seek dismissal of plaintiff's claims for LUTPA, unjust enrichment, and conspiracy. Plaintiff concedes in its opposition that the court should dismiss the LUTPA, fraud, and unjust enrichment claims against these defendants. Accordingly, the court finds that these claims against the EarthLink defendants should be dismissed. CamSoft asserts that it has not stated a separate cause of action for conspiracy. As such, there is no need to dismiss plaintiff's conspiracy "claim" against these defendants as there is no independent cause of action to dismiss. Insofar as plaintiff's conspiracy allegations relate to its **[*30]** antitrust claims, we have already stated that this ruling does not address the parties' arguments regarding plaintiff's antitrust claims.

Motorola

Motorola has also filed a motion to dismiss. Plaintiff concedes that its fraud, LUTPA, and unjust enrichment claims against Motorola should be dismissed. As such, the court finds that these claims against Motorola should be dismissed.

MMR

MMR also seeks dismissal of plaintiff's claims against it. CamSoft concedes in its opposition that its claims against MMR are "solely" based on "the legal theory of successor liability" (doc. 251, p. 47). Plaintiff also makes clear that it "does not allege that MMR Constructors or its employees played any independent role in the alleged activities" described in the Complaint (*id.*, pp. 47-48). MMR correctly points out, though, that CamSoft has failed to allege facts sufficient to establish successor liability of MMR. In its opposition, CamSoft cites to no specific allegations in the Complaint; plaintiff simply asserts that it has established successor liability based on the fraud or continuation exceptions to the general rule of non-liability. [7] However, plaintiff has not alleged sufficient facts in its Complaint **[*31]** to indicate MMR was formed to defraud creditors of NetMethods. Plaintiff's only option, then, is to have alleged facts sufficient to establish that MMR was a continuation of NetMethods. CamSoft's allegations fall short in this regard as well. Plaintiff has not alleged that MMR purchased all the assets of NetMethods, [8] nor that the owners of the selling company had a substantial or almost identical interest in the purchasing corporation. [9] The closest the Complaint comes to making such allegations is its assertion that MMR "acquired" [10] NetMethods; however, the Complaint also alleges that St. Pierre, the former owner of NetMethods, was merely a "contractor" [11] of MMR.

Based solely on the factual allegations contained in the Complaint, CamSoft has failed to state a claim against MMR for violation of LUTPA, violation of LUTSA, fraud, conspiracy, or unjust enrichment, as CamSoft has failed to allege facts sufficient to establish successor liability. As such, these claims against MMR should be dismissed.

Accordingly, the Active-Southern Defendants' motion (doc. 233) is GRANTED INSOFAR as it seeks dismissal of plaintiff's claims against the Active-Southern Defendants for violation of LUTPA, state law business torts based on joint venture, [12] and unjust enrichment, and is DENIED in all other respects, except that the court makes no determination on the merits of the parties' arguments regarding RICO and antitrust claims. CIBER's motion (doc. 234) is GRANTED INSOFAR as it seeks dismissal of plaintiff's claims against CIBER for violation of LUTPA, violation of LUTSA, fraud, and unjust enrichment, **[*33]** and is DENIED in all other respects, except that the court makes no determination on the merits of the parties' arguments regarding RICO and antitrust claims. Mark Kurt's motion (doc. 238) is GRANTED INSOFAR as it seeks dismissal of plaintiff's claims against Kurt for violation of LUTPA, state law fraud, tortious interference with business relations, and unjust enrichment, and is DENIED in all other respects, except that the court makes no determination on the merits of the parties' arguments regarding RICO and antitrust claims. The Dell employees' motions (docs. 240, 241, 242) are GRANTED INSOFAR as they seek dismissal of plaintiff's claims for LUTPA violations, fraud, unjust enrichment, and conspiracy; however the court makes no determination regarding the merits of the parties' arguments regarding antitrust and RICO claims.

Dell's motion (doc. 239) is GRANTED INSOFAR as it seeks dismissal of plaintiff's LUTPA, fraud, and unjust enrichment claims, and DENIED in all other respects, except that the court makes no determination on the merits of the parties' arguments regarding RICO and antitrust claims. The EarthLink defendants' motions (docs. 243, 245) are GRANTED IN PART, and plaintiff's claims against these defendants for fraud, LUTPA, and unjust enrichment are DISMISSED; however, the court makes no determination on the merits of the parties' arguments regarding RICO and antitrust claims. Motorola's motion (doc. 244) is GRANTED IN PART, and plaintiff's claims against Motorola for fraud, LUTPA, and unjust enrichment are DISMISSED; however, the court makes no determination on the merits of the parties' arguments regarding RICO and antitrust claims. MMR's motion (doc. 246) is GRANTED INSOFAR as it seeks dismissal of plaintiff's claims against MMR for violation of LUTPA, violation of LUTSA, fraud,

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[7] 8 GLENN MORRIS & WENDELL HOMES, LA CIVIL LAW TREATISE § 37.02 (2010). Plaintiff has also not alleged facts sufficient to invoke either of the other noted exceptions—based on assumption of liabilities or "de facto" merger/consolidation.

[8] *See* *Pichon v. Asbestos Defendants, 52 So.3d 240, 244 (La. App. 4th Cir. 2010)*, citing *Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 94 S. Ct. 414, 38 L. Ed. 2d 388 (1973)*. *See also*, *LeBlanc v. Adams, 510 So.2d 678, 682 (La. App. 4th Cir. 1987)* (continuing business operations of company does not constitute an acquiring **[*32]** of assets and liabilities).

[9] *See Nat'l Sur. Corp. v. Pope Park, Inc.*, 240 LA. 63, 121 So.2d 240, 243 (La. 1960).

[10] *See, e.g.*, Complaint, ¶¶ 257, 326, 356. See also, Complaint, ¶ 259, which alleges that MMR merely assumed a "part of NetMethods business."

[11] Complaint, ¶¶ 254, 356.

[12] As noted earlier in our ruling, the phrase "business torts based on joint venture" refers specifically to state law claims asserted by CamSoft against the Active-Southern Defendants based on breach of fiduciary duty, applicable gross negligence, intentional tortious misconduct, intentional breach of duty of loyalty, intentional unlawful distribution, and acts **[*34]** or omissions in bad faith or involving fraud or a knowing and intentional violation of law.

conspiracy, and unjust enrichment; however, the court makes no determination on the merits of the parties' arguments regarding **[*35]** RICO and antitrust claims. Plaintiff's request for oral argument (doc. 281) is HEREBY DENIED.

Signed in Baton Rouge, Louisiana, on July 26, 2011.

/s/ James J. Brady

JUDGE JAMES J. BRADY

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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TradeComet.com LLC v. Google, Inc.

United States Court of Appeals for the Second Circuit

July 26, 2011, Decided

No. 10-911-cv

Reporter

435 Fed. Appx. 31 *; 2011 U.S. App. LEXIS 15425 **; 2011-2 Trade Cas. (CCH) P77,538

TRADECOMET.COM LLC, Plaintiff-Appellant, -v.- GOOGLE, INC., Defendant-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: *TradeComet.com, LLC v. Google, Inc., 693 F. Supp. 2d 370, 2010 U.S. Dist. LEXIS 20154 (S.D.N.Y., 2010)*

Core Terms

forum selection clause, district court, arbitration clause, retroactive, evidentiary hearing, overreaching, arbitration, parties, argues, antitrust claim, public policy, Programs, courts, terms

LexisNexis® Headnotes

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

Contracts Law > Contract Interpretation > General Overview

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

An appellate court's review of a district court's dismissal of a complaint pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(3)* is de novo. An appellate court must view all the facts in the light most favorable to the non-moving party. An appellate court's review of a district court's interpretation of a contract is also de novo.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > Presumptions

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN2[] **Contract Conditions & Provisions, Forum Selection Clauses**

Under applicable precedent, a determination of whether to dismiss a claim based on a forum selection clause involves a four-part analysis. First, a court must determine whether the clause was reasonably communicated to the party resisting enforcement. Second, it must determine whether the language of the clause is mandatory, as opposed to merely permissive. Third, the court must examine whether the claims and parties involved in the suit are subject to the forum selection clause. If these three requirements are met, the forum selection clause is presumptively enforceable. The final step of the analysis requires a court to find whether the party resisting enforcement of the clause has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or overreaching.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

HN3[] **Pleading & Practice, Motion Practice**

A party waives his right to an evidentiary hearing on an issue by failing to request it until after the court rules against him.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **Contract Conditions & Provisions, Forum Selection Clauses**

In determining whether to dismiss a claim based on a forum selection clause, a district court must view all the facts in the light most favorable to the party claiming that venue is proper, while no disputed fact should be resolved against that party until it has had an opportunity to be heard. Accordingly, a disputed fact may be resolved in a manner adverse to that party only after an evidentiary hearing.

Contracts Law > Contract Interpretation > General Overview

HN5[] **Contracts Law, Contract Interpretation**

Under California law, the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning. *Cal. Civ. Code § 1644*. Courts must apply the standard statutory rules of contract interpretation in order to ascertain the mutual intention of the parties as it existed at the time the original agreements were entered into. *Cal. Civ. Code §§ 1636*, *1637*).

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN6[] Contract Conditions & Provisions, Arbitration Clauses

Courts construing arbitration clauses refuse to subject claims to arbitration where the claims arise from or relate to conduct occurring prior to the effective date of the agreement, and where the clause is limited to claims under "this agreement." In contrast, courts find claims arising from or related to conduct occurring before the effective date of an arbitration clause to be within the scope of a clause that is not limited to claims arising under the agreement itself. In such circumstances, courts allow arbitration agreements to apply retroactively to transactions that occurred prior to the execution of the agreement.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Evidence > Burdens of Proof > Allocation

HN7[] Contract Conditions & Provisions, Forum Selection Clauses

California courts place a substantial burden on a plaintiff seeking to defeat a forum selection clause, requiring it to demonstrate enforcement of the clause would be unreasonable under the circumstances of the case.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Evidence > Burdens of Proof > Allocation

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN8[] Contract Conditions & Provisions, Forum Selection Clauses

A party challenging a forum selection clause bears the burden of showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching. This exception to enforcement is interpreted narrowly, and rebuts the presumption of enforceability where, among other things, the incorporation of the clause into the agreement was the result of fraud or overreaching, or if the clause contravenes a strong public policy of the forum state.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

HN9[] Contract Conditions & Provisions, Forum Selection Clauses

In Carnival Cruise Lines, Inc. v. Shute, the U.S. Supreme Court held that a forum selection clause contained in a form passage contract was enforceable, despite the fact that the terms of the form passage contract were not subject to negotiation, and that individuals had no bargaining power with the vendor. The Supreme Court rejected the argument that a non-negotiated forum selection clause was never enforceable simply because it was not subject to bargaining. The Supreme Court found that a reasonable forum selection clause was permissible where there was a special interest in limiting the fora in which a party potentially could be subject to suit.

Antitrust & Trade Law > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > Defenses > Public Policy Violations

HN10[] **Antitrust & Trade Law**

Both the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court have made clear that the mere existence of a federal antitrust claim does not void a forum selection clause as against public policy.

Counsel: **[**1]** CHARLES F. RULE (Jonathan Kanter, Joseph J. Bial, and Daniel J. Howley, on the brief), Cadwalader, Wickersham & Taft LLP, Washington, D.C., for Plaintiff-Appellant.

JONATHAN M. JACOBSON (Sara Ciarelli Walsh, on the brief), Wilson Sonsini Goodrich & Rosati, P.C., New York, NY, for Defendant-Appellee.

Judges: PRESENT: RALPH K. WINTER, ROBERT D. SACK, DEBRA ANN LIVINGSTON, Circuit Judges.

Opinion

[*32] SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, and DECREED that the judgment of the district court be AFFIRMED.

Plaintiff-Appellant TradeComet.com LLC ("TradeComet") appeals from a judgment entered pursuant to an opinion and order of the United States District Court for the Southern District of New York (Stein, *J.*) dismissing its complaint. TradeComet brought this action against Defendant-Appellee Google, Inc. ("Google") for alleged violations of the Sherman Act, *15 U.S.C. §§ 1*, *2*. On March 31, 2009, Google moved to dismiss TradeComet's complaint for lack of subject matter jurisdiction and improper venue, pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(3)*. The district court granted Google's motion on March 5, 2010. TradeComet timely appealed to this Court on March 15, 2010. In an opinion filed **[**2]** contemporaneously with this order, we hold that a defendant may seek enforcement of a forum selection clause specifying a federal forum other than the one in which suit is pending through a *Rule 12(b)* motion to dismiss. *See* *TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 2011 U.S. App. LEXIS 15311, No. 10-911-cv (2d Cir. Jan. 26, 2011)*. Here, we address whether the district court properly applied our four-part test for determining whether to dismiss a claim based on a forum selection clause. *See* *TradeComet.com, LLC v. Google, Inc., 693 F. Supp. 2d 370 (S.D.N.Y. 2010)*. We assume the parties' familiarity with the underlying facts and procedural history.

On appeal, TradeComet argues that the district court erred by: 1) failing to conduct an evidentiary hearing on whether TradeComet was reasonably informed of the August 2006 agreement's forum selection clause; 2) applying the August 2006 forum selection clause to claims arising from conduct that occurred prior to Google's publication and TradeComet's alleged acceptance of the August 2006 agreement; and 3) declining to find the forum selection **[*33]** clause unreasonable and/or unconscionable. ***HN1***[] Our review of a district court's dismissal of a complaint pursuant to Rules 12(b)(1) **[**3]** and 12(b)(3) is *de novo. See* Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007); Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). We must view all the facts in the light most favorable to the non-moving party. Phillips, 494 F.3d at 384. Our review of a district court's interpretation of a contract is also *de novo. Id.* Both parties agree that California state law controls the interpretation of the Google agreements and that federal law applies as to the enforceability of the forum selection clause.

HN2[] Under our precedent, a determination of "whether to dismiss a claim based on a forum selection clause involves a four-part analysis." Id. at 383. First, a court must determine whether the clause was "reasonably communicated to the party resisting enforcement." *Id.* Second, it must determine whether the language of the clause is mandatory, as opposed to merely permissive. *Id.* Third, the court must examine "whether the claims and parties involved in the suit are subject to the forum selection clause." *Id.* If these three requirements are met, the forum selection clause is presumptively enforceable. *Id.* The final step of the analysis requires a court to find whether the **[**4]** party resisting enforcement of the clause "has rebutted the presumption of enforceability by making a sufficiently strong showing that 'enforcement would be unreasonable or unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.'" Id. at 383-84 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)).

A. The District Court's Factual Findings

TradeComet argues that the district court committed a legal error by resolving a disputed issue of fact against it without an evidentiary hearing. TradeComet attests that it disputed whether the terms of the August 2006 agreement had been reasonably communicated to it. TradeComet, however, has forfeited this argument by failing to seek an evidentiary hearing before the district court. *See* United States ex rel. Drake v. Norden Sys., Inc., 375 F.3d 248, 256 (2d Cir. 2004) (noting that **HN3**[] the plaintiff waived his right to an evidentiary hearing by failing to request it until after the court ruled against him). We conclude, moreover, that TradeComet failed to raise any material issue of fact as to Google's communication of the terms of the August 2006 agreement that required an evidentiary hearing.

HN4[] In determining whether **[**5]** to dismiss a claim based on a forum selection clause, the district court must view all the facts in the light most favorable to the party claiming that venue is proper, while "no disputed fact should be resolved against that party until it has had an opportunity to be heard." *New Moon Shipping Co., Ltd. v. MAN B&W Diesel AG, 121 F.3d 24, 29 (2d Cir. 1997)*. Accordingly, a "*disputed* fact may be resolved in a manner adverse to that party only after an evidentiary hearing." *Id.* (emphasis added). Here, TradeComet points to information provided by Google showing that, in August 2006, a user agreed to the August 2006 agreement for at least ten of TradeComet's AdWords accounts within a span of three seconds. Google, however, did not dispute this fact; rather, it explained that TradeComet had an umbrella account that allowed one user to accept the August 2006 terms and conditions at once for all accounts included under the umbrella (here, the ten accounts that indicated assent). TradeComet did not contest this explanation below, and does not dispute it on appeal. Further, as the district court **[*34]** found, TradeComet did not submit any evidence to the contrary. TradeComet's belated demand for an **[**6]** evidentiary hearing is therefore misplaced; the district court did not err in concluding that TradeComet accepted the terms of the August 2006 agreement.

B. "Retroactive" Application of the August 2006 Forum Selection Clause

TradeComet next argues that the forum selection clause contained in its April 2005 and May 2006 agreements with Google should apply in the instant case, and that TradeComet's antitrust claims do not fall within the scope of that clause. It further argues that the district court erred by "retroactively" applying the August 2006 agreement to Google's alleged anticompetitive conduct, which began prior to the effective date of this agreement. We find TradeComet's contentions to be without merit.

Both parties agree that California law controls in interpreting the agreements, including the scope of their respective forum selection clauses. ***HN5***[] Under California law, "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." *Badie v. Bank of Am., 67 Cal. App. 4th 779, 797, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998)* (quoting *Cal. Civ. Code § 1644*). We must apply "the standard statutory rules of contract interpretation in **[**7]** order to ascertain the mutual intention of the parties as it existed at the time the original account agreements were entered into." *Id. at 798* (citing *Cal. Civ. Code §§ 1636*, *1637*).

TradeComet cites few cases directly addressing the "retroactive" application of a forum selection clause. We are therefore guided here by analogous cases discussing the retroactive application of arbitration clauses. *See AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 158 (2d Cir. 1984)* (quoting *Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-19, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974))* ("[A]n agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause . . . ."). ***HN6***[] Courts construing arbitration clauses have refused to subject claims to arbitration where the claims arise from or relate to conduct occurring prior to the effective date of the agreement, *and* where the clause is limited to claims under "*this* Agreement." *See, e.g., Thomas v. Carnival Corp., 573 F.3d 1113, 1117-19 (11th Cir. 2009)* (refusing to apply arbitration clause "retroactively" where the clause applied to "[a]ny and all disputes arising out of or in connection with *this Agreement*" (emphasis added)); *Wachovia Bank N.A. v. Schmidt, 445 F.3d 762, 767-69 (4th Cir. 2006)* **[**8]** (same); *Sec. Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 372 (6th Cir. 1999)* (finding arbitration clause inapplicable to disputes under previous agreements where clause applied to all claims "arising out of or relating to the [p]roducts furnished *pursuant to this Agreement* or acts or omissions . . . under *this Agreement*" (emphasis added)).

In contrast, courts have found claims arising from or related to conduct occurring before the effective date of an arbitration clause to be *within* the scope of a clause that "is not limited to claims arising under the agreement itself." *In re Verisign, Inc. Derivative Litig., 531 F. Supp. 2d 1173, 1224 (N.D. Cal. 2007)*. In such circumstances, "courts have allowed arbitration agreements to apply retroactively to transactions that occurred prior to the execution of the agreement." *Id.* The court in *In re Verisign* rejected a retroactivity argument similar to TradeComet's, on the ground that the arbitration provision was "extremely broad, and cover[ed] not just **[*35]** services provided under the Agreement, but also 'any other services provided by'" the defendant. *Id.; see also In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 407 (S.D.N.Y. 2003)* **[**9]** (finding arbitration clause applicable to claims arising prior to execution of the agreement when it covered claims beyond those under the agreement); *cf. Al-Thani v. Wells Fargo & Co., No. C 08-1745, 2009 U.S. Dist. LEXIS 2732, at *16-*17 (N.D. Cal. Jan. 7, 2009)* (finding arbitration clause applicable to claims arising prior to execution of agreement, and observing that a clause not limited to claims under the agreement "place[s] no retroactive obligation on Plaintiff" and merely imposes a "*prospective* obligation to arbitrate, rather than litigate").

TradeComet nevertheless contends that California courts are hostile towards such retroactive application of forum selection clauses. TradeComet's cited case law, however, does not support this view. In *Bancomer S.A. v. Superior Court of Los Angeles County,* for example, the court refused to apply the forum selection clause because the party against whom enforcement was sought was never a party to the agreement containing the clause. *44 Cal. App. 4th 1450, 1459-61, 52 Cal. Rptr. 2d 435 (Cal. App. Ct. 1996)*. In *Allez Medical Applications v. Allez Spine, LLC, No. G037314, 2007 Cal. App. Unpub. LEXIS 2660, 2007 WL 927905 (Cal App. Ct. Mar. 29, 2007)* (unpublished), the arbitration clause at issue **[**10]** did not take effect until after the plaintiff filed suit. *See id. at *1*. Neither of these cases, fairly read, support TradeComet's broad proposition. In fact, ***HN7***[] California courts "have placed a substantial burden on a plaintiff seeking to defeat a [forum selection] clause, requiring it to demonstrate enforcement of the clause would be unreasonable under the circumstances of the case." *CQL Orig. Prods., Inc. v. Nat'l Hockey League Players' Ass'n, 39 Cal. App. 4th 1347, 1354, 46 Cal. Rptr. 2d 412 (Cal. Ct. App. 1995)*.

Here, the plain language of the August 2006 agreement applies to claims "arising out of or relating to this agreement *or the Google Program(s).*" August 2006 Adwords Agreement ¶ 9 (emphasis added). "Google Programs," in turn, is defined to include the AdWords program at issue in this case. *See id.* ¶ Introduction. The forum selection clause is therefore not limited to claims arising from or related to the August 2006 agreement itself; it broadly includes any claim arising under or related to the "Google Programs," irrespective of whether it arose prior to or subsequent to the acceptance of the August 2006 agreement. The district court expressly found TradeComet's claims to "relate to" the "Google **[**11]** Programs," a finding TradeComet does not dispute on appeal. In addition, the April 2005 and May 2006 agreements expressly permitted Google to modify the forum selection clause to that contained in the August 2006 agreement, which – through TradeComet's acceptance – "*supersede[d] and replace[d]* any other agreements, terms and conditions applicable to the subject matter hereof." August 2006 AdWords Agreement ¶ 9 (emphasis added). The district court therefore did not impermissibly give "retroactive" effect to the August 2006 forum selection clause.

C. Unreasonableness and Unconscionability

TradeComet finally argues that enforcement of the forum selection clause would be unconscionable and against public policy. ***HN8***[] TradeComet bears the burden of showing that "enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Phillips, 494 F.3d at 384* (quoting *Bremen, 407 U.S. at 15*). **[*36]** This exception to enforcement "is interpreted narrowly," and rebuts the presumption of enforceability where, *inter alia,* the incorporation of the clause "into the agreement was the result of fraud or overreaching," or "if the clause[] contravene[s] a strong public **[**12]** policy of the forum state." *S.K.I. Beer Corp. v. Baltika Brewery, 612 F.3d 705, 711 (2d Cir. 2010)* (quoting *Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993)*). For the following reasons, TradeComet's arguments fail.

1. *Overreaching*

TradeComet first contends that the forum selection clause is unenforceable because it was the result of overreaching on Google's part. ***HN9***[] In *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)*, the Supreme Court held that a forum selection clause contained in a form passage contract was enforceable, *id. at 595*, despite the fact that the terms of the form passage contract were not subject to negotiation, and that individuals had no bargaining power with the vendor, *id. at 593*. The Court rejected the argument that a non-negotiated forum selection clause was never enforceable simply because it was not subject to bargaining. *Id.* The Court found that a reasonable forum selection clause was permissible where there was a "special interest in limiting the fora in which [a party] potentially could be subject to suit." *Id.* Such a "special interest" was present where there were transactions with individuals from many locales, and where a mishap could subject **[**13]** the vendor to litigation in several different fora. *See id.*

Similar concerns warrant finding the forum selection clause reasonable in this case. TradeComet itself attests that Google is "the essential medium for search advertising to *over a million advertisers,* ranging from the largest companies in the world to the smallest, unsophisticated operations." Appellant's Br. 5 (emphasis added). Each of these advertisers, meanwhile, agrees to the terms of the agreement at issue in this case in connection with its participation in programs like AdWords. Google unquestionably holds a "special interest" in making sure that it is not subject to suit in numerous different fora for claims arising from its agreements with over a million advertisers.

TradeComet nevertheless argues that Google's ability to "modify . . . [the] Terms at any time without liability" constitutes overreaching where it expands the scope of an agreement into areas not contemplated by the original agreement. Specifically, TradeComet contends that Google's modification of its forum selection clause to include claims arising from or relating to "the Google Programs" was such an unreasonable expansion. TradeComet's own cited precedent, **[**14]** however, expressly distinguishes modifications to an agreement that were "clearly related to a matter addressed in the original contract." *Badie, 67 Cal. App. 4th at 792*. Here, a forum selection clause specifying Santa Clara County, California as the locus for litigation was present in all three of the relevant agreements. The modification to the forum selection clause was therefore "clearly related" to a matter addressed by the agreements – namely, where cases between the parties were to be tried. Furthermore, TradeComet points to no evidence suggesting that Google's purpose in modifying the forum selection clause was to discourage plaintiffs from bringing suit. *See Shute, 499 U.S. at 595* (noting the Supreme Court's concern over forum selection clauses that serve as "means of discouraging [plaintiffs] from pursuing legitimate **[*37]** claims"). TradeComet's claims of overreaching are therefore without merit.

2. Public Policy

Relying on our prior decision in *American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)*, TradeComet next contends that Google's forum selection clause is contrary to public policy favoring enforcement of antitrust laws by private parties. This **[**15]** argument fails. The Supreme Court limited *American Safety Equipment Corp. in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*, where it held that arbitration clauses subjecting federal antitrust claims to arbitration were enforceable. *Id. at 640*. In doing so, the Court found that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id. at 632*. In accordance with *Mitsubishi Motors,* we have also found enforceable an arbitration clause applicable to federal antitrust claims. *See JLM Indus. Inc. v. Stolt-Nielsen S.A., 387 F.3d 163, 181 (2d Cir. 2004)*. We held in *Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982)*, moreover, that a forum selection clause was applicable to the plaintiff's federal antitrust claims. *See id. at 720*. In short, ***HN10***[] both this Circuit and the Supreme Court have made clear that the mere existence of a federal antitrust claim does not void a forum selection clause as against public policy. TradeComet thus fails to meet its burden of demonstrating that the forum selection clause was unreasonable **[**16]** or unconscionable.

D. Conclusion

We have considered the parties' remaining arguments and find them to be moot or without merit. For the foregoing reasons, and for the reasons stated in an opinion filed contemporaneously with this order, the judgment of the district court is AFFIRMED.

End of Document

[Invista S.A.R.L. v. Frontech, Inc.](#)

United States District Court for the Southern District of Texas, Houston Division

July 29, 2011, Decided; July 29, 2011, Filed

Civil Action No. H-10-2100

Reporter
2011 U.S. Dist. LEXIS 171400 *

INVISTA S.À. R.L., INVISTA TECHNOLOGIES S.À. R.L., and INVISTA NORTH AMERICA S.À. R.L., Plaintiffs, v. FRONTECH, INC., MING D. WAN, and DOES 1-10, Defendants.

Prior History: *Invista S.A.R.L. v. Frontech, Inc., 2011 U.S. Dist. LEXIS 171396 (S.D. Tex., Mar. 4, 2011)*

Core Terms

disparagement, sham, technology, lawsuit, licensees, license, press release, summary judgment, counterclaim, pleadings, immunity, Lanham Act, allegations, false designation, matter of law, judicial-proceedings, Reactor, trade secret, misappropriation, nonmoving, summary judgment motion, common law, antitrust, fails, judicial proceedings, false advertising, proprietary, baseless, no evidence, genuine

Counsel: **[*1]** For Invista S.A R.L, Plaintiff: Dion Alaniz, EOG Resources, Inc., San Antonio, TX USA; Kendall Johan Burr, McDowell Hetherington LLP, Houston, TX USA; David T McDowell, McDowell Hetherington LLP, Houston, TX USA.

For Invista Technologies S.A R.L., Invista North America S.A R.L., Plaintiffs: David T McDowell, McDowell Hetherington LLP, Houston, TX USA.

For Frontech, Inc., Ming D. Wan, also known as Frank Wan, Defendants: Maurice L Bresenhan, Jr, LEAD ATTORNEY, Zukowski Bresenhan et al, Houston, TX USA.

For Does 1-10, Defendant: Frontech, Inc.; Counter Claimant: Maurice L Bresenhan, Jr, LEAD ATTORNEY, Zukowski Bresenhan et al, Houston, TX USA.

For Ming D. Wan, Counter Claimant: Maurice L Bresenhan, Jr, LEAD ATTORNEY, Zukowski Bresenhan et al, Houston, TX USA.

For Frontech, Inc., Ming D. Wan, Counter Defendants: Maurice L Bresenhan, Jr, LEAD ATTORNEY, Zukowski Bresenhan et al, Houston, TX USA.

Judges: DAVID HITTNER, United States District Judge.

Opinion by: DAVID HITTNER

Opinion

ORDER

Pending before the Court are Plaintiffs INVISTA S.a r.l., INVISTA Technologies S.a. r.l., and INVISTA North America S.a. r.l.'s Motion for Summary Judgment Dismissing Defendants' Counterclaims (Document No. 99) and Defendants Frontech, Inc. **[*2]** and Ming D. Wan's Motion for Complete Summary Judgment (Document No. 113). Having considered the motions, submissions, and applicable law, the Court determines Plaintiffs' motion should be granted and Defendants' motion should be granted in part and denied in part.

I. BACKGROUND

This is an alleged misappropriation of trade secrets case. Plaintiffs INVISTA S.a r.l., INVISTA Technologies S.a. r.l., and INVISTA North America S.a. r.l. ("Plaintiffs") produce and license a high-pressure hydrogenation process used to manufacture Butanediol ("BDO"), an industrial solvent and intermediate compound used in the production of various plastics and polymers. Defendant Frontech, Inc. ("Frontech") competes with Plaintiffs, primarily in China, to license BDO technology. Defendant Ming D. Wan ("Mr. Wan") is Frontech's owner, president, and sole employee.[1]

On June 15, 2010, Plaintiffs brought suit alleging Defendants misappropriated an engineering diagram that reflects Plaintiffs' detailed design and proprietary trade secret technology of a hydrogenation reactor used in a key step of the BDO manufacturing process. Plaintiffs further allege that Defendants licensed the technology as Defendants' own to customers **[*3]** in China. Plaintiffs' complaint assert eight separate causes of action: (1) false designation of origin under the Lanham Act; (2) false advertising under the Lanham Act; (3) theft under the Texas Theft Liability Act; (4) misappropriation of trade secrets under Texas common law; (5) conversion under Texas common law; (6) misappropriation under Texas common law; (7) unfair competition under Texas common law; (8) civil conspiracy under Texas common law; and unjust enrichment under Texas common law. Defendants assert two counterclaims for business disparagement and sham litigation. Plaintiffs move for summary judgement on Defendants' counterclaims and Defendants cross move for summary judgement on all Plaintiffs' claims.

II. STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The court must view the evidence in a light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist., 113 F.3d 528, 533 (5th Cir. 1997)*. Initially, the movant bears the burden of presenting the basis for the motion and the elements of the causes of action upon which the nonmovant will be unable to establish a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The burden then shifts **[*4]** to the nonmovant to come forward with specific facts showing there is a genuine issue for trial. *See also* *Fed. R. Civ. P. 56(c)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 956 (5th Cir. 1993)* (citation omitted).

But the nonmoving party's bare allegations, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Moreover, conclusory allegations unsupported by specific facts will not prevent an award of summary judgment; the plaintiff cannot rest on his allegations to get to a jury without any significant probative evidence tending to support the complaint. *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio, 40 F.3d 698, 713 (5th Cir. 1994)*. If a reasonable jury could not return a verdict for the nonmoving party, then summary judgment is appropriate. *Liberty Lobby, Inc., 477 U.S. at 248*. The nonmovant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, or "only a scintilla of evidence." *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007)* (quoting *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994))*. Furthermore, it is not the function of the court to search the record on the nonmovant's behalf for evidence that may raise a fact issue. *Topalian v. Ehrman, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992)*.

[1] For the purposes of this Order, Frontech and Mr. Wan will be referred to collectively as "Defendants."

III. LAW & ANALYSIS

A. Plaintiffs' Motion for Summary Judgment

Plaintiffs move to dismiss Defendants' counterclaims for business **[*5]** disparagement and sham litigation. Plaintiffs contend that Defendants' business disparagement counterclaim fails as a matter of law because Defendants cannot prove one or more of the essential requirements for relief. Plaintiffs contend that Defendants' sham litigation counterclaim fails as a matter of law because the claim is not a substantive cause of action, rather, it is a doctrine, which may be invoked to defeat an immunity defense to antitrust liability. Additionally, Plaintiffs contend that even assuming Defendants can assert sham litigation as a substantive cause of action, Defendants cannot prove one or more of the essential requirements for relief. Defendants respond and contend that Plaintiffs' motion for summary judgment should be denied because there are genuine fact issues to be resolved.

1. Business Disparagement

As an initial matter, the Court notes that it is unable to identify from Defendants' pleadings the nature of the alleged disparaging statements they complain of. Plaintiffs' motion for summary judgment, however, provides the Court with guidance. Plaintiffs contend that Mr. Wan provided deposition testimony as Frontech's corporate representative wherein he claimed **[*6]** the business disparagement counterclaim was premised on three categories of written and oral statements: (1) the pleadings filed in the instant lawsuit; (2) a press release relating to the instant lawsuit; and (3) statements allegedly made by one of Plaintiffs' agents to Defendants' potential licensees.[2]

Plaintiffs contend Defendants have no evidence to support the required elements of their business disparagement counterclaim for any of the three alleged statements. Specifically, Plaintiffs contend that the lawsuit pleadings and the press release are privileged communications, which precludes a business disparagement claim. Additionally, Plaintiffs contend Defendants have no evidence of any oral or written statements made by any of Plaintiffs' agents to potential Frontech clients. Defendants contend the alleged disparaging statements are not privileged and that there is sufficient evidence to raise a fact issue as its business disparagement claim.

To prove business disparagement, Defendants must establish that: (1) Plaintiffs published false and disparaging information about Defendants; (2) with malice; (3) without privilege; (4) which resulted in special damages to Defendants. *Forbes, Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 170 (Tex. 2003)*; *see* ***[*7]*** *also* *LED Sign Co., LLC v. Hwee, Civil Action No. H-08-1463, 2008 U.S. Dist. LEXIS 97851, 2008 WL 5114957, at *9 (S.D. Tex. Dec. 3, 2008)* (Miller, J.) (citing *Forbes*). A business disparagement claim is similar to a defamation claim. They differ in that defamation serves to protect the reputation of the injured party, while business disparagement serves to protect the economic interest of the injured party. *Forbes, 124 S.W.3d at 170*.

Under Texas law, an absolute privilege or immunity is extended to "[a]ny communication, oral or written, uttered or published in the due course of a judicial proceeding." *Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166 S.W.2d 909, 912 (Tex. 1942)*; *see also* *James v. Brown, 637 S.W.2d 914, 916 (Tex. 1982)* ("Communications in the due course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made."); *Intel Corp. v. Intel-Logistics, Inc., No. Civ.A. H-05-2255, 2006 U.S. Dist. LEXIS 34361, 2006 WL 1517510, at *1 (S.D. Tex. May 30, 2006)* (Rosenthal, J.) (citing *Reagan* and *James*). "This privilege extends to any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case." *James, 637 S.W.2d at 916-17*; *see also* *Daystar Residential, Inc. v. Collmer, 176 S.W.3d 24, 27 (Tex. App.—Houston [1st Dist.] 2004, pet denied)* (citing *James*). The privilege also extends to "statements made in contemplation of and preliminary to judicial proceedings."

[2] Plaintiffs' Exhibit No. A, 150:22-151:16; 151:17-18 (Document No. 99).

Daystar, 176 S.W.3d at 27 (citing Watson v. Kaminski, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no pet.)).

"To be privileged, the communication must bear some relationship **[*8]** to pending or proposed litigation and must further the attorney's representation." *Id.*; *but see* Bell v. Lee, 49 S.W.3d 8, 11 (Tex. App.—San Antonio 2001, no pet.) (finding that the "further the attorney's representation" requirement is "nowhere mentioned by the [Texas] [S]upreme [C]ourt in *James*, and holding that the "privilege attaches if the statement has some relationship to a contemplated proceeding, regardless of whether it in fact furthers the representation."). Whether an alleged disparaging communication is related to a proposed or existing judicial proceeding is a question of law. Daystar, 176 S.W.3d at 28. When deciding the issue, "the court must consider the entire communication in its context, and must extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding." *Id.* (citing Russell v. Clark, 620 S.W.2d 865, 870 (Tex. App.—Dallas 1981, writ ref'd n.r.e.). Additionally, the court should resolve all doubt in favor of the relevancy of the statement. *Id.*

i. Plaintiffs' pleadings

The first category of disparaging statements identified by Mr. Wan comes from the pleadings filed in the instant lawsuit. To the extent that Defendants allege Plaintiffs' pleadings are disparaging, the Court finds the pleadings are covered by the judicial-proceedings privilege. *See* James, 637 S.W.2d at 916-17; Reagan, 166 S.W.2d at 912. Accordingly, Defendants' business **[*9]** disparagement counterclaim fails as a matter of law on this category of alleged disparagement.

ii. Plaintiffs' press release

The second category of disparaging statements identified by Mr. Wan comes from Plaintiffs' press release relating to the instant lawsuit. On June 16, 2010, the day after filing suit, Plaintiffs issued a press release in the United States and in China with the heading, "BDO Licensor Frontech Accused of Unauthorized use of INVISTA Trade Secrets."[3] Defendants contend that by June 24, 2011, the press release had been picked up by more than 180 websites, including three Chinese websites, and had been viewed over 550 times.[4] Defendants contend that as a result of the press release, they lost a bid to license their BDO technology to Guodian Younglight Energy & Chemicals Group Company, Ltd ("Younglight"). Finally, Defendants contend that since the press release, they have been unable to secure a single BDO-licensing project in China.

Plaintiffs contend the press release is covered by the judicial-proceedings **[*10]** privilege because it merely repeats assertions made by Plaintiffs in this litigation. Plaintiffs' press release reads in full as follows:

> **BDO licensor Frontech accused of unauthorized use of INVISTA trade secrets**
> Houston, Texas - June 16, 2010 - INVISTA filed a suit yesterday against Houston-based Frontech Inc. for misappropriation of trade secrets, theft, false advertising and unfair competition.
> The trade secrets at issue involve INVISTA's proprietary process for manufacturing butanediol (BDO), a chemical intermediate with applications including automobile parts, adhesives, personal care products and spandex.
> INVISTA produces and licenses BDO globally, utilizing its proprietary, high-pressure hydrogenation process. Frontech competes with INVISTA, primarily in China, to license BDO technology.

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[3] INVISTA, http://www.invista.com/en/news/pr_frontech_bdo_dispute.html .

[4] The three Chinese websites include:

(1) http://www.echinachem.com/CN/News/1006/20106171446079940.shtml ;

(2) http://www.polymer.cn/polymernews/2010-6-22/201062295325662.htm ; and

(3) http://www.gluenet.cn/news/3202.html .

> According to the complaint, INVISTA recently discovered that Frontech has been offering INVISTA's proprietary processes to potential licensees in China, falsely representing INVISTA's unique process as its own. INVISTA recently received additional evidence including an engineering design diagram used by Frontech, which was virtually identical to INVISTA's proprietary diagram for the same process. **[*11]**
> "INVISTA is a company known for its world-class technology and continuous innovation," said Bob Francois, president of INVISTA Specialty Materials. "We take great care to protect our licensees' investment in our valuable technology and will not tolerate theft or misuse of our intellectual property."
> INVISTA and Frontech are currently competing for several Chinese BDO technology projects, and the bidding on some of these projects closes very soon. The lawsuit, filed in U.S. District Court for the Southern District of Texas, seeks damages and declaratory and injunctive relief to halt Frontech's misconduct.
> INVISTA has been licensing its leading technologies in chemical intermediates and polymers in China since 1990. The total investment of INVISTA's Chinese licensees has exceeded RMB 32 billion.

Defendants contend, however, that even assuming the privilege attaches to a communication, the privilege is not absolute. Defendants cite *Knox v. Taylor* for the proposition that the privilege "cannot be enlarged into a license to go about in the community and make false and slanderous charges against his court adversary and escape liability for damages caused by such charges on the ground that he **[*12]** had made similar charges in his court pleadings." *Knox v. Taylor, 992 S.W.2d 40, 52 (Tex. App.—Houston [14th Dist.] 1999, no pet)*. Defendants argue that the press release was orchestrated as part of a smear campaign intended to disparage Defendants' business. In support of this theory, Defendants point to an e-mail sent by James Ma ("Mr. Ma"),[5] Plaintiffs' alleged agent, to Plaintiffs one month prior to the filing of this lawsuit. Defendants argue the Ma E-mail reveals Plaintiffs' plan to disseminate false information about Defendants. The Ma E-mail states in part:

> I suggest that we disperse the information informally, that some company had gained access to INVISTA's proprietary technology illegally and licensed in Chan and INVISTA had gathered certain evidence and is in preparation of issuing lawsuit against this company both in China and U.S.A.
> . . . .
> This might have some effect on some enterprise who may want to use Frontech technology—especially SOE. I hope INVISTA legal can give some proposals and recommendations.[6]

Based on the Ma E-mail, Defendants argue that Plaintiffs did exactly what *Knox* prevents by claiming a license to go about in the community and make false and slanderous charges against Defendants and escape liability for damages caused by that conduct. **[*13]** However, Defendants' reliance on *Knox* is misplaced for two reasons.

First, *Knox* does not actually stand for the quoted proposition Defendants suggest. Rather, the quoted language comes from *De Mankowski v. Ship Channel Dev. Co., 300 S.W. 118, 122 (Tex. Civ. App.—Galveston 1927, no writ)*.[7] The *Knox* court cites the quoted language, not as support for its holding, but as part of its observation of *Levingston Shipbuilding Co. v. Inland West Corp., 688 S.W.2d 192 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.)*, a case that relied on *De Mankowski* in reaching its decision that the judicial-proceedings privilege was waived.[8] The

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[5] Mr. Ma is president of J&F International Development Corporation, an independent consulting firm hired by Plaintiffs to investigate the alleged misappropriation of Plaintiffs' trade-secret information.

[6] Defendants' Exhibit No. G (Document No. 104).

[7] In *De Mankowski*, the plaintiff sued defendant for, among other things, cancellation of a contract. Defendant countersued for slander. After a trial on the merits, a jury rendered a verdict against plaintiffs on the cancellation of contract claim and in favor of defendant on the slander counterclaim. The Galveston Court of Civil Appeals affirmed the jury's award in favor of the defendant stating that while "the statements contained in [the plaintiffs] petition . . . are absolutely privileged and the filing by [the plaintiff] of such petition cannot be made the basis of a cause of action for libel or slander [regardless of] how false and malicious such statements may be . . . [the defendant's] claim for damages [was] not based upon the bringing of the suit by [the plaintiff], nor upon the false statements contained in his petition, but upon [the plaintiffs's] slanderous statements" made to other persons prior to an subsequent to the filing of the lawsuit. *De Mankowski, 300 S.W. at 122*.

Knox court went on to note the El Paso Court of Appeals' criticism of *Levingston*, which argued that *Levingston* mistakenly relied on *De Mabnkowski. See Hill v. Herald-Post Pub. Co., 877 S.W.2d 774, 783 (Tex. App.—El Paso 1994, writ granted)*, *aff'd in part, rev'd in part on other grounds*, *891 S.W.2d 638 (Tex. 1994)*. In particular, the El Paso Court of Appeals observed that

> It was clear in *De Mankowski* that the defamation suit was not based on the appellant's pleadings in the prior suit but rather on appellant's slanderous statements made to various persons both prior to and subsequent to the filing of the suit. *De Mankowski, 300 S.W. at 121-22*. It appeared in *Levingston Shipbuilding* that the primary motive of the appellant in ordering copies of the suit delivered to the media was to obtain extensive publication with the intention of eliminating competition by harming the reputation of its competitor. *688 S.W.2d at 196*. Although these facts **[*14]** seem to justify the affirmance of the jury verdict, the holding has no support in the case law and is a deviation from the general rule of absolute privilege. The harm resulting to the defamed party by delivering a copy of the suit or motion in a pending proceeding to the news media could demonstratively be no greater than it would be if the news media reporters got a tip from someone or found the pleadings on their own. For these reasons, we decline to follow the holding in *Levingston Shipbuilding* and instead, hold that under the facts of this case, the mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in a waiver of the absolute privilege.

Id.

The second reason Defendants' reliance on *Knox* is misplaced is that *Knox* is factually distinguishable from the present case. In *Knox*, Eagle Insurance Company had previously sued Stacy Taylor. John Knox, Taylor's business competitor, anonymously sent the pleadings of the Eagle lawsuit to one of Taylor's business partners and to other associates in Taylor's field of business. In addition to the pleadings, **[*15]** Knox also authored and sent a three-page memorandum, which contained defamatory statements about Taylor. Consequently, Taylor sued Knox for defamation and tortious interference. After a trial on the merits, the jury returned a verdict in favor of Taylor. On appeal, Houston's Fourteenth Court of Appeals found that the judicial privilege was inapplicable because Knox was not a party to the Eagle lawsuit. *Knox, 992 S.W.2d at 53*. Additionally, the court found that Knox did more than merely send a copy of the Eagle pleadings, he also distributed a three-page memorandum, which the court found contained defamatory statements that went beyond any statements made in the accompanying legal pleadings. *Id.*

Here, Plaintiffs filed their lawsuit and then issued a press release the next day. The press release contains a basic description of the allegations contained in Plaintiffs' complaint. Based on the contents of the press release, the Court determines the press release is related to the lawsuit and is therefore covered by the judicial-proceedings privilege. *Daystar, 176 S.W.3d at 28* ("[A] press release advising the media that a lawsuit has been filed, including a basic description of the allegations, does not amount to publication outside of **[*16]** the judicial proceedings resulting in a waiver of the absolute privilege." (citing *Dallas Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 238-40 (Tex. App.—Dallas 2000, pet. denied))*). Any alleged malice in which the press release was issued is of no consequence. *See James, 637 S.W.2d at 916*. Accordingly, because Defendants cannot overcome the element of privilege, their counterclaim for business disparagement as the result of Plaintiffs' press release fails as a matter of law.

iii. Oral statements made to Defendants' potential licensees

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[8] In *Levingston*, the plaintiff sued the defendant, a competitor, alleging the defendant had disclosed trade secrets. After filing the lawsuit, the plaintiff instructed one of its employees and the attorneys on the case to give a copy of the lawsuit to the media, which resulted in extensive publication and harm to the defendant's reputation. The defendant then countersued for defamation. A jury found in favor of the defendant on its defamation counterclaim. The Beaumont Court of Appeals affirmed finding that the plaintiff's lawsuit was privileged when filed. However, the court went on to cite *De Mankowski* and observed that because the jury believed the plaintiff accomplished its purpose of using the lawsuit to eliminate competition, the plaintiff necessarily "stepped out of the umbrella of privilege." *Levingston, 688 S.W.2d at 196-97*.

The third category of disparaging statements identified by Mr. Wan are the statements Mr. Ma allegedly made to Defendants' potential licensees. According to Mr. Wan's deposition, Mr. Ma told Defendants' potential licensees in China that if they used Defendants' BDO technology, Plaintiffs would sue them.[9] Plaintiffs contend that Defendants have no evidence that Plaintiffs or Mr. Ma orally made disparaging statements about Defendants. In support thereof, Plaintiffs point to Mr. Wan's deposition testimony. The following are excerpts of the relevant questions and answers related to this third category of alleged disparagement:

Q. Okay. So you claim that Invista disparaged FronTech by placing the ownership of the technology - -
A. At issue, yeah.

Q. - - at issue and by telling potential **[*17]** clients - - clients of potential clients that if they used FronTech technology, Invista would sue them?
A. Yes.
Q. Okay. Who from Invista told clients and potential clients that if they used FronTech technology, Invista would sue them?
A. I don't know exact people. They tell from Invista people, but I do know they have - - they have an agent, he act very aggressively against FronTech and said so many bad words about FronTech an threaten the client. He's Invista's agent in China market for license of BDO technology.
. . . .
Q. Did you say that this agent had written your clients or potential clients?
A. Threaten.
. . . .
Q. Orally or in writing?
A. I didn't see a writing but orally. That's client tell me. They didn't show me something.
Q. Did the agent - - have you - - have you - - who is this agent?
A. The company name is called J&F International Development Corporation something.
. . . .
Q. Who from J&F do you believe has made statements regarding FronTech?
A. The president of J&F, Mr. Ma.
. . . .
Q. And have you yourself seen or heard Mr. Ma make any statements regarding FronTech?
A. No.
Q. Have you seen or heard anyone from Invista make a disparaging statement regarding FronTech?
. . . .

A. Face to **[*18]** face?
Q. Yes.
A. No.
Q. Regarding Mr. Ma, who told you that Mr. Ma was saying anything regarding FronTech?
A. The Younglight project people [alleged potential licensee], the Shaanhua people [alleged potential licensee], the Markor people [alleged potential licensee].
Q. Who at Markor talked to Mr. Ma regarding FronTech?
A. I don't know he talking with Mr. Ma or he heard from Mr. Ma, but he told me.
Q. My question to you, though, and I want to make sure I understand your answer. I want to know specifically who at Markor spoke to Mr. Ma regarding FronTech, do you know?
A. I don't know.
Q. Okay. Who at Shaanhua spoke to Mr. Ma regarding FronTech?
A. I don't know exact people because they are in meeting. There's a bunch of people.
Q. Who at Younglight spoke to Mr. Ma regarding FronTech?
A. I don't know.

[9] Plaintiffs' Exhibit A, 126:12-127:16 (Document No. 99).

> Q. So you don't have personal knowledge of any disparaging statement made by Mr. Ma regarding FronTech correct? . . . You're not aware of any specific statement made by Mr. Ma to a particular person regarding FronTech, correct?
> A. Not a particular person, yes.
> Q. Okay. And who at Younglight has Invista spoken to regarding FronTech?
> A. I don't know.
>
> Q. Who at Shaanhua has Invista spoke to regarding FronTech? **[*19]**
> A. I don't know.
> Q. Who at Markor has Invista spoken to regarding - - FronTech?
> A. I don't know.
> Q. Who at Jianfeng has Invista spoke to regarding - -
> A. I don't't' know.
> Q. - - or regarding FronTech? You don't't' know?
> A. I don't know.
> Q. Who at Xinjing, X-I-N-J-E-N?
> . . . .
> A. I don't know.[10]

According to Mr. Wan's deposition testimony, Mr. Wan was unable to identify any individuals associated with the potential licensee companies that purportedly heard Plaintiffs or Mr. Ma make disparaging remarks about Defendants. Additionally, Mr. Wan was unable to identify the words or nature of the disparaging statements that were allegedly made. In response to Plaintiffs motion for summary judgment, Defendants offer no additional evidence of oral statements made to Defendants potential licensees by either Plaintiffs or Mr. Ma. Therefore, because Defendants present no evidence of any disparaging statements orally made to potential licensees, their counterclaim for business disparagement on this third category of alleged disparaging statements fails as a matter of law.

2. Sham Litigation

According to Defendants' counterclaim, Plaintiffs have impermissibly resorted to "sham litigation" in order to hinder Defendants **[*20]** as a competitor in the licensing of BDO manufacturing technology. Specifically, Defendants contend that Plaintiffs' lawsuit is objectively baseless and further attempts to interfere with Defendants' business by using the government process of litigation as an anticompetitive weapon.

Plaintiffs move for summary judgment and contend that Defendants' sham litigation counterclaim fails as a matter of law because it is not a substantive cause of action, rather, it is an doctrine, which may be invoked to defeat an immunity defense to an underlying antitrust claim. Alternatively, Plaintiffs contend that even assuming Defendants can assert sham litigation as a substantive cause of action, Defendants have no evidence to support one or more of the essential requirements for relief. In response, Defendants explain that in the event the Court finds the judicial-proceedings privilege acts as a bar to its business disparagement claim, then Defendants invoke the sham litigation doctrine. Defendants contend this doctrine strips away Plaintiffs' judicial-proceedings privilege.

i. Use of the sham litigation doctrine

The Court's research indicates that sham litigation is indeed a doctrine, which was developed **[*21]** in the context of *First Amendment* petitioning and ***antitrust law***. The *First Amendment to the United States Constitution* guarantees the right to petition the courts for a redress of grievances. *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. Under what has been termed the *Noerr-Pennington*

[10] Plaintiff's Exhibit A, 126:9-130:8 (Document No. 99).

immunity, "the right to petition the courts for a redress of grievances is generally immune from antitrust liability unless the petitioning activity is a 'sham.'" *Bryant v. Military Dep't of Miss., 597 F.3d 678, 690 (5th Cir. 2010)* (citing *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* and *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961))*; *see also Bill Johnson's Restaurant v. NLRB, 461 U.S. 731, 743 (1983)* ("Baseless litigation is not immunized by the *First Amendment* right to petition."). Thus, sham litigation is an exception to *Noerr-Pennington* immunity.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, the United States Supreme Court outlined a two-part test for determining whether petitioning activity is a sham. *508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611*. First, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id. at 60*. And second, "only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation" to determine "whether the baseless lawsuit concealed 'an attempt to interfere *directly* with the business relationships of a competitor,' through the 'use [of] the governmental process—as opposed to the *outcome* of that process—as an **[*22]** anticompetitive weapon.'" *Id. at 60-61* (internal citations omitted). Based on this test, the party asserting the sham litigation exception to *Noerr-Pennington* immunity bears the burden of disproving the challenged lawsuit's legal viability before subjective intent will be considered. *Id. at 61*.

An example of how the the sham litigation exception may be asserted is as follows: A plaintiff files a lawsuit against a defendant for trademark infringement. The defendant countersues claiming the plaintiff's lawsuit violates antitrust laws for which the defendant has sustained damages. The plaintiff-defendant asserts *Noerr-Pennington* immunity as an affirmative defense to any potential antitrust liability. The defendant-plaintiff asserts sham litigation as an exception to the plaintiff-defendant's claim to *Noerr-Pennington* immunity. At trial, the defendant-plaintiff bears the burden of demonstrating both the objective and the subjective component of the sham litigation exception. *Id. at 61*. Assuming the defendant-plaintiff can prove plaintiff-defendant's lawsuit is a sham, then the plaintiff-defendant would be deprived of immunity, and the defendant-plaintiff must move forward with proving its underlying antitrust claims. **[*23]** *Id. at 61* ("Poof of a sham merely deprives the defendant[-plaintiff] of immunity; it does not relieve the plaintiff[-defendant] of the obligation to establish all other elements of his claim.").

ii. Application of sham litigation exception to this case

Although the sham litigation exception is generally applied in the context of antitrust suits, it has been extended in other contexts. *Bryant, 597 F.3d at 692*. But even in the nonantitrust context, courts still discuss sham litigation as an exception to *Noerr-Pennington* immunity. Here, Defendants have countersued Plaintiffs for business disparagement, a nonantitrust suit. In defense, Plaintiffs have asserted the judicial-proceedings privilege, not *Noerr-Pennington* immunity, as a means of disproving one of the required elements for business disparagement. Defendants' argument that the sham litigation exception strips away Plaintiffs' judicial-proceedings privilege is unprevailing. Defendants have cited no cases, and the Court has found none, that address the application of the sham litigation exception to the judicial-proceedings privilege. Thus, the Court finds the sham litigation exception is inapplicable to the present case.

Even assuming a sham litigation exception **[*24]** to the judicial-proceedings privilege exists, the Court finds that Defendants have failed to satisfy the first prong of the sham litigation test—whether Plaintiffs' lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *See Professional Real Estate Investors*, 508 U.S. at 60. As the party moving for summary judgment, Plaintiffs have argued that Defendants are unable to offer any evidence that Plaintiffs' lawsuit is objectively baseless. Plaintiffs have presented the Court with persuasive argument and supporting evidence that when Plaintiffs filed this lawsuit, they reasonably believed that Defendants had included in its licensing packages to Chinese licensees, a copy of an engineering drawing containing a high-pressure hydrogenation reactor. The reactor drawing Defendants submitted to their licensees ("Frontech Reactor Copy") evidences a detailed design of a reactor used in Plaintiffs' BDO manufacturing process. According to Plaintiffs the Frontech Reactor Copy exhibits extraordinary similarity to the reactor drawing owned by Plaintiffs, which Plaintiffs contend they procured from a design firm during the developmental stages of Plaintiffs' proprietary technology. **[*25]**

As the nonmoving party, and the party with the burden of proof at trial, Defendants must bring forth competent evidence demonstrating a genuine issue of material fact for trial. In support of their sham litigation counterclaim, Defendants rely on the Ma E-mail, which Defendants contend outlines Plaintiffs' intent to file a lawsuit as part of a larger plan to engage in a smear campaign and gain a competitive advantage over Defendants in China. Even if taken as true, this evidence only goes to Plaintiffs' subjective intent, and the two-tiered test for sham litigation first requires Defendants to disprove the legal viability of Plaintiffs' lawsuit before Plaintiffs' subjective intent will be considered. *See* *id. at 61*. Defendants have presented no competent evidence in their summary judgment response that demonstrates, objectively, whether Plaintiffs' lawsuit is baseless in the sense that no reasonable litigant could realistically expect success on the merits. Therefore, the Court finds that Plaintiffs are entitled to summary judgment on Defendants' counterclaim for sham litigation.

B. Defendants' Motion for Summary Judgment

Plaintiffs claims against Defendants include federal claims under the Lanham **[*26]** Act for false designation of origin and false advertising and state claims under the n Texas Theft Liability Act and under Texas common law for misappropriation of trade secrets, conversion, misappropriation, unfair competition, civil conspiracy, and unjust enrichment. Defendants move for summary judgment and contend that Plaintiffs' causes of action fail as a matter of law. Plaintiffs oppose summary judgment.

1. Plaintiffs' Lanham Act claims

"'The typical § 43(a) Lanham Act claim is brought by a plaintiff who is in competition with the defendant, and charges the defendant with using a mark—a brand name, a word, 'a slogan, a symbol, a combination of words and symbols, an ornamental feature, a distinctive shape, or something else intended to remind the consumer of the brand'—so similar to that of the plaintiff's that the public may be confused as to the source of the good or service." *Advanced Res. Int'l, Inc. v. Tri-Star Petroleum Co., 4 F.3d 327, 334 (4th Cir. 1993)* (quoting *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 604, 609 (7th Cir. 1986)* and listing example cases brought under *§ 43(a)*). Although trademark protection is at the core of the Lanham Act, *§ 43(a)* of the Act, codified at *15 U.S.C § 1125(a)*, extends to nontrademark scenarios. *Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23,27-28, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003)*. These scenarios include false designation of origin, *15 U.S.C. § 1125(a)(1)(A)*; and false advertisement, *15 U.S.C. § 1125(a)(1)(B)*, both of which Plaintiffs assert against Defendants. **[*27]**

a. False designation of origin

Section 1125(a)(1)(A) creates a civil cause of action for false designation of origin made in connection with goods or services. *Id.* *§ 1125(a)(1)(A)*. This cause of action arises in a "reverse passing off' scenario, which occurs when a "producer misrepresents someone else's goods or services as his own."[11] *Dastar, 539 U.S. at 28 n.1*. The "origin" of a good or service is the "producer of the tangible goods [or services] that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods [or services]." *Id. at 37*. Thus, the goods or services that are examined under a reverse-passing-off claim for false designation of origin are those of the defendant. *See id.*

Plaintiffs' false designation of origin claim alleges that Defendants have made false and misleading statements of fact regarding the origin of Defendants' BDO technology and regarding the origin of the Frontech Reactor Copy, in

[11] Contrasted with "passing off," which occurs when "a producer misrepresents his own goods or services as someone else's." *Dastar, 539 U.S. at 38 n.1*.

connection with bids seeking to license the BDO technology and in subsequent license packages provided to licensees. Defendants contend that the BDO technology at issue is merely a process for creating BDO, and therefore, it is not a protectable "good" under the Lanham Act. The Court agrees. **[*28]** *See, e.g., INVISTA S.a.r.l. v. E.I. Du Pont De Nemours & Co., et al., No. 08 Cv. 7270(BSJ), 2008 U.S. Dist. LEXIS 94009, 2008 WL 4865208, at *3 (S.D.N.Y. Nov. 3, 2008)* (Jones, J.) (dismissing INVISTA's Lanham Act claim because the defendant's alleged misrepresentations related to a technological process rather that any "goods or services" within the meaning of Section 43(a)); *see also Hans-Jurgen Laube & Oxidwerk HJL AG v. KM Europa Metal AG, No. 96 Cv 8147(PKL), 1998 U.S. Dist. LEXIS 3921, 1998 WL 148427, at *2 (S.D.N.Y. Mar. 27, 1998)* (Leisure, J.) ("[N]either a patent nor a process for creating a product constitute 'goods' under Section 43(a) of the Lanham Act.").

Even assuming, however, that the BDO technology at issue is a good, or even more, that Defendants' licensing of that technology constitutes a services, as Plaintiffs argue, Plaintiffs misunderstand the application of the Lanham Act. To state a claim for reverse passing off, Plaintiffs must allege that the actual goods or services that Defendants provided to its licensees were in fact produced or performed by Plaintiffs. *Tao of Sys Integration, Inc. v. Analytical Servs. & Materials, Inc., 299 F. Supp. 2d 565, 572 (E.D. Va. 2004)* (Smith, J.). Plaintiffs' allegations and summary judgment evidence provide no basis for suspecting that Defendants' services, if any, were actually performed by Plaintiffs. Additionally, Plaintiffs' allegations and summary judgment evidence provide no basis for suspecting that Defendants' goods—presumably Defendants' **[*29]** BDO technology or the Frontech Reactor Copy—were actually produced by Plaintiffs and sold by Defendants. At best, Plaintiffs allege that Defendants' licensing bids and licensing packages incorporated technological ideas or concepts that belonged to Plaintiffs. This is precisely the sort of allegation that the Supreme Court has rejected for a reverse-passing-off claim. *See Dastar, 539 U.S. at 37* (stating that the term "origin" as used in § 43(a) of the Lanham Act refers to the "producer of the tangible goods [or services] that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods [or services]. To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do."). Accordingly, Plaintiffs false designation of origin claim fails as a matter of law.

b. False advertising

Section 1125(a)(1)(B) provides a civil cause of action against any person who, "in commercial adverting or promotion," misrepresents the "the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities." *15 U.S.C. § 1125(a)(1)(B)*. Plaintiffs' false advertising claim alleges that Defendants have made false and misleading **[*30]** statements of fact regarding the *origin* of Defendants' BDO technology and regarding the *origin* of the Frontech Reactor Copy, in connection with the advertising and marketing of Defendants' services to potential licensees of BDO technology and in subsequent license packages provided to licensees. The Court finds these allegations to be, basically, a restatement of Plaintiffs' prior claim for false designation of origin under *§ 1125(a)(1)(A)*. Moreover, Plaintiffs have presented no evidence that any of Defendants' alleged misrepresentations relate to the "the nature, characteristics, qualities, or geographic origin" of any "goods or services" that Plaintiffs actually produced or rendered. Accordingly, for the reasons stated previously, this claim fails as a matter of law.

2. Plaintiffs' state-law claims

Defendants move for summary judgment on all Plaintiffs' state-law claims, which include claims under the Texas Theft Liability Act and under Texas common law for misappropriation of trade secrets, conversion, misappropriation, unfair competition, civil conspiracy, and unjust enrichment. Having considered the parties' arguments and summary judgment evidence, the Court finds there are material fact questions **[*31]** on each of Plaintiffs' remaining state-law claims.

IV. CONCLUSION

Based on all of the foregoing, the Court hereby

ORDERS that Plaintiffs INVISTA S.a r.l., INVISTA Technologies S.a. r.l., and INVISTA North America S.a. r.l.'s Motion for Summary Judgment Dismissing Defendants' Counterclaims (Document No. 99) is GRANTED. Defendants' counterclaims for business disparagement and sham litigation are DISMISSED. The Court further

ORDERS that Defendants Frontech, Inc. and Ming D. Wan's Motion for Complete Summary Judgment (Document No. 113) is GRANTED IN PART and DENIED IN PART. Plaintiffs' federal claim for false designation of origin and false advertising under § 43(a) of the Lanham Act are DISMISSED. Plaintiffs' state-law claims, however, will proceed to trial.

SIGNED at Houston, Texas, on this 29 day of July, 2011.

DAVID HITTNER

United States District Judge

Kay Elec. Coop. v. City of Newkirk

United States Court of Appeals for the Tenth Circuit

July 29, 2011, Filed

No. 10-6214

Reporter

647 F.3d 1039 *; 2011 U.S. App. LEXIS 15646 **; 2011-2 Trade Cas. (CCH) P77,550

KAY ELECTRIC COOPERATIVE, an Oklahoma Rural Electric Cooperative; and KAY COUNTY RURAL WATER DISTRICT NO. 3, an Oklahoma Rural Water District, Plaintiffs - Appellants, v. THE CITY OF NEWKIRK, OKLAHOMA, a Municipality; and THE NEWKIRK MUNICIPAL AUTHORITY, a public trust, Defendants - Appellees. OKLAHOMA ASSOCIATION OF ELECTRIC COOPERATIVES, Amicus-Curiae.

Subsequent History: US Supreme Court certiorari denied by *Newkirk v. Kay Elec. Coop., 2012 U.S. LEXIS 849 (U.S., Jan. 17, 2012)*

Prior History: [1]** Appeal from the United States District Court for the Western District of Oklahoma. (D.C. No. 10-CV-00347-C).

Kay Elec. Coop. v. City of Newkirk, 2010 U.S. Dist. LEXIS 84131 (W.D. Okla., Aug. 16, 2010)

Core Terms

municipality, electricity, immunity, monopoly, anticompetitive, antitrust, foreseeable, annexed, anticompetitive conduct, authorize, cooperative, customers, sewage, anti trust law, Restructuring, markets, rural, Sherman Act, jail, Regulation, powers

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN1[] **Scope, Exemptions**

When a city acts as a market participant it generally has to play by the same rules as everyone else. It can't abuse its monopoly power or conspire to suppress competition. Except sometimes it can. If the city can show that its parent state authorized it to upend normal competition, to install instead a municipal monopoly, the city enjoys immunity from federal antitrust liability.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN2[] **Scope, Exemptions**

The U.S. Supreme Court has held that the Sherman Act's terms should not be read to preempt state imposed restraints of trade. States may regulate economic activity as they wish, pursuing even patently anticompetitive policies without having to look over their shoulders to see if Congress approves. Thus was born the concept of "state action immunity" (though the term "immunity" may be a bit strong since the U.S. Supreme Court held only that Congress hadn't covered state action, not that it couldn't).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN3[] **Scope, Exemptions**

A municipality sometimes may be sued under the Sherman Act and sometimes it may not. Because municipalities are not themselves sovereign, they should not automatically be eligible for the federal deference given to the States that create them. A municipality's "parochial interests" in anticompetitive policies don't necessarily implicate the federalism concerns that animate the state action immunity doctrine and shouldn't always be placed above the nation's economic goals reflected in the antitrust laws. This means not only that the Sherman Act can sometimes preempt a municipality's actions; it also means that municipalities may be subject to treble damage awards for violating the Act. At the same time, if a state expressly adopts an anticompetitive policy and chooses to use its municipal subdivisions as instruments to effect that policy, then the federal-state comity concerns undergirding the Parker state immunity doctrine do come into play. A municipality will be entitled to the protection of the state action exemption from the antitrust laws only if there is a clear articulation of a state policy to authorize anticompetitive conduct by the municipality. Put simply, at the end of the day a municipality shares the state's "immunity" when but only when it is implementing anticompetitive policies authorized by the state.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN4[] **Scope, Exemptions**

A municipality surely lacks antitrust "immunity" unless it can bear the burden of showing that its challenged conduct was at least a foreseeable (if not explicit) result of state legislation.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN5[] **Scope, Exemptions**

A state's grant of a traditional corporate charter to a municipality isn't enough to make the municipality's subsequent anticompetitive conduct foreseeable. Municipal charters typically endow the municipality with the authority to make contracts, to buy and sell property, to enter into joint ventures. But most private corporate charters allow companies to do these same things. And natural persons win these powers simply by reaching the age of majority. Neither companies nor persons automatically take with these pedestrian powers the right to use them in an anticompetitive fashion, and there's no reason to think municipalities do either. Put simply, simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN6[] **Scope, Exemptions**

The fact that a state may have authorized some forms of municipal anticompetitive conduct isn't enough to make all forms of anticompetitive conduct foreseeable. Antitrust violations come in a variety of flavors and just because the state has authorized one doesn't mean it has authorized all. Even a lawful municipal monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN7[] **Scope, Exemptions**

When asking whether the state has authorized the municipality's anticompetitive conduct courts look to and preference the most specific direction issued by the state legislature on the subject. After all, it is long and well settled that whenever courts construe legislative enactments a specific statute controls over a general one without regard to priority of enactment.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Energy & Utilities Law > Utility Companies > Contracts for Service

HN8[] **Scope, Exemptions**

The Oklahoma legislature has spoken with specificity to the question whether there should be competition for electricity services in annexed areas. And it has expressed a clear preference for, not against, competition.

Energy & Utilities Law > Utility Companies > Contracts for Service

HN9[] **Utility Companies, Contracts for Service**

Okla. Stat. Ann. tit. 18, § 437.2(k) expressly entitles rural electric cooperatives to continue and extend furnishing of electric energy in areas they have traditionally serviced even after those areas are annexed by a municipality. *Okla. Stat. Ann. tit. 18, § 437.2(k)*.

Energy & Utilities Law > Utility Companies > Contracts for Service

HN10[] **Utility Companies, Contracts for Service**

Far from displacing competition, the language in *Okla. Stat. Ann. tit. 18, § 437.2(k)* seeks to preserve competition after annexation by constraining municipalities from using their considerable regulatory powers to harm rival rural electricity providers.

Energy & Utilities Law > Utility Companies > Contracts for Service

HN11[] **Utility Companies, Contracts for Service**

See *Okla. Stat. Ann. tit. 17, § 190.2*.

Constitutional Law > Separation of Powers

HN12[] Constitutional Law, Separation of Powers

The doctrine of separation of powers prevents holding that a legislative enactment is ineffective by nonuse or obsolescence.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN13[] Scope, Exemptions

General municipal charters are never enough to trigger the protections of the Parker state immunity doctrine.

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

HN14[] Regulated Practices, Monopolies & Monopolization

"Natural" monopolies are hardly always obvious or immutable. What one might call a natural monopoly in one place might not be a natural monopoly in another, and what might be a natural monopoly today might not be one tomorrow (think telephones and railroads).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN15[] Scope, Exemptions

Okla. Stat. Ann. tit. 17, § 190.7 does forbid a rural electrical cooperative from taking a municipality's existing customers. Nothing in *Okla. Stat. Ann. tit. 17, § 190.7* prohibits a rural electrical cooperative from competing against a municipality for new customers in annexed areas. *Okla. Stat. Ann. tit. 18, § 437.2(k)* expressly guarantees a rural electrical cooperative the right to do exactly that.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN16[] Scope, Exemptions

To say that the authority to provide services in two markets authorizes a municipality to do whatever it wants in one or both of those markets would be to let the Parker immunity exception swallow the Sherman Act's antitrust rule.

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Andrew W. Lester (Carrie L. Williams, Lester, Loving & Davies, P.C., Edmond, Oklahoma, with him on the brief), for Defendants - Appellees.

Michael Burrage, Whitten Burrage, Oklahoma City, Oklahoma, for Amicus - Curiae.

Judges: Before MURPHY, GORSUCH, and MATHESON, Circuit Judges.

Opinion by: GORSUCH

Opinion

[*1041] GORSUCH, Circuit Judge.

HN1[] When a city acts as a market participant it generally has to play by the same rules as everyone else. It can't abuse its monopoly power or conspire to suppress competition. Except sometimes it can. If the city can show that its parent state authorized it to upend normal competition, to install instead a municipal monopoly, the city enjoys immunity from federal antitrust liability. The problem for the City of Newkirk in this case is that the state has done no such thing.

Newkirk and Kay Electric **[**2]** Cooperative both provide electricity to Oklahoma consumers. Traditionally, Newkirk has served customers inside its city limits while Kay, a rural electrical cooperative, has served nearby customers outside the city boundaries. When the announcement came that a new jail would be built just outside Newkirk, Kay naturally offered to provide electricity. But unwilling to let so lucrative an opportunity slip away, Newkirk responded by annexing the area and issuing its own service offer. At the end of the day, Kay's offer was much the better but the jail still elected to buy electricity from Newkirk. Why? Because Newkirk is the only provider of sewage services in the area and it refused to provide any sewage services to the jail — that is, unless the jail also bought the city's electricity. Finding themselves stuck between a rock and a pile of sewage, the operators of the jail reluctantly went with the city's package deal.

As these things go Kay responded by suing Newkirk, alleging that the city had engaged in unlawful tying and attempted monopolization in violation of the Sherman Act. *15 U.S.C. §§ 1*, *2*. But the district court refused to allow the case to proceed, granting Newkirk's motion **[**3]** to dismiss under *Fed. R. Civ. P. 12(b)(6)* after it found Newkirk "immune" from liability as a matter of law. It is this ruling Kay challenges on appeal.

The Sherman Act has little to say about municipal immunity, at least directly. It contains only the broadest and barest of proscriptions against anticompetitive activity — declaring unlawful any contract, combination, or conspiracy in restraint of trade and forbidding any monopoly or attempt to monopolize. Over the last 120 years, however, much judicial embroidery has stitched out the scope of permissible and impermissible competitive activity under the Act, handiwork that's often been informed by evolving (if sometimes competing) schools of economic thought. One particular development, however, and the one at issue in this case, has less to do with economic regulation than state sovereignty.

While the Sherman Act clearly forbids anticompetitive conduct by *private* market players, what about conduct by *state* actors? In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the plaintiff argued that the Act's sweeping terms don't distinguish between private and public players, that states must live by the same antitrust rules as everyone else. The Supreme **[**4]** Court, however, disagreed. It assumed without deciding that Congress *could* constitutionally preempt state law directing state actors to behave anticompetitively. *Id. at 350*. But at **[*1042]** the same time the Court said there's "no hint" Congress wished to attack and undo such state sanctioned restraints of trade when it passed the Sherman Act. *Id*. Given this, and given the importance of federal-state comity, *HN2*[] the Court held that the Act's terms should not be read to preempt *state imposed* restraints of trade. States may regulate economic activity as they wish, pursuing even patently anticompetitive policies without having to look over their shoulders to see if Congress approves. *Id. at 351*. Thus was born the concept of "state action immunity" (though the term "immunity" may be a bit strong since the Court held only that Congress *hadn't* covered state action, not that it *couldn't*).

The Court's answer in *Parker*, however, soon begot new questions of its own. If states are free from federal antitrust worries, what about the municipal agents they create and through which they often act? When the Supreme Court eventually took up this question, it conclusively answered it inconclusively, holding that **[**5]** *HN3*[] a municipality *sometimes* may be sued under the Sherman Act and *sometimes* it may not. Because municipalities "are not themselves sovereign," the Court reasoned, they should not automatically be eligible for the "federal deference [given to] the States that create them." *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412, 98 S.*

Ct. 1123, 55 L. Ed. 2d 364 (1978) (plurality); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985). A municipality's "parochial interests" in anticompetitive policies, the Court added, don't necessarily implicate the federalism concerns that animate the state action immunity doctrine and shouldn't always be placed "above the Nation's economic goals reflected in the antitrust laws." Lafayette, 435 U.S. at 412-13. Perhaps surprisingly, the Court told us, this means not only that the Sherman Act *can* sometimes *preempt* a municipality's actions; it also means that municipalities may be subject to treble damage awards for violating the Act. *See generally* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 223 (Aspen 3d ed. 2006); Community Communications Co. v. City of Boulder, 455 U.S. 40, 60-61, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982) (Rehnquist, J., dissenting). At the same time, the Court held, if a *state* **[**6]** expressly adopts an anticompetitive policy and chooses to use its municipal subdivisions as instruments to effect that policy, then the federal-state comity concerns undergirding the *Parker* state immunity doctrine *do* come into play. And "[i]t is therefore clear," the Court concluded after laying all this out, "that a municipality will be entitled to the protection of the state action exemption from the antitrust laws" only if there is a "clear articulation of a state policy to authorize anticompetitive conduct" by the municipality. Hallie, 471 U.S. at 34 (internal quotation omitted); *see also* Boulder, 455 U.S. at 54-55; City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). Put simply, at the end of the day a municipality shares the state's "immunity" when but only when it is implementing anticompetitive policies authorized by the state.

How *clearly* must a state legislature articulate its authorization of anticompetitive municipal conduct to trigger antitrust immunity? Now many decades removed from *Parker*, the Court has sometimes declared that its judicially created "[s]tate-action immunity [should be] disfavored," F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 635-36, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992) **[**7]** (citing Lafayette, 435 U.S. at 398-99), and, because of this, a municipality's authority to suppress competition **[*1043]** must be "*clearly articulated* and *affirmatively expressed*" in state legislation. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980) (emphasis added); Ticor, 504 U.S. at 636 (requiring "real compliance" with *Midcal*). At other times, however, the Court has appeared to require something *less* of cities seeking to invoke *Parker's* protections, suggesting that a municipality's actions are free from the grasp of federal ***antitrust law*** if anticompetitive effects "*logically would result*" from state legislative policy. Hallie, 471 U.S. at 42. Complicating matters still further, the Court has also said that a municipality may be authorized to engage in anticompetitive actions that are merely the "*foreseeable result*" of state legislation. *Id*. (emphasis added).

With its usual care Professor Areeda and Hovenkamp's treatise traces all these warps and wefts before gently suggesting that "while the policy favoring competition is national and the states are permitted to establish an alternative regime," states should be required to "declare their intentions **[**8]** clearly rather than falling back on the ambiguity-creating compromises that often characterize the legislative process." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 225a at 133. Such a bright line rule, they have said, would "do a much better job of identifying the relevant principle of federalism that undergirds the *Parker* doctrine." *Id*. But however much sense this makes (and we think it makes quite a lot of sense), our lot as a lower court isn't to choose between the Supreme Court's holdings but to apply them. And though it's hard to see a way to reconcile all of the Court's competing statements in this area, we can say with certainty this much — ***HN4***[] a municipality surely lacks antitrust "immunity" unless it can bear the burden of showing that its challenged conduct was *at least* a foreseeable (if not explicit) result of state legislation. Of course, what does and doesn't qualify as foreseeable is hardly "self-evident" or self-defining, itself perhaps another reason to eschew the test. *See id*. ¶ 225b3 at 144. But there *are* at least a few bright lines we can discern in this muddled arena — and these are enough to allow us to dispose of this appeal with confidence.

First, ***HN5***[] a state's grant of a traditional **[**9]** corporate charter to a municipality isn't enough to make the municipality's subsequent anticompetitive conduct foreseeable. Municipal charters typically endow the municipality with the authority to make contracts, to buy and sell property, to enter into joint ventures. But most private corporate charters allow companies to do these same things. And natural persons win these powers simply by reaching the age of majority. Neither companies nor persons automatically take with these pedestrian powers the right to use them in an anticompetitive fashion, and there's no reason to think municipalities do either. Put simply, simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully. *See* Boulder, 455 U.S. at 54-55; Hovenkamp, ***Antitrust Law*** ¶ 225b5 at 155 (giving as examples a municipality's operation of golf courses and swimming pools and explaining that monopoly in "such facilities is hardly inevitable"); *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Svc. Dist. No. 1, 171 F.3d 231, 235 (5th Cir. 1999)*; *Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 402-03 (9th Cir. 1991)*.

Second, ***HN6***[] the fact that a state may have authorized **[**10]** *some* forms of municipal anticompetitive conduct isn't enough to make *all* forms of anticompetitive conduct **[*1044]** foreseeable. Antitrust violations come in a variety of flavors and just because the state has authorized one doesn't mean it has authorized all. As the Court has put it, "even a lawful [municipal] monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Lafayette, 435 U.S. at 417*; *see also Hallie, 471 U.S. at 44* ("[T]he legislature contemplated *the kind of action* complained of.") (emphasis added); *Midcal, 445 U.S. at 105*; Areeda & Hovenkamp, ***Antitrust Law*** ¶ 225a at 132-33.

Third, ***HN7***[] when asking whether the state has authorized the municipality's anticompetitive conduct we look to and preference the most specific direction issued by the state legislature on the subject. After all, it is long and well settled that whenever we construe legislative enactments — and that's precisely what we're called on to do when deciding a municipality's antitrust immunity in light of state authorizing legislation — "a specific statute controls over a general one without regard to priority of enactment." *Bulova Watch Co. v. United States, 365 U.S. 753, 758, 81 S. Ct. 864, 6 L. Ed. 2d 72, 1961-1 C.B. 782 (1961)*; **[**11]** *Edmond v. United States, 520 U.S. 651, 657, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997)*.

Applying these rules to our case, it quickly becomes clear that Newkirk enjoys no immunity. ***HN8***[] The Oklahoma legislature has spoken with specificity to the question whether there should be competition for electricity services in annexed areas. And it has expressed a clear preference for, not against, competition. While Newkirk cites a number of more general enabling statutes conferring on the city the authority to do business, none authorizes the kind of anticompetitive conduct alleged here, let alone suggests that we may ignore the more specific provisions of law indicating it may not.

The most specific legislation relevant to our inquiry the parties have identified is *§ 437.2* of the Rural Electric Cooperative Act. Part of Oklahoma law since 1961, ***HN9***[] this provision expressly entitles rural electric cooperatives like Kay to "continue and extend furnishing of electric energy" in areas they have traditionally serviced even after those areas are annexed by a municipality. *18 Okla. Stat. § 437.2(k)*. This provision thus speaks directly to both the area and issue in this lawsuit. It is undisputed that the jail lies in an area traditionally serviced **[**12]** by Kay; that the area has now been annexed by Newkirk; and that Newkirk is allegedly thwarting Kay's ability to operate there. And *§ 437.2(k)* doesn't merely *authorize* Kay to continue to compete in annexed areas; it *protects* Kay from municipal interference in those areas, allowing Kay to continue to operate without having to seek or obtain "consent, franchise, license, [or] permit" from Newkirk. ***HN10***[] Far from displacing competition, then, this language foreseeably does just its opposite — it seeks to *preserve* competition after annexation by constraining municipalities from using their considerable regulatory powers to harm rival rural electricity providers. Underscoring the point, the statute goes on to say a municipality may impose only two conditions on electric cooperatives operating in annexed areas — it may force them to pay taxes and comply with safety regulations. The fact that the statute fails to authorize any other municipal burden on competition is glaring. *See United States v. Johnson, 529 U.S. 53, 58, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000)* ("When [the legislature] provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that [the legislature] **[**13]** considered the issues of exceptions **[*1045]** and, in the end, limited the statute to the ones set forth.").

This specific and state-sanctioned battle for electricity customers in annexed areas rests against an even grander plan to expand competition in electricity markets. In 1997, the Oklahoma legislature enacted the Electric Restructuring Act seeking to ***HN11***[] "allow direct access by retail consumers to the competitive market for the generation of electricity while maintaining the safety and reliability of the electricity system in the state." *17 Okla. Stat. § 190.2*. Creating a joint task force to promote restructuring, this law expressly aims to "provide greater competition and more efficient regulation," "increase[] consumer choice," and "provide electric generation service at the lowest and most competitive rates." *Id.; see also 17 Okla. Stat. § 190.4* ("Competitive markets are to be encouraged to the greatest extent possible."). Here again, Oklahoma has expressed an unmistakable policy preference for competition in the provision of electricity.

Of course, Newkirk replies that the Electric Restructuring Act has yet to restructure much of anything. The sort of competition it envisions has yet to **[**14]** emerge on the scale the legislature hoped, Newkirk says. And perhaps this is so. But no one denies that the Restructuring Act *is* on the books or that it expresses a policy preference for competition in electricity generation and supply. Neither is it the place of a court to say whether, over the last fourteen years since the statute's enactment, Oklahoma has moved too slowly or quickly in its efforts to restructure an entire industry. And no one before us has been so bold as to suggest that desuetude might render this statute, only in its teenage years, a dead letter we might simply ignore. *See* Norman J. Singer & J.D. Shambie Singer, 1A Statutes and Statutory Construction § 23:26 at 533 (7th ed. 2009) (***HN12***[] "The doctrine of separation of powers prevents holding that a legislative enactment . . . is ineffective by nonuse or obsolescence."). Besides, competition *is* already a manifest reality between cooperatives and municipalities in Oklahoma — as this case itself attests — and the state has taken other affirmative steps to increase this form of competition by conducting studies and declaring a moratorium on efforts by cities to condemn competing private facilities. *See* *11 Okla. Stat. § 21-222*.

In **[**15]** reply to all this, Newkirk draws our attention to various other provisions of state law, some of which merit attention here. Each, however, speaks with far less specificity to the challenged conduct than either the Cooperative Act or Restructuring Act. In fact, Newkirk begins its case with and emphasizes heavily throughout its brief the most general and least specific laws of all, portions of the Oklahoma state constitution that merely authorize municipalities to do business. *See* *Okla. Const. Art. 18, §§ 6*, *7*. But this hardly tells us much of anything. As already explained, it is well settled that ***HN13***[] general municipal charters are never enough to trigger *Parker's* protections.

Newkirk next draws our attention to *11 Okla. Stat. § 22-104*. On inspection, however, this provision (similarly) turns out to be nothing more than a general enabling statute allowing municipalities to run utilities. Of course, one might argue that at least certain utilities are "natural" monopolies and so a great variety of anticompetitive conduct, including the conduct challenged in this case, would foreseeably follow from allowing a city to operate a utility. But we reject any such suggestion. For starters, and as **[**16]** we have already explained, Supreme Court precedent doesn't support the idea that an enabling law permitting a city to run a business is enough **[*1046]** to produce *Parker* immunity. Beyond that, Newkirk's reading would require courts to decide whether a particular utility is or isn't a "natural" monopoly. And that's a business as busy as a box of frogs. ***HN14***[] "Natural" monopolies are hardly always obvious or immutable. What one might call a natural monopoly in one place might not be a natural monopoly in another, and what might be a natural monopoly today might not be one tomorrow (think telephones and railroads). *See* Alfred E. Kahn, 2 The Economics of Regulation: Principles and Institutions 10 (1971) ("[T]echnology is perpetually developing: so the natural monopoly of yesterday may no longer be natural today."); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 636 (1969) ("[N]atural monopoly conditions are quite likely to be transient."). For an anticompetitive result to qualify as a foreseeable consequence of state legislative advance than a court's ruling on whether a particular business at a particular time and in a particular place qualifies as a "natural" **[**17]** monopoly.

Trying another angle, Newkirk argues that *17 Okla. Stat. § 190.7* demonstrates an intent by Oklahoma to limit competition in the electricity markets. And here Newkirk has at least something of a point. ***HN15***[] *Section 190.7* *does* forbid a rural electrical cooperative like Kay from taking a municipality's *existing* customers. The difficulty is that nothing in *§ 190.7* prohibits a rural electrical cooperative from competing against a municipality for *new* customers in annexed areas. And this is hardly surprising given that (as we've seen) *§ 437.2(k)* expressly guarantees Kay the right to do exactly that. Neither is the question before us whether Oklahoma has sought to make the electricity market competitive in every respect. It is instead, and as we have already explained, only whether Oklahoma has authorized the *specific form* of anticompetitive conduct under attack. And in this case Kay has challenged Newkirk's ability to preclude it from winning a *new* customer, *not* taking Newkirk's *existing* customers. On that, the question posed by this case, *§ 190.7* has nothing to say.

An even greater problem besets Newkirk's reliance on 18 Okla. Stat. § 437.2(k). Newkirk notes that this statute allows **[**18]** municipalities, after annexing an area, to expropriate the facilities of the incumbent rural electric cooperative. On first blush this appears to be the strongest evidence yet of a legislative intent to allow municipalities to monopolize electricity markets within their borders. But, as part of its plan to bring more competition to electricity markets, the state legislature recently and expressly *suspended* these very powers. *See* 11 Okla. Stat. § 21-222. So if anything Newkirk's citation winds up doing more harm than good to its cause.

In a final stand, Newkirk insists that our decision to allow this case to proceed cannot be reconciled with *Hallie* or Sterling Beef Co. v. City of Fort Morgan, 810 F.2d 961 (10th Cir. 1987). Analogies to these cases, Newkirk insists, demonstrate its entitlement to *Parker* immunity. In truth, however, they do nearly the opposite.

In *Hallie*, the Court confronted a state statute that authorized municipalities to delineate the area in which it wished to afford sewage services. When the defendant-city did just that, some nearby towns complained that the city had refused to treat sewage from outside the city's delineated boundaries, and alleged that the city's **[**19]** refusal to share or provide access to its treatment plant amounted to a violation of the Sherman Act. The Court found *Parker* immunity because the city's conduct was just the sort of thing the state legislature **[*1047]** had authorized. But, by contrast in our case, there's nothing on Oklahoma's statute books to suggest that the legislature authorized the species of antitrust violation alleged here — refusing to provide an end customer one service (sewage) unless he purchased something entirely different (electricity). At the end of the day, Oklahoma law simply allows Newkirk to provide sewage and electricity services. And it is no more foreseeable from this fact that Newkirk might unlawfully use its sewage business to sell electricity than to sell magazines, or life insurance, or require the prison to be painted a particular color. ***HN16***[] To say that the authority to provide services in two markets authorizes a municipality to do whatever it wants in one or both of those markets would be to let the *Parker* immunity exception swallow the Sherman Act's antitrust rule.

Hallie is beside the point for another but still related reason. It involved a situation where the legislative evidence ran but one way — **[**20]** the only relevant statute in the case tended to suggest that the particular challenged anticompetitive conduct was foreseeable. Meanwhile, the statutes identified by plaintiffs to suggest a pro-competitive state policy were introduced too late in the proceedings. And, as it turned out, they were themselves no more than general enabling statutes authorizing the plaintiffs to conduct business. *See* 471 U.S. at 42 n.5. *Hallie* thus doesn't tell us anything about the situation we face — where specific state statutes authorizing competition are compared to more general ones that are at best only susceptible to an anticompetitive gloss.

Sterling Beef is no more and perhaps even less analogous. The municipality there operated a natural gas utility. Under state law, it enjoyed the power not just to operate its own utility but also to decide whether to allow competitors to provide distribution systems within its territorial limits. The municipality denied authorization to a distributor who wished to build its pipes within city limits. When the distributor brought an antitrust suit, this court — unsurprisingly — held that an "anticompetitive impact" is the "obvious result of the state scheme." Sterling Beef, 810 F.2d at 964. **[**21]** Indeed, the statute amounted to an express permission to create a monopoly if the municipality wished; competition could exist only at the city's grace. *See also* Allright Colo., Inc. v. City and Cty. of Denver, 937 F.2d 1502, 1508-09 (10th Cir. 1991) (finding antitrust immunity where state statute authorized city to regulate all airport transportation services). This case could hardly be more different. Oklahoma expressly entitles Kay to provide electricity services in the annexed area at issue — and expressly frees it of the need to obtain Newkirk's "consent, franchise, license, permit, or other authority" to do so. 18 Okla. Stat. § 437.2(k). If *Sterling Beef* has any bearing on this case, then, it serves only as a study in contrast not commonality.

The district court's Rule 12(b)(6) dismissal order is reversed, and the case is remanded for further proceedings with respect to Kay's allegations of unlawful tying and attempted monopolization of electricity services. No other aspects of the district court's dismissal order were pursued in this appeal.

End of Document

Navien Am., Inc. v. Allen

Superior Court of Connecticut, Judicial District of Ansonia-Milford At Milford

August 1, 2011, Decided; August 1, 2011, Filed

116409, CV106003256

Reporter

2011 Conn. Super. LEXIS 2036 *

Navien America, Inc. v. John H. Allen, III, dba Allen's Plumbing Supply

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

antitrust, counterclaim, motion to strike, courts, antitrust statute, rule of reason, anticompetitive, argues, fixing

LexisNexis® Headnotes

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

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

A motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings. The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaint or counter claim to state a claim upon which relief can be granted. A motion to strike requires no factual findings by a trial court.

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

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

Conn. Gen. Stat. §§ 35-26 and 35-28(a) expressly concern the prohibition against restraint of trade or commerce.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

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

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

HN3[] **Regulated Practices, Trade Practices & Unfair Competition**

Federal precedent is to be followed when the courts of Connecticut interpret the Connecticut Antitrust Act unless the text of the antitrust statutes, or other pertinent state law, requires them to interpret it differently. The rule of reason analysis is the applicable standard to determine if there has been a violation of the Connecticut Antitrust Act with respect to a claim of vertical price fixing.

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

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order for price fixing and related acts to warrant application of the per se test, it is incumbent upon a party to allege and establish that such restraint on trade is manifestly anticompetitive through its pernicious effect on competition and its lack of any redeeming virtue. "Per se" rules of illegality should be applied only to conduct which is shown to be "manifestly anticompetitive."

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

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

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Connecticut courts have held that it is a fundamental requirement under a rule of reason claim that there must be an allegation of public injury to competition; a harmful effect on a more generalized market and not merely on a single supplier or purchaser. In the context of an antitrust count, a plaintiff cannot merely state, in conclusory terms, that a defendant violated antitrust laws. Such allegations are essential because the antitrust laws were enacted to protect competition, not competitors.

Judges: [*1] JOSEPH W. DOHERTY, JUDGE.

Opinion by: JOSEPH W. DOHERTY

Opinion

MEMORANDUM OF DECISION RE (#110) PLAINTIFF'S MOTION TO STRIKE COUNTERCLAIM

This is a collection action brought by the plaintiff, Navien America, Inc. ("Navien") against the defendant, John H. Allen, III, d/b/a Allen's Plumbing Supply ("Allen").

The defendant has made a counterclaim against the plaintiff alleging that the plaintiff has engaged in price-fixing in violation of *§§3* and *5(a)* of the *Connecticut Antitrust Act*, *Conn. Gen. Statutes §§35-26* and *35-28(a)*.

The plaintiff has moved to strike that counterclaim, arguing that 1) it fails to apprise the plaintiff sufficiently of the nature of the action and (2) it fails to state a legally sufficient antitrust claim upon which relief can be granted.

HN1[] "A motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." *Faulkner v. United Technologies Corp., 240 Conn. 576, 588, 693 A.2d 293 (1997)*. "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint [or counter claim] . . . to state a claim upon which relief can be granted . . . A motion to strike . . . requires **[*2]** no factual findings by the trial court." *Fort Trumbull Conservancy, LLC v Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003)*.

The parties appeared and were heard and the Court reserved decision. Having considered the arguments of counsel, the applicable statutes and case law, the Court makes the following findings.

The defendant bases its allegation of price fixing on the fact that the plaintiff engages in a policy with the retail companies with which it supplies tankless water heaters whereby such retailers, including the defendant, are not permitted to sell its products for less than a minimum price set by Navien. When Allen refused to go along with that policy, Navien refused to provide Allen with the merchandise. Navien continues to supply those products to Allen's competitors. Allen has alleged that such practice constitutes illegal price fixing.

(1) AS FOR THE CLAIM THAT THE COUNTER CLAIM DOES NOT SUFFICIENTLY APPRISE THE PLAINTIFF OF THE NATURE OF THE ACTION:

The defendant's reference to *Sections 35-26* and *35-28(a), C.G.S.* more than sufficiently apprises the plaintiff as to what proscribed conduct the defendant is relying upon. *HN2*[] Those statutes expressly, concern the prohibition against restraint of **[*3]** trade or commerce. The reference to "*Sections 3* and *5(a)* of the Connecticut Antitrust Act," while inaccurate, does not prevent the plaintiff from being aware of the defendant's counterclaim.

That argument in opposition to the motion to strike has no merit.

(2) AS FOR THE ARGUMENT THAT COUNTERCLAIM FAILS TO STATE A LEGALLY SUFFICIENT ANTITRUST CLAIM:

The plaintiff, Navien, has cited a number of cases which deal with the issue of price fixing policies which rise to the level of violations of the antitrust statutes. Navien argues that its policy of mandatory price minimums for its products does not constitute a restrain on trade and cites authority for its position.

In its brief in support of the motion to strike, Navien points out, "It is the intent of the General Assembly that in construing *sections 35-24 to 35-46*, inclusive, the courts of this state shall be guided by the interpretations given by the federal courts to federal antitrust statutes." *Sec. 35-44b, C.G.S.*

Navien argues that there are two ways in which the Court may analyze alleged violations of the Connecticut Antitrust Act: (1) the "rule of reason" analysis when dealing with conduct which is in restraint of trade or (2) finding **[*4]** a "per se" violation when presented with conduct that is "manifestly anticompetitive." See *Bridgeport Harbour Place I, LLC v. Ganim, 111 Conn. App. 197, 958 A.2d 210, 216 (2008)*, and *Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 230-31, 413 A.2d 1226 (1979)*.

Navien points out that the United States Supreme Court recently rejected the application of the "per se" rule to cases alleging antitrust violations based on the existence of a vertical price restraint, citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 908, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

In light of that decision, Navien argues that courts faced with cases alleging vertical price constraints (such as Allen's counterclaim in the instant case) must now employ a "rule of reason" test, which requires a court to distinguish between a restraint with an anticompetitive effect that is harmful to the consumer and a restraint with a procompetitive effect that is in the consumers' interest. See *Leegin, supra, p. 897*.

In his opposition to Navien's motion to strike Allen argues that judicial interpretation of the Act is to be guided by, not mandated by, the interpretations given to federal antitrust statutes by federal courts and that certain interpretations of federal **[*5]** law are inappropriate or inapposite when interpreting the Connecticut Antitrust Act.

He cites *Westport Taxi Serv., Inc. v. Westport Transit Dist., 235 Conn. 1, 664 A.2d 719 (1995)*, wherein our Supreme Court held, "we follow federal precedent when we interpret the Act *unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently.*" *Id.* P. 15-16 (emphasis added).

Allen argues that *Leegin* is applicable only to federal ***antitrust law*** and to antitrust laws of states which strictly follow federal case law and which do not have "significant statutory departures from Sherman Act's provisions for price maintenance." He considers Connecticut to be one of those states.

Allen points out that during the pendency of the *Leegin* case, Connecticut joined 37 other states in a brief in favor of the per se rule and in opposition to the adoption of the rule of reason analysis. Despite that effort in *Leegin*, the United States Supreme Court decided that in federal cases vertical price maintenance is subject to the rule of reason analysis rather than the per se rule.

Leegin, as ***HN3***[] federal precedent, is to be followed when the courts of this state interpret the Connecticut Antitrust **[*6]** Act unless the text of our antitrust statutes, or other pertinent state law, requires them to interpret it differently. See *Miller's Pond Co., LLC v. New London, 273 Conn. 786, 806, 873 A.2d 965 (2005)*.

Notwithstanding Connecticut's historic position for the maintenance of the per se test, this court has not been provided with any Connecticut antitrust statutes or pertinent state law to permit it not to follow *Leegin* as a federal precedent. The court finds that the rule of reason analysis is the applicable standard in this case to determine if there has been a violation of the Connecticut Antitrust Act.

Allen goes on to argue that if the courts were to follow the rule of reason and reject the per se rule against vertical minimum price fixing, a plaintiff (in this case, Allen, in furtherance of his counterclaim) would bear the burden of showing that an agreement had anticompetitive effects. Should he succeed in meeting that burden, the burden would then switch to the defendant (in this case the plaintiff, Navien) to show that the conduct challenged supports a sufficiently pro-competitive objective. Citing *Major League Baseball Properties Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir., 2008)*.

In this **[*7]** case, Allen has not cited any authority for this court not to follow the precedent of *Leegin.* He has, however, argued that the text of *§35-28, C.G.S.*, as per the holding in the *Westport Taxi* case, allows this court to apply the per se test notwithstanding the holding in *Leegin.*

Allens' reliance upon the provisions of *§35-28, C.G.S.* (which prohibit, *inter alia*, fixing, controlling or maintaining prices, limiting the sale or supply, and refusing to deal) to warrant the application of the per se test is misplaced. ***HN4***[] In order for such acts to warrant application of the per se test, it is incumbent upon Allen to allege and establish "that such restraint on trade is manifestly anticompetitive through its pernicious effect on competition and its lack of any redeeming virtue . . . 'Per se' rules of illegality should be applied only to conduct which is shown to be 'manifestly anticompetitive.' " *Elida, Inc., v. Harmor Realty Corporation, 177 Conn. 218, 231, 413 A.2d 1226 (1979)*.

No such allegation is made by Allen in his counterclaim.

In support of its motion, Navien points out that ***HN5***[] our courts have held that it is a fundamental requirement under a rule of reason claim that there must be an allegation of "public **[*8]** injury to competition . . . a harmful effect on a more generalized market and not merely on a single supplier or purchaser . . ." See *Baer v. New England Home Delivery Service, LLC, 2007 Conn.Super. LEXIS 2696 at*8-*9 fn.3 (Conn.Super.Ct. Oct 18, 2007)*.

"In the context of an antitrust count, a plaintiff cannot merely state, in conclusory terms, that a defendant violated . . . antitrust laws." *Budget Rent a Car of Westchester, Inc. v. Rental Car Resources, Inc. 842 F.Sup. 614, 616 (D.Conn. 1993)*.

"There must be some allegation of public injury to competition; a harmful effect on a more generalized market and not merely on a single supplier or purchaser." *Blaine v. Meineke Discount Muffler Shops, Inc., 670 F.Sup. 1107, 1114 (D.Conn. 1987)*."

"Such allegations are essential because the antitrust laws were enacted to protect competition, not competitors." *Retail Service Associates v. ConAgra Products Co., 759 F. Supp. 976, 979-80 (D.Conn. 1987)*.

For the foregoing reasons, the plaintiff's motion to strike the defendant's counterclaim is hereby granted.

BY THE COURT,

JOSEPH W. DOHERTY, JUDGE

End of Document

Massengale v. City of Jefferson

United States District Court for the Western District of Missouri, Central Division

August 2, 2011, Decided; August 2, 2011, Filed

Case No. 10-CV-4232-NKL

Reporter

2011 U.S. Dist. LEXIS 84940 *; 2011 WL 3320508

GEORGE P. MASSENGALE, Plaintiff, v. CITY OF JEFFERSON, MISSOURI, and ALLIED SERVICES, LLC, Defendants.

Subsequent History: Appeal after remand at, Decision reached on appeal by *Massengale v. City of Jefferson, 2013 Mo. App. LEXIS 1155 (Mo. Ct. App., June 11, 2013)*

Core Terms

solid waste, municipality, collection, disposal, solid waste management, supervision, households, transfer station, bags, anti trust law, recycling, state action, regulations, cart, residential, antitrust, displace, summary judgment motion, city limits, immunity, state policy, Ambulance, Alternate, franchise, monopoly, rates, state action doctrine, ambulance service, summary judgment, trash collection

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

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

HN1[] **Summary Judgment, Evidentiary Considerations**

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party bears the initial responsibility of informing the district court of the basis for its motion and must identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. If the moving party satisfies its burden, *Rule 56(e)* requires the non-moving party to respond by submitting evidentiary materials that designate specific facts showing that there is a genuine issue for trial. In determining whether summary judgment is appropriate, a district court must look at the record and any inferences to be drawn from it in the light most favorable to the non-moving party. Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN2[] Clayton Act, Claims

See 15 U.S.C.S. § 15(a).

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

HN3[] Sherman Act, Scope

See 15 U.S.C.S. § 1.

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

HN4[] Scope, Monopolization Offenses

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] Exemptions & Immunities, Parker State Action Doctrine

Federal antitrust laws cannot be applied to prevent states from exercising their sovereign powers to intervene in markets, even if such intervention entails anticompetitive restraints. Nothing in the language of the Sherman Act or in its history suggests that its purpose is to restrain a state or its officers or agents from activities directed by its legislature, and an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

HN6[] Exemptions & Immunities, Parker State Action Doctrine

The Parker state action doctrine does not extend to all governmental entities, whether state agencies or subdivisions of a state, simply by reason of their status as such. However, municipalities are instrumentalities of the state, and the state action doctrine exempts anticompetitive conduct engaged in by municipalities, pursuant to state policy to displace competition with regulation or monopoly public service. An adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Home Rule

HN7[] Exemptions & Immunities, Parker State Action Doctrine

The state action doctrine does not provide immunity from antitrust liability when a city acted pursuant only to a state's broad grant of "home rule" power.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

HN8[] Exemptions & Immunities, Parker State Action Doctrine

Articulating the state action antitrust immunity rule in the municipality context, a sufficient expression of state policy consists of two elements: (1) the legislature must have authorized the challenged activity, and (2) it must have done so with an intent to displace competition.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

HN9[] Exemptions & Immunities, Parker State Action Doctrine

For purposes of state action antitrust immunity in the municipal context, a specific, detailed legislative authorization of monopoly service need not exist to infer the necessary state intent. It is sufficient that the legislature contemplated the kind of action complained of. In other words, a sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN10[] Parker State Action Doctrine, Local Governments & Private Parties

For purposes of state action antitrust immunity in the municipal context, although Midcal had required active state supervision of the challenged restraint, the United States Supreme Court has applied that requirement only in cases in which the defendants were private entities or individuals. When a city directly intervenes in the market, because municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context. Moreover, because the Parker doctrine requires that the state delegate to the local government the authority to engage in the challenged conduct, state supervision of a city's conduct is unnecessary to find state action. Requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity. Thus, at least where a municipality executes a traditional governmental function to protect public health and safety, the state action doctrine requires only that it act pursuant to state policy and does not require active state supervision.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

HN11[] Exemptions & Immunities, Parker State Action Doctrine

The active state supervision requirement for state action antitrust immunity should not be imposed in cases in which the actor is a municipality. The requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. Once it is clear that state authorization exists, there is no need to require the state to supervise actively the municipality's execution of what is a properly delegated function.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

HN12[] Solid Wastes, Disposal Planning

See *Mo. Rev. Stat. § 260.215*.

Environmental Law > Solid Wastes > Disposal Planning

Governments > Local Governments > Duties & Powers

HN13[] Solid Wastes, Disposal Planning

While *Mo. Rev. Stat. § 260.215* does not expressly grant municipalities the power to grant exclusive solid waste disposal contracts, it clearly provides for such authority. Moreover, a legislative intent to displace competition can be inferred from the statutory scheme because it is a necessary and reasonable consequence of engaging in the authorized activity. Under the Missouri statute, municipalities are granted broad authority to regulate solid waste management and to contract with private companies to provide for solid waste management and disposal. Missouri caselaw also recognizes the validity of a municipal grant of a private monopoly in solid waste disposal. The legislative scheme contemplates displacing competition with regulation in the area of solid waste management and disposal.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN14[] Judgments, Summary Judgment

In most cases, when federal and state claims are joined and the federal claims are dismissed on a motion for summary judgment, the pendent state claims are dismissed without prejudice to avoid needless decisions of state law.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN15[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Under *28 U.S.C.S. § 1367(c)(3)*, a court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction.

Counsel: [*1] For George P. Massengale, Plaintiff: Audrey E. Smollen, LEAD ATTORNEY, Rosenthal Law, LLC, Jefferson City, MO.

For Allied Services, LLC, Defendant: Bradley C. Letterman, Jane Christine Drummond, LEAD ATTORNEYS, Duane E. Schreimann, Schreimann, Rackers, Francka & Blunt, L.L.C., Jefferson City, MO.

For City of Jefferson, Missouri, Defendant: Nathan M. Nickolaus, LEAD ATTORNEY, City Counsel's Office of Jefferson City, Jefferson City, MO.

Judges: NANETTE K. LAUGHREY, United States District Judge.

Opinion by: NANETTE K. LAUGHREY

Opinion

ORDER

Before the Court are the Motion for Summary Judgment [Doc. # 39] filed by Defendant Allied Services, LLC ("Allied"), the Motion for Summary Judgment [Doc. # 41] filed by Defendant City of Jefferson, Missouri ("Jefferson City"), and the Motion for Summary Judgment [Doc. # 53] filed by Plaintiff George P. Massengale. For the following reasons, the Court grants summary judgment in favor of Defendants only with respect to Plaintiffs' federal antitrust claim and remands the remainder of the action to the Circuit Court of Cole County, Missouri.

I. Background

A. Relevant Undisputed Facts[1]

Plaintiff **[*2]** Massengale has been a resident and taxpayer of Jefferson City for over 11 years. Defendant Jefferson City is a constitutional charter city located in Cole County and organized under the statutes and Constitution of Missouri. Defendant Allied is organized under Delaware law and based in Phoenix, Arizona.

1. Before the Solid Waste Contract

Before Defendants Jefferson City and Allied entered into an exclusive Solid Waste Contract, the residential trash collection service in Jefferson City was voluntary. Before that Solid Waste Contract took effect in November 2009, Jefferson City residents could choose between using a 95-gallon cart or 32-gallon plastic bags for the twice-a-week pickup, or they could choose some other way of disposing of their solid waste. The rate charged for rental of a 95-gallon cart was $14.88 per month.

Before the Solid Waste Contract took effect, Plaintiff Massengale purchased the bags offered for sale by the solid waste contractors (all associated with Allied) that serviced Jefferson City's solid waste collection needs. Plaintiff would dispose of his trash by placing it in the bags and setting them at the curb for collection by the solid waste

[1] The Court has considered the parties' statements of undisputed fact which are supported by evidence.

contractor. During the **[*3]** time Plaintiff Massengale was allowed to use these bags, he seldom, if ever, set out more than one bag a month. Plaintiff paid about $1.25 per bag in December 1999, and that amount increased over time to its highest rate of $1.56 just before the effective date of the Solid Waste Contract. There were no other fees or charges for Plaintiff's regular trash pickup. Prior to the effective date of the Solid Waste Contract, Plaintiff Massengale participated in recycling by taking his recyclables to the New World recycling bins provided at Memorial Park, at no cost.

Tom Brown, of the consulting firm Burns & McDonnell, submitted information to Defendant Jefferson City before the City sent out Request for Proposal # 2419 ("the RFP") on October 21, 2008, to potential solid waste collection contractors. Brown opined:

> . . . Jefferson City and Allied Waste report the following statistics relative to residential collection:
>
> - Number of single family and duplex households — 14,000
> - Number of households subscribing to cart service — approximately 7,900
> - Bag sales per week — approximately 2,600
>
> Assuming 1,300 households put out 2 bags per week, the total monthly rate for each of these households would be **[*4]** $12.90/month (2 bags/week x $1.49 per bag x 4.33 weeks/month). Under this assumption, as many as 4,800 households (14,000 — 7,900 — 1,300 households) pay no fees for residential waste removal. Our understanding is that the waste from these households is mainly placed in shared carts. If all these households use shared carts, Allied Waste may be removing up to 52% (4,800 households/9,200 households) more waste than it is being compensated for. At 75% use of shared carts, Allied Waste may be removing up to 39% (3,600 households/9,200 households) more waste than it is being compensated for.
>
> . . .
>
> Optional Residential Collection: Optional participation in the residential collection services offered by Allied Waste (on the basis of its contract with the City) has resulted in as many as 4,800 households not participating in payment of services for residential collection.

[Doc. # 46 at ¶ 22; *see also* Doc. # 58, Ex. T.]

2. The Request for Proposal and the Solid Waste Contract

Defendant Jefferson City's RFP requested two different rate proposals for residential trash collection service. The first requested rate proposal, the Base Proposal, continued voluntary participation in residential trash collection **[*5]** service much like it had been in Jefferson City — i.e., twice-a-week pickup of either a 95-gallon container or 32-gallon plastic bags — but now including optional residential curbside recycling at an additional charge. The second requested rate proposal, the Alternate Proposal, was for curbside solid waste pickup, with curbside recycling service included at no additional cost, with collection only once per week and mandatory participation.

The RFP also required any winning bidder to provide a solid waste transfer station to be open to the public and located within Jefferson City limits, and which would be transferred to Jefferson City at no cost prior to the end of the contract period. Also in the RFP, Jefferson City required any winning bidder to construct a separate transfer station for long-distance solid waste hauling, also to be located within Jefferson City limits. The RFP required that this long-distance-haul transfer station and all of its property be transferred to Jefferson City for the price of one dollar prior to the end of the contract period.

From before the time of the RFP process, Defendant Allied has owned the only existing landfill and drop-off transfer station within **[*6]** Jefferson City limits. There has been no long-distance-haul transfer station within Jefferson City limits.

The RFP further required that the successful bidder agree to pay a "Street Repair Fee" (later called "Road Use Fee"). This fee would be $7.50 per ton of solid waste collected, increased annually at the same rate that solid waste collection rates were increased.

Defendant Allied's Base Proposal presented rates as follows: for cart use without the road fee, $14.90; without the transfer station, $13.30; with both, $16.24; and without both, $13.98. Allied's Base Proposal also presented per-bag rates for customers who would choose bag service: without the road fee, $2.03; without the transfer station, $2.05; with both, $2.08; and without both, $2.00. Allied's Base Proposal presented an additional monthly recycling fee of $5.50. The Base Proposal provided for solid waste collection to occur twice weekly.

Allied's Alternate Proposal presented per-month rates for mandatory cart-only use as follows: without the road fee, $10.37; without the transfer station, $10.53; with both, $10.90; and without both, $10.01. Allied's Alternate Proposal also presented an additional monthly recycling fee **[*7]** of $4.50. The Alternate Proposal provided for solid waste collection to occur once per week and curbside recycling collection to occur once per week.

Defendant Jefferson City accepted Defendant Allied's bid under the alternate, mandatory rate option, using two 64-gallon carts — one for solid waste, and one for recycling. After the acceptance of Allied's proposal, which was the only proposal submitted, the requirement to build a long-distance-haul transfer station was dropped from the Solid Waste Contract. However, the Solid Waste Contract did include an obligation for Allied to pay a "Future Planning Fee" to Jefferson City, which had not been mentioned in the RFP. The Future Planning Fee provision required Allied to pay $200,000 per year to Jefferson City for the construction of a transfer station, the expansion of the existing landfill (currently owned by Allied), the creation of a new landfill, or for other similar purposes designed to assure the continuation of solid waste services in Jefferson City at a reasonable price. The Solid Waste Contract also provided that Allied would collect and haul all solid waste disposed of by City-owned facilities at no charge to Jefferson City. As **[*8]** of mid-January, 2011, approximately $136,300 had been paid to Jefferson City under the Road Use Fee and the Future Planning Fee provisions of the Solid Waste Contract.

No vote by Defendant Jefferson City's voters was taken to approve such funds going to Jefferson City for street repair or for the goals associated with the Future Planning Fee. Beyond its contract-based relationship with Jefferson City, Defendant Allied's solid waste collection and removal service rates are unregulated.

Under Jefferson City's new trash ordinances — authorizing and implementing the Solid Waste Contract — Plaintiff Massengale is required to pay the contracted rate, currently $15.65 per month, regardless of how much solid waste he generates, or whether he uses or intends to use the curbside solid waste collection and recycling service at all. The Solid Waste Contract provides that Allied is entitled to increase its rates annually by an amount not to exceed the increase in the Consumer Price Index. Since the effective date of the Solid Waste Contract, there has been one rate increase, by 2.02%. Since the new trash ordinances have been in effect, Plaintiff Massengale alternates between setting out his trash **[*9]** cart one week and his recycling cart the next week, neither of which is ever full.

B. Procedural History

Plaintiff Massengale filed his Petition in the Circuit Court of Cole County, Missouri, on September 17, 2010. [Doc. # 1, Ex .1.] The Petition contains five counts. Count I asserts a claim under the Hancock Amendment to the Missouri Constitution, *Mo. Const., art. 10 § 22*, alleging that Jefferson City levied a tax without the approval of a majority of Jefferson City voters. Count II alleges that Defendants violated Missouri antitrust laws, *Mo. Rev. Stat. §§ 416.011-416.161*. Count III asserts a claim under the Clayton Antitrust Act, *15 U.S.C. § 12, et seq.*, for the violation of federal antitrust laws. Count IV asserts that Defendants' Solid Waste Contract is illegal, void, or voidable, because Allied failed to affirm its participation in a federal work authorization program and also failed to affirm that it did not knowingly employ unauthorized aliens, in violation of *Mo. Rev. Stat. § 285.530*. Finally, Count V seeks a declaratory judgment, under *Mo. Rev. Stat. § 527.010*, that neither Plaintiff nor any other resident of Jefferson City is required to enter into a contract with Allied.

Citing **[*10]** Count III of Plaintiff's Petition — invoking federal ***antitrust law*** — Defendant Allied removed this action to federal court on October 22, 2010. [Doc. # 1, ¶ 3.]

II. Discussion

A. Summary Judgment Standard

HN1[] Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party "bears the initial responsibility of informing the district court of the basis for its motion" and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. If the moving party satisfies its burden, *Rule 56(e)* requires the non-moving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In determining whether summary judgment is appropriate, a district court must look at the record and any inferences to be drawn from it in the light most favorable **[*11]** to the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id. at 248*.

B. Plaintiff's Count III for Violation of Federal *Antitrust Law*

Plaintiff Massengale brings Count III of his Petition under the Clayton Act:

> . . .***HN2***[] [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a). In support of his Motion for Summary Judgment, Plaintiff clarifies that the Clayton Act prohibits any violation of federal ***antitrust law*** and that Defendants allegedly violated sections 1 and 2 of the Sherman Act. *See* *15 U.S.C. §§ 1* (***HN3***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is **[*12]** declared to be illegal."), *2* (***HN4***[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony").

Plaintiff Massengale summarizes his antitrust theory as follows:

> The City and Allied worked together to give Allied the entire trash collection service area in Jefferson City, under a six-year contract. A price is set for each resident to pay, under the threat of a fine for not paying it. Allied already owned the only landfill and drop-off area in the City limits (as required in the RFP), and worked with the City *after* submitting the only proposal, to be relieved of having to build the expensive, long-distance-haul transfer station (which also was required in the RFP to be within City limits). No other trash collection company would have a reasonable amount of time to submit plans for an expensive transfer station and drop-off area within the City limits, especially when one already exists. Allied sets its own prices, and those prices are not regulated by anyone [i.e., beyond the terms of the Solid Waste Contract].

[Doc. # **[*13]** 46 at 12.]

Even assuming that Plaintiff properly pleaded Count III in his Petition, and that he submitted sufficient evidence to establish a prima facie case for violation of federal antitrust laws, Count III still must fail because of the state action immunity doctrine. In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court first determined that ***HN5***[] federal antitrust laws could not be applied to prevent states from exercising their sovereign powers to intervene in markets, even if such intervention entailed anticompetitive restraints. Chief Justice Stone found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" and explained that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id. at 350-51*.

Later, in *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*, the Supreme Court faced the question of whether municipalities were also immune from federal antitrust liability under *Parker*'s state action doctrine. A plurality of four justices wrote that ***HN6***[] the doctrine **[*14]** did not extend to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." *Id. at 408*. However, those justices recognized that municipalities were instrumentalities of the state and held that the state action doctrine exempts "anticompetitive conduct engaged in . . . by [municipalities], pursuant to state policy to displace competition with regulation or monopoly public service." *Id. at 413*. The Eighth Circuit has characterized *City of Lafayette* as holding that "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature *contemplated* the kind of action complained of." *Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005, 1011 (8th Cir. 1983)* (quoting *City of Lafayette, 435 U.S. at 415*).

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, the Supreme Court required active state supervision of the challenged restraint, in addition to an affirmative expression of state policy. In *Midcal*, **[*15]** a California statute had delegated to wine producers the power to prevent price competition by dictating the prices charged by wholesalers. *Id. at 103*. Although California's wine pricing scheme was clearly state policy, it did not qualify for antitrust immunity because there was no state supervision. *Id. at 105* ("The State simply authorizes price setting and enforces the prices established by private parties."). Two years later, *Community Communications Co. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*, held that ***HN7***[] the state action doctrine did not provide immunity from antitrust liability when the city acted pursuant only to the state's broad grant of "home rule" power. *Id. at 55-56*.

In 1983, the Eighth Circuit decided *Gold Cross Ambulance*, a case in which two private ambulance companies brought federal antitrust claims against Kansas City, its municipal trust, city consultants, and the private ambulance service that obtained the exclusive contract with the city through a non-competitive process. Kansas City had tasked its municipal trust with implementing a "public utility model" for ambulances within city limits, "designed to eliminate the incentive created by free-market delivery of ambulance **[*16]** service by private companies to neglect emergency ambulance service in favor of the more profitable nonemergency business." *Gold Cross Ambulance, 705 F.2d at 1008*. ***HN8***[] Articulating the state action immunity rule in the municipality context, the Eighth Circuit wrote that a sufficient expression of state policy consisted of two elements: (1) "The legislature must have authorized the challenged activity," and (2) "it must have done so with an intent to displace competition." *Id. at 1011*. The first element was easily satisfied:

> The state permits cities to provide ambulance service to its citizens, to acquire the necessary equipment, to "contract with one or more" operators to provide the ambulance service, and to promulgate rules to regulate the provision of that service. *Mo. Rev. Stat. § 67.300*.

Id. With respect to the second element, the Eighth Circuit wrote:

> ***HN9***[] [A] specific, detailed legislative authorization of monopoly service need not exist to infer the necessary state intent. It is sufficient that the legislature contemplated the kind of action complained of. In other words, a sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence **[*17]** of engaging in the authorized activity.
>
> . . .
>
> Because monopoly service is the necessary consequence of having only one municipal ambulance operator as authorized by Missouri law, *[section 67.300]* alone supports the district court's finding that the state intended to displace unregulated competition in the ambulance industry.

Id. at 1012-13 (internal quotations and citations omitted).

The Eighth Circuit in *Gold Cross Ambulance* faced only the question of whether Kansas City, its municipal trust, and its consultants were immune from antitrust liability under the state action doctrine. Judge Heaney explained that **HN10**[] although *Midcal* had required active state supervision of the challenged restraint, the Supreme Court had applied that requirement "only in cases in which the defendants were private entities or individuals." Id. at 1014 (citations omitted). Unlike California's statute delegating price setting to private wine producers, when a city directly intervenes in the market:

> Because municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private **[*18]** context.
>
> Moreover, because the *Parker* doctrine requires that the state delegate to the local government the authority to engage in the challenged conduct, state supervision of Kansas City's conduct is unnecessary to find state action. As a leading commentator recently noted:
>
>> requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity.

Id. (citing, inter alia, Areeda, ***Antitrust Law*** ¶ 212.2a, at 47 (1982 Supp.)). Thus, at least where a municipality executes "a traditional governmental function to protect public health and safety," id. at 1014 n.13, the state action doctrine requires only that it act pursuant to state policy and does not require active state supervision.

Two years later, in Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985), the Supreme Court echoed the Eighth Circuit's reasoning in *Gold Cross Ambulance*:

> In [*Midcal*,] a unanimous Court held that supervision is required where the anticompetitive conduct is by private parties. In *Boulder*, however, the most recent relevant case, we expressly left this issue open as to municipalities. **[*19]** We now conclude that **HN11**[] the active state supervision requirement should not be imposed in cases in which the actor is a municipality.
>
> . . .
>
> [T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. . . . Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. . . . Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Hallie, 471 U.S. at 46-47. In *Hallie*, the City of Eau Claire was the only defendant. It remained somewhat unclear whether the state action immunity doctrine would also shield a private actor alleged to have conspired with a municipality in the course of the municipality's execution of a properly delegated function.

That question seems to have been resolved, at least in the Eighth Circuit, by L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985) — a highly analogous case to that now before the Court. There, the City of Heber **[*20]** Springs, Arkansas, granted a solid waste disposal franchise to a private firm, Lake City Sanitation. Lake City Sanitation had devised the franchise scheme, but plaintiff L & H Sanitation then submitted a lower bid. The municipality rejected both bids and invited Lake City Sanitation officials to a private meeting. When L & H Sanitation officials caught wind of the meeting and decided to attend, they were asked to leave. The municipality awarded the solid waste disposal franchise to Lake City Sanitation at the meeting, and L & H Sanitation sued Lake City Sanitation and municipal officials for conspiring to restrain trade and to create a monopoly. Id. at 519.

The Eighth Circuit's decision quoted extensively from *Hallie*, noting that the active state supervision requirement "should not be imposed in cases in which the actor is a municipality." Id. at 520 (quoting Hallie, 471 U.S. at 46). It then provided the Eighth Circuit state action immunity rule: (1) the state legislature must have authorized the challenged municipal activity, and (2) the legislature must have intended to displace competition. Id. at 521. After quoting the relevant Arkansas statute, the Eighth Circuit applied the state **[*21]** action immunity rule in a single paragraph:

> The Arkansas Solid Waste Management Act does not expressly grant municipalities the power to grant exclusive solid waste disposal franchises. However, we agree with the district court that the legislative intent to displace competition can be inferred from the statutory scheme because it is a necessary and reasonable consequence of engaging in the authorized activity. Under the Arkansas Solid Waste Management Act municipalities are granted broad authority to regulate solid waste management and to enter into agreements to provide for solid waste management and disposal. Regulation of solid waste management is one of the traditional public health functions of local government, and Arkansas law recognizes the validity of a municipal grant of a private monopoly in solid waste disposal. It certainly cannot be said that Arkansas has adopted a policy of indifference or mere neutrality respecting the municipal actions challenged as anticompetitive. Rather, we agree that the legislative scheme contemplates displacing competition with regulation in the area of solid waste management and disposal.
>
> In sum, we hold that the state action immunity doctrine **[*22]** is applicable to the city's award of the exclusive solid waste disposal franchise to Lake City. This holding makes any discussion of the question of Lake City's immunity under the *Noerr-Pennington* doctrine unnecessary.

Id. at 522 (citations and internal quotations omitted). Thus, in *L & H Sanitation*, the Eighth Circuit shielded from federal ***antitrust law*** not only city officials but also the private company awarded the franchise by the city, without requiring active state supervision of the city's decision.

The Missouri statute in this case and the Arkansas statute in *L & H Sanitation* are so similar that L & H Sanitation must control, and Defendants Jefferson City and Allied are entitled to state action immunity from Plaintiff Massengale's federal antitrust claim. The Eighth Circuit quoted the Arkansas statute as follows:

> **82-2705. Municipal solid waste management systems.**-(a) All municipalities shall develop a plan to provide a solid waste management system and shall adequately provide for the disposal of solid wastes generated or existing within the incorporated limits of such municipality or in the area to be served thereby and in accordance with the rules, regulations, and orders of **[*23]** the Commission [or Department of Pollution Control and Ecology]. The governing body of the municipality may enter into agreements with a county or counties, with one or more other municipalities, with private persons or trusts, or with any combination thereof, to provide a solid waste management system or any part thereof for the municipality, but such agreement shall not relieve the parties thereto of their responsibilities hereunder. . . .

Id. at 522 n.2 (quoting Ark. Stat. Ann. § 82-2701 (1976)). The Missouri statute here provides, in relevant part:

> **260.215. Solid wastes, how handled—duties of cities and counties—exemptions—charges, how stated, how collected.**
>
> **HN12**[] 1. . . . [E]ach city . . . shall provide individually or collectively for the collection and disposal of solid wastes for those areas within its boundaries that are to be served by the solid waste management system; shall be responsible for implementing their approved plan required by section 260.220 as it relates to the storage, collection, transportation, processing, and disposal of their solid wastes; and may purchase all necessary equipment, acquire all necessary land, build any necessary buildings, incinerators, transfer **[*24]** stations, or other structures, lease or otherwise acquire the right to use land or equipment. Each city and county may levy and collect charges for the necessary cost of providing such services . . . .
> 2. Any city or county may adopt ordinances or orders, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes which shall be in conformity with the rules and regulations adopted by the [Department of Natural Resources] for solid waste management systems. Nothing in sections 260.200 to 260.245 shall usurp the legal right of a city or county from adopting and enforcing local

ordinances, rules, regulations, or standards for the storage, collection, transportation, processing, or disposal of solid wastes equal to or more stringent than the rules or regulations adopted by the department . . . .

3. (1) Cities or counties may contract as provided in chapter 70, RSMo, with any person, city, county, common sewer district, political subdivision, state agency or authority in this or other states to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid wastes. . . .

Mo. Rev. Stat. § 260.215.

Thus, **[*25]** ***HN13***[] while the Missouri statute does not expressly grant municipalities the power to grant exclusive solid waste disposal contracts, it clearly provides for such authority. Moreover, as with the Arkansas statute in *L & H Sanitation*, a "legislative intent to displace competition can be inferred from the statutory scheme because it is a 'necessary and reasonable consequence of engaging in the authorized activity.'" *L & H Sanitation, 769 F.2d at 522* (quoting *Gold Cross Ambulance, 705 F.2d at 1013*.). Under the Missouri statute, municipalities are granted broad authority to regulate solid waste management and to contract with private companies to provide for solid waste management and disposal. As was true with Arkansas caselaw in *L & H Sanitation*, Missouri caselaw also recognizes the validity of a municipal grant of a private monopoly in solid waste disposal. *See State ex rel. City of Macon v. Belt, 561 S.W.2d 117, 118 (Mo. 1978)*. Here, as in *L & H Sanitation*, "the legislative scheme contemplates displacing competition with regulation in the area of solid waste management and disposal." *L & H Sanitation, 769 F.2d at 522* (citing *Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 426-28 (8th Cir. 1983))*.

For **[*26]** the reasons stated above, the Court concludes that the state action immunity doctrine is applicable to Defendant Jefferson City's award of the exclusive Solid Waste Contract to Defendant Allied. This ruling makes any discussion of the question of Allied's immunity under the *Noerr-Pennington* doctrine unnecessary. Defendants' motions for summary judgment are granted with respect to Count III of Plaintiff Massengale's Petition alleging violations of federal ***antitrust law***.

C. Remaining State Law Claims

Plaintiff Massengale's remaining claims are all asserted under Missouri law. To avoid needless decisions of state law, the Court remands the action to the Circuit Court of Cole County, Missouri. *See Ivy v. Kimbrough, 115 F.3d 550, 552-53 (8th Cir. 1997)* (***HN14***[] "In most cases, when federal and state claims are joined and the federal claims are dismissed on a motion for summary judgment, the pendent state claims are dismissed without prejudice to avoid needless decisions of state law." (internal quotation marks and citation omitted)); ***HN15***[] *28 U.S.C. § 1367(c)(3)* (court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction).

III. Conclusion

Accordingly, **[*27]** it is hereby ORDERED that the Motion for Summary Judgment [Doc. # 39] filed by Defendant Allied and the Motion for Summary Judgment [Doc. # 41] filed by Defendant Jefferson City are GRANTED only with respect to Count III of Plaintiff's Petition. The remainder of the action is REMANDED to the Circuit Court of Cole County, Missouri.

/s/ Nanette K. Laughrey

NANETTE K. LAUGHREY

United States District Judge

Dated: August 2, 2011

Jefferson City, Missouri

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Allen v. Dairy Farmers of Am., Inc.

United States District Court for the District of Vermont

August 3, 2011, Decided; August 3, 2011, Filed

Case No. 5:09-cv-230

Reporter
2011 U.S. Dist. LEXIS 85753 *; 2011-2 Trade Cas. (CCH) P77,598; 2011 WL 3361233

ALICE H. ALLEN, LAURANCE E. ALLEN, d/b/a Al-lens Farm, GARRET SITTS, RALPH SITTS, JONATHAN HAAR and CLAUDIA HAAR, on behalf of themselves and all others similarly situated, Plaintiffs, v. DAIRY FARMERS OF AMERICA, INC., DAIRY MARKETING SERVICES, LLC, and DEAN FOODS COMPANY, Defendants.

Subsequent History: Settled by, Judgment entered by *Allen v. Dairy Farmers of Am., Inc., 2011 U.S. Dist. LEXIS 90846 (D. Vt., Aug. 15, 2011)*

Prior History: *Allen v. Dairy Farmers of Am., Inc., 2011 U.S. Dist. LEXIS 48479 (D. Vt., May 4, 2011)*
In re Southeastern Milk Antitrust Litig., 2011 U.S. Dist. LEXIS 85025 (E.D. Tenn., Aug. 1, 2011)

Core Terms

Settlement, Notice, Milk, attorney's fees, lawsuit, class member, discovery, risks, settlement fund, class action, preliminary approval, factors, class representative, market share, courts, dairy, incentive award, antitrust, farmers, settlement amount, questions, revised, costs and expenses, negotiated, lodestar, damages, cases, raw, class action litigation, attorney's fees award

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN1[] **Class Actions, Notice of Class Action**

Notice must be reasonably calculated to apprise the class of the pending action and to afford class members an opportunity to object.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN2[] **Class Actions, Compromise & Settlement**

There is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions. Settlements generally advance the public interest because they minimize the expense of litigation, avoid the expenditure of judicial resources, and ensure injured parties' recoveries without the time, expense, and inconvenience of litigation. The claims of a certified class may be settled only with the court's approval. *Fed. R. Civ. P. 23(e)*.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN3[] **Class Actions, Compromise & Settlement**

In deciding whether to approve a settlement, the court must determine, after a hearing, whether it is "fair, reasonable and adequate," *Fed. R. Civ. P. 23(e)(2)*, and is not the product of collusion. This analysis requires the court to consider both the settlement's terms and the negotiating process leading to settlement. The U.S. Court of Appeals for the Second Circuit has identified nine factors to be considered in making this determination: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN4[] **Class Actions, Compromise & Settlement**

A proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate if it was the product of arm's length negotiations conducted by capable counsel experienced in class action litigation and if it occurred after meaningful discovery.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN5[] **Class Actions, Compromise & Settlement**

Courts have held that it is enough for the parties to have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN6[] **Class Actions, Compromise & Settlement**

It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.

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

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

HN7[] **Regulated Practices, Monopolies & Monopolization**

The core element of a monopolization claim is market power, which is defined as the ability to raise price by restricting output.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Regulated Practices, Monopolies & Monopolization**

The U.S. Court of Appeals for the Second Circuit has held that once a relevant market has been established, a defendant's market share may be used "as a proxy for market power."

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

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

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

Dismissals for insufficient pleading of market power are rare pre-discovery and are generally reserved for complaints bereft of factual allegations or which contain market share or market power allegations that are purely conclusory. Courts have consistently held that firms with market shares of less than 30% are presumptively incapable of exercising market power.

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

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] **Regulated Practices, Private Actions**

As a general matter, in the antitrust context, the continuing violation doctrine is heavily disfavored in the U.S. Court of Appeals for the Second Circuit and courts have been loath to apply it absent a showing of compelling circumstances.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN11[] **Class Actions, Compromise & Settlement**

The fact that a defendant is able to pay more than it offers in a settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate. Instead, this factor must be weighed in conjunction with all of the Grinnell factors, most notably the risk of the class prevailing and the reasonableness of the settlement fund.

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

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN12[] **Regulated Practices, Private Actions**

Antitrust litigation in general, and class action litigation in particular, is unpredictable.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN13[] Class Attorneys, Fees

Courts recognize that when a common fund is created, the party who creates it is generally entitled to a reasonable attorney's fee. The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost. Courts further acknowledge the reality that a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN14[] Class Attorneys, Fees

Courts have used two distinct methods to determine what is a reasonable attorneys' fee. The first is the lodestar, under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate. Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier based on other less objective factors, such as the risk of the litigation and the performance of the attorneys. The second method is simpler. The court sets some percentage of the recovery as a fee. In determining what percentage to award, courts have looked to the same "less objective" factors that are used to determine the multiplier for the lodestar.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN15[] Class Attorneys, Fees

The trend in the U.S. Court of Appeals for the Second Circuit has been to express the attorneys' fees as a percentage of the total settlement. In determining the proper percentage, the Second Circuit has identified six factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN16[] Class Attorneys, Fees

The U.S. Court of Appeals for the Second Circuit has rejected the notion of a "benchmark" for common fund cases. It has also tasked the district courts to act as a fiduciary who must serve as a guardian of the rights of absent class members. Accordingly, the court must take a hard look at plaintiffs' fee request because awards in common fund cases are proper only if made with moderation.

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

HN17[] **Class Members, Named Members**

An incentive award is meant to compensate the named plaintiff for any personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit.

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For Garret Sitts, on behalf of himself and all others similarly situated, Ralph Sitts, on behalf of himself and all others similarly situated, Jonathan Haar, on behalf of himself and all others similarly situated, Claudia Haar, on behalf of herself and all others similarly situated, Donna Hall, on behalf of herself and all others simiilarly situated, Plaintiffs: Andrew D. Manitsky, Esq., Gravel and Shea, Burlington, VT; Benjamin D. Brown, Esq., Brent W. Johnson, Esq., Kit A. Pierson, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Daniel A. Small, Esq., Emmy L. Levens, Esq., PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC; George F. Farah, Esq., Cohen Milstein Sellers & Toll PLLC, New York, NY; Gregory J. Commins, Jr., Robert G. Abrams, Esq., PRO HAC VICE, Baker & Hostetler LLP, Washington, DC; Robert L. Green, Esq., PRO HAC VICE, Howrey, LLP, Washington, DC; Terry L. Sullivan, Esq., Baker & Hostetler LLP, Washington, **[*3]** DC.

For Vince Neville, on behalf of himself and all others similarly situated, Plaintiff: Andrew D. Manitsky, Esq., Gravel and Shea, Burlington, VT; Benjamin D. Brown, Esq., Brent W. Johnson, Esq., Kit A. Pierson, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Daniel A. Small, Esq., Emmy L. Levens, Esq., PRO HAC VICE, Cohen Milstein Sellers & Toll PLLC, Washington, DC; George F. Farah, Esq., Cohen Milstein Sellers & Toll PLLC, New York, NY; Gregory J. Commins, Jr., Robert G. Abrams, Esq., PRO HAC VICE, Baker & Hostetler LLP, Washington, DC; Rachel M. Brown, Esq., PRO HAC VICE, Shapiro Haber & Urmy LLP, Boston, MA; Robert L. Green, Esq., PRO HAC VICE, Howrey, LLP, Washington, DC; Terry L. Sullivan, Esq., Baker & Hostetler LLP, Washington, DC.

For Dairy Farmers of America, Inc., Dairy Marketing Services, LLC, Defendants: Amber L. McDonald, Esq, Kimberly N. Shaw, Esq., PRO HAC VICE, Baker & Miller PLLC, Washington, DC; Carl R. Metz, Esq., Christopher R. Looney, Esq., Kevin Hardy, Esq., Lauren Collogan, Esq., Shelley J. Webb, Esq., PRO HAC VICE, Williams & Connolly LLP, Washington, DC; Ian P. Carleton, R. Jeffrey Behm, Sheehey Furlong & Behm P.C., Burlington, VT; Steven R. Kuney, Esq., **[*4]** Williams & Connolly LLP, Washington, DC; W. Todd Miller, Esq., Baker & Miller PLLC, Washington, DC.

For Dean Foods Company, Defendant: Carolyn H. Feeney, Dechert LLP, Philadelphia, PA; John T. Sartore, Paul Frank Collins PC, Burlington, VT; Paul T. Denis, Esq., Paul D. Frangie, Esq., PRO HAC VICE, Dechert LLP, Washington, DC; Paul H. Friedman, Esq., Dechert LLP, Washington, DC.

For ENE Evaluator, ENE Evaluator: Michael J. Marks, Esq., MarksPowers LLP, Middlebury, VT.

For Vermont Attorney General's Office, also known as Attorney General, Office of the, Amicus: Robert F. McDougall, Vermont Office of the Attorney General, Montpelier, VT.

Judges: Christina Reiss, Chief United States District Judge.

Opinion by: Christina Reiss

Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART FINAL APPROVAL OF DEAN SETTLEMENT

(Docs. 310, 327)

This matter came before the court on July 18, 2011 for a hearing on Plaintiffs' motion for an order granting final approval of the settlement Plaintiffs reached with Defendant Dean Foods Company ("Dean") on December 7, 2010 (the "Dean Settlement"). (Doc. 327.) Plaintiffs also request: (1) approval of class counsel's application for an award of $8.5 million in attorney's fees, as well as **[*5]** accrued interest, plus $1.5 million in costs and expenses; and (2) a $7,500 incentive award to each of the six class representatives. (Doc. 310.) At issue before the court is whether the Dean Settlement is fair, reasonable and adequate. *See* *Fed. R. Civ. P. 23(e)*. With certain modifications, the court concludes that it is, and therefore grants final approval.

Plaintiffs are represented by Kit A. Pierson, Esq., and Andrew D. Manitsky, Esq. Dean is represented by Paul H. Friedman, Esq. and John T. Sartore, Esq. Mr. Grant John Gorton requested, and was granted, an opportunity to address his concerns regarding the Dean Settlement.

A. Factual and Procedural Background.

In this lawsuit, Plaintiffs, on behalf of themselves and other dairy farmers who produced and pooled raw Grade A milk in Federal Milk Marketing Order 1 ("Order 1"), allege that Defendants Dairy Farmers of America, Inc. ("DFA"), Dairy Marketing Services, LLC ("DMS"), and Dean engaged in anticompetitive conduct in the dairy industry. In their 98-page, seven-count Revised Consolidated Amended Class Action Complaint, Plaintiffs allege, *inter alia*, that Defendants conspired to fix prices and monopolize and monopsonize the raw Grade **[*6]** A milk market in Order 1. Defendants deny Plaintiffs' claims.

In August 2010, the court granted in part and denied in part the motions to dismiss filed by each of the Defendants. [1] (Doc. 81.) The court set an expedited discovery schedule. Discovery in this case closed on May 20, 2011. In December 2010, Plaintiffs and Dean filed a motion for preliminary approval of the Dean Settlement. (Doc. 160.)

In March 2011, the court granted the Vermont Attorney General ("VTAG") permission to file an amicus brief in this action. Dean notified each attorney general whose state is located within Order 1 of the Dean Settlement. VTAG has submitted several letters to the court regarding the Dean Settlement.

On May 4, 2011, the court granted preliminary approval of the Dean Settlement, as revised. The revisions included the deletion of the injunctive relief provision in the Dean Settlement, clarification of the definition of the proposed settlement class, and inclusion of additional financial information.

1. *The Dean Settlement Agreement*.

As revised, the Dean Settlement Agreement identifies the proposed settlement class as follows:

[1] Defendant H.P. Hood, LLC was dismissed at that time.

> All dairy farmers, whether **[*7]** individuals, entities or members of cooperatives, who produced raw Grade A milk in Order 1 and pooled raw Grade A milk in Order 1 during any time from January 1, 2002 to the Notice Date. Defendants' current officers and directors are excluded from the Settlement Class.

(Doc. 294-1 at 8-9.) Paragraph 9.1 of the Dean Settlement Agreement sets forth the amount of the Settlement Fund:

> Within fifteen calendar days after the entry of the Preliminary Approval Order, the Settling Defendant [Dean] will deposit a sum of thirty million United States dollars ($30,000,000) into an escrow account (the "Settlement Fund"), held and administered by Eagle Bancorp, Inc.

(Doc. 294-1 at 17.) Pursuant to the settlement, Dean admits no wrongdoing and Plaintiffs agree, on behalf of the proposed settlement class, that once the Dean Settlement Agreement becomes final, their claims against Dean will be released. Until such release, Dean has agreed to respond to reasonable discovery requests in the status of a non-party. To date, it has submitted to four depositions.

2. *Notice of the Dean Settlement*.

The Preliminary Approval Order required class counsel to, *inter alia*: (1) send notice of the Dean Settlement to members **[*8]** of the settlement class, via first class mail, within thirty days after the order was signed; and (2) publish a summary notice of the Dean Settlement in four agricultural publications widely circulated in the Northeast.

The Affidavit of Charlene Young (the "Young Affidavit"), Senior Project Administrator for the Dean Settlement Claims Administrator, Rust Consulting ("Rust"), details Plaintiffs' dissemination of the Dean Settlement notices. According to the Young Affidavit, Rust mailed to 9,067 prospective Dean Settlement class members a packet containing the Settlement Notice (the "Notice"), a claim form, cover letter, and envelope which contained information required by the court in its preliminary approval order. [2] The United States Postal Service ("USPS") returned 201 of these mailings as undeliverable without a forwarding address. Rust obtained new addresses for 149 of these undeliverable packets and promptly re-mailed them. The USPS also returned ten notice packets that contained forwarding addresses; Rust re-mailed those packets as well. At the fairness hearing, Plaintiffs estimated that they sent individualized notices to 98% to 99% of the settlement class.

Through Rust, and pursuant to the Preliminary Approval Order, Plaintiffs also created a case-dedicated settlement website, *www.NEDairySettlement.com*, which became available on May 14, 2011 and includes links to the Notice, Claim Form, Dean Settlement Agreement, and other court documents. The website's opening paragraph states in bold:

> **IF [*10] YOU ARE A DAIRY FARMER WHETHER AN INDIVIDUAL, ENTITY OR MEMBER OF A COOPERATIVE, WHO PRODUCED RAW GRADE A MILK IN ORDER 1 AND POOLED RAW GRADE A MILK ON ORDER 1 DURING ANY TIME FROM JANUARY 1, 2002 TO MAY 23, 2011, A PROPOSED CLASS ACTION SETTLEMENT MAY AFFECT YOUR LEGAL RIGHTS**

(Doc. 327-3 at 22.) The website answers the following questions: "What is the lawsuit about? Who is included in the Dean Settlement Class? What are the terms of the settlement? What are my rights? What if I have questions?" (Doc. 327-3 at 22.) As of July 8, 2011, Plaintiffs estimate that this website had been viewed by approximately 1,456 visitors. In her Affidavit, Ms. Young noted that Rust established a toll-free telephone number, which went 'live' on May 13, 2011, and which provided a recorded message and access to a live representative to answer any additional questions. The toll-free number logged approximately 354 calls by July 8, 2011. (Doc 327-3 at 4.)

[2] The Notice is an eight-page **[*9]** document which describes in plain, easily understood language the nature of the litigation, the terms of the Dean Settlement, the definition of the settlement class, how to request a claim form, how to submit a claim, how to obtain exclusion from the lawsuit, how to object, how to attend the court's fairness hearing, and what happens if a class member does nothing. It divides these topics into twenty-seven discrete questions that explain the Dean Settlement in even greater detail. The Notice also advises each class member of the right to be represented by his or her own lawyer, and the binding effect of the Dean Settlement if exclusion is not requested. The Notice directs settlement class members to the website established specifically for the Dean Settlement, and to Rust, for further information. Contact information for class counsel is also provided.

Rust, on behalf of Plaintiffs, also created a one page "Summary Notice" regarding the Dean Settlement which they published in four trade publications: *Country Folks; Farming: The Journal of Northeast Agriculture; Farmshine*; and *Progressive Dairymen* (Northeast **[*11]** edition). The Summary Notice begins with the following statement: "**If Your Farm Produced Grade A Milk In the Northeast Since 2002[,] You Could Get Money from a Class Action Settlement.**" (Doc. 327-3 at 7.) The Summary Notice describes the Dean Settlement and briefly answers the following questions: "What is the Case About? Who is Included in the Class? What Does the Settlement Provide? How to Get a Payment?" (Doc. 327-3 at 7.) The final paragraph, entitled "Your Other Rights," sets forth the following information:

> If you do nothing, you will be legally bound by the Settlement, your rights will be affected and you will not be able to sue Dean for any claim relating to the lawsuit. If you do not want to be legally bound by the Settlement, you may exclude yourself from it by **June 27, 2011.** If you stay in the Settlement, you may object to it by **June 27, 2011**. The Court will hold a hearing on **July 18, 2011** to consider whether to approve the Settlement and a request by the Class lawyers for up to one-third of the settlement amount ($10 million) in attorneys' fees, plus costs, expenses, and incentive fees for the dairy farmers who brought the lawsuit. You do not need to attend the hearing. **[*12]** If you wish, you or your own lawyer may ask to appear and speak at the hearing at your own cost.

(Doc. 327-3 at 7.) The Summary Notice provides the Settlement toll free number and web address if class members wanted more information and a claim form.

The court finds that the Notice of the Dean Settlement fairly and reasonably apprised settlement class members of the nature of the lawsuit, the nature of the Dean Settlement, their right to object and to request exclusion from the settlement class, the time and manner for requesting exclusion, and the consequences for failing to do so. The Notice also provided settlement class members with clear directions as to how, when, and where to present any objections to the Dean Settlement, and of their right to be represented by their own attorneys. *See In re Michael Milken & Assocs. Sec. Litig., 150 F.R.D. 57, 60 (S.D.N.Y. 1993)* (observing that ***HN1***[] notice must be reasonably calculated to apprise the class of the pending action and to afford class members an opportunity to object). The Notice was supplemented by the Summary Notice, the Dean Settlement website, and toll-free number. As a result, the court finds that Plaintiffs have provided the best **[*13]** practicable notice under the circumstances. *See Fed. R. Civ. P. 23(c)(2)*.

3. *Objections to the Dean Settlement*.

Rust received four requests for exclusion from the Dean Settlement. Two class members objected to the Dean Settlement, including Mr. Gorton. At the July 18th hearing, Mr. Gorton expressed: (1) a concern that this lawsuit will do little to change the conditions in the dairy industry which are causing price instability, overproduction, and underpayments to farmers; (2) a desire to preserve a relationship with Dean which Mr. Gorton described as his "best customer;" (3) a concern that unregulated competition is destructive for the dairy industry and that what benefits an individual may not benefit the industry as a whole; and (4) a belief that the attorney's fees proposed for Plaintiffs' counsel are too high. Ranson Mead of Mead Farms, LLC in Newport Center, Vermont, the other objector, opposed the settlement because not enough money is being paid back to the farmers, and because an example should be set for the big milk companies who are not following the rules while farmers are required to do so. (Doc. 320.)

VTAG advised the court, by letter, that it had received criticism that **[*14]** the Dean Settlement amount was too low. It noted that this was a common criticism in class action litigation and that, although it had objected to settlements in the past on this basis, it would not interpose an objection to the Dean Settlement. VTAG questioned, however, why the $144 million settlement amount that Dean agreed to pay in the *In re Southeastern Milk Litigation* ("*Southeastern Milk*") [3] was considerably greater than the settlement amount offered by Dean in this case.

[3] *In Southeastern Milk*, litigated in the Eastern District of Tennessee, the plaintiffs alleged that the defendants (including Dean and Dairy Farmers of America) violated *sections 1* and *2* of the Sherman Act through conspiracy to monopolize and monopsonize; unlawful monopsony and unlawful monopolization; attempt to monopolize and monopsonize; and conspiracy to

Plaintiffs respond to the objections as follows. First, they point out that the number of objections and requests for exclusion is extremely low when compared to a class that exceeds 9,000 class members. Second, they argue that they did not reach settlement with Dean until they had completed over seventy depositions and had engaged in extensive written discovery, and thus were in a position to adequately assess the strengths and weaknesses of their case against Dean. Third, they assert that they have some questions regarding Dean's continuing financial viability, which renders a settlement advisable at this time. Fourth, they note that any argument by VTAG that the settlement amount should be based upon the volume of milk processed in Order 1 as opposed to the volume of milk processed in Orders 5 and 7 (the federal milk orders involved in the *Southeastern Milk* litigation), is irrational and not supported by either evidence or expert opinion. Plaintiffs further posit that VTAG is not **[*16]** sufficiently familiar with *Southeastern Milk* to make a proper comparison between the two settlements. For example, they point out that VTAG was initially unaware that *Southeastern Milk* involved both Orders 5 and 7, that Dean's market share in that geographic market approximated 70% (compared to a much smaller market share in Order 1), and that the *Southeastern Milk* settlement was payable over four years, as opposed to the Dean Settlement which is payable within six months.

Plaintiffs further contend that the attorney's fees and expenses they request are fair and reasonable, and fall well within what courts typically approve in litigation of this complexity and magnitude. They assert that devoting time and resources to this case involved significant risk, and that without a fee and expense award in the requested amount, attorneys would not bring these types of cases. Plaintiffs also contend that either the percentage or lodestar method are appropriate to calculate the attorney's fees award, and that a 28% recovery from the Dean Settlement Fund ($8.5 million), plus $1.5 million in expenses—which is "$500,000 less than the total expenditures of settlement class counsel on the instant litigation **[*17]** during this time period" (Doc. 310-1 at 18)—is reasonable.

For its part, Dean advised the court that it believes its damages in this lawsuit would have been confined to a four year period due to the statute of limitations. Dean also stated that it had strong defenses based upon its limited market share in the Northeast; that the facts at issue (insofar as they pertain to Dean) are very different in the two cases; and that, unlike the plaintiffs in that litigation, Plaintiffs here still have many hurdles to overcome before their claims against Dean proceed to trial. Dean asserted that the settlement amount is sizable in light of its smaller litigation risk and potential exposure should Plaintiffs prevail on their claims against it.

B. The Standard for Granting Approval of the Dean Settlement.

As the court has previously acknowledged, ***HN2***[] "there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions." *In re Prudential Sec. Inc. Ltd. P'ships Litig., 163 F.R.D. 200, 209 (S.D.N.Y. 1995)* (citations omitted). Settlements generally advance the public interest because they minimize the expense of litigation, avoid the expenditure of judicial **[*18]** resources, and ensure injured parties' recoveries without the time, expense, and inconvenience of litigation. The claims of a certified class may be settled "only with the court's approval." *Fed. R. Civ. P. 23(e)*. ***HN3***[] In deciding whether to approve a settlement, the court must determine, after a hearing, whether it is "fair, reasonable and adequate," *Fed. R. Civ. P. 23(e)(2)*, and is not the product of collusion. *See D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001)*. "This analysis requires the court to consider both 'the settlement's terms and the negotiating process leading to settlement.'" *Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 674 (S.D.N.Y. 2011)* (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005))*. The Second Circuit has identified nine factors to be considered in making this determination:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability;

price-fix. While the plaintiffs' litigation theories in *Southeastern Milk* are similar to those in this case, the factual allegations and the structure of the Grade A milk market are quite different. The posture of the two cases is also markedly different. The plaintiffs in *Southeastern Milk* have survived a motion to dismiss and a motion for summary judgment. **[*15]** Class certification has been granted (although a motion is currently pending to decertify the class). *Southeastern Milk* is on the eve of a jury trial; in this case, the parties just completed discovery.

> (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability **[*19]** of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted) (abrogated on other grounds by *Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000))*. Application of the *Grinnell* factors to the Dean Settlement reveals that it should be approved.

1. *Complexity, Expense, and Likely Duration of the Litigation; Stage of the Proceedings*.

This is a complex and expensive lawsuit that has already required a sizable time and monetary investment by Plaintiffs' counsel, totaling 31,429.6 hours from the time the lawsuit was filed on October 8, 2009 until April 30, 2011. Extensive written discovery, motion practice, and depositions took place before the Dean Settlement was reached. [4] Plaintiffs' counsel is experienced in antitrust and class action litigation and negotiated the Dean Settlement at arm's length, in a vigorous and non-collusive manner, with equally competent and experienced counsel **[*20]** for Dean. By settling before the completion of discovery, both Plaintiffs and Dean have saved themselves, and the prospective class, the time and expense of further discovery, class certification proceedings, motions for summary judgment, and the often exorbitant costs of trial. On the other hand, this is not a case which was settled prior to an adequate testing of the strength of Plaintiffs' allegations against Dean. *See* *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd., 2004 U.S. Dist. LEXIS 8608, 2004 WL 1087261, at *1 (S.D.N.Y. May 14, 2004)* (***HN4***[] "A proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate if . . . it was the product of arm's length negotiations conducted by capable counsel experienced in class action litigation . . . , and if it occurred after meaningful discovery.") (citations omitted).

HN5[] Courts have held that "it is enough for the parties to have engaged in sufficient investigation of the facts to enable the [c]ourt to 'intelligently make . . . an appraisal' of the Settlement." *In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 176(S.D.N.Y. 2000)* **[*21]** (quoting *Plummer v. Chemical Bank, 668 F.2d 654, 660 (2d Cir. 1982))*. The court has some opportunity to consider the strength of Plaintiffs' claims against Dean in deciding the motions to dismiss. It concludes that the Dean Settlement neither grossly overvalues nor undervalues those claims.

2. *Reaction of the Class to the Dean Settlement*.

HN6[] "It is well settled that 'the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.'" *In re Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001)* (quoting *Sala v. Nat'l R.R. Passenger Corp., 721 F. Supp. 80, 83 (E.D. Pa. 1989))*; *see also* *Wal-Mart Stores, Inc., 396 F.3d at 118* ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (internal quotation marks and citation omitted); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785, 812 (3d Cir. 1995)* (the number and vociferousness of the objectors is a factor to consider in weighing reasonableness of proposed settlement); *In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003)* **[*22]** ("[A] certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement") (citation omitted).

In this case, notwithstanding broadly disseminated individualized and published notice of the Dean Settlement, only two objections to the revised settlement were filed, together with four requests for exclusion. By any measure, this is an exceedingly small number of objections and exclusions. The court thus concludes that the class reaction to the Dean Settlement has been largely favorable.

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[4] In addition to the discovery conducted in this case, Plaintiffs are privy to all of the discovery involving Dean in *Southeastern Milk*.

3. *Risks of Establishing Liability and Damages, and of Maintaining Class Action*.

The court next examines the risks of establishing liability and damages, and of maintaining the class action through trial. In seeking dismissal of this action over a year ago, Dean challenged Plaintiffs' definition of both the product and geographic markets, and argued that based upon publicly available documents, it owned fewer than 20% of the bottling plants in Order 1, and possessed only 18% of the market share, during Plaintiffs' **[*23]** proposed class period. ***HN7***[] "The core element of a monopolization claim is market power, which is defined as 'the ability to raise price by restricting output.'" *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 107 (2d Cir. 2002)* (quoting 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, ¶ 501, at 85 (2002)). [5] Dean argued that its own market power in Order 1 was simply too insignificant to form a factual and legal basis for Plaintiffs' antitrust claims.

In its Opinion and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, this court denied Dean's request for dismissal, observing that ***HN9***[] "[d]ismissals for insufficient pleading of market power are rare pre-discovery and are generally reserved for complaints bereft of factual allegations or which contain market share or market power allegations that are purely conclusory." *Allen v. Dairy Farmers of Am. Inc., 748 F. Supp. 2d 323, 340 (D. Vt. 2010)* (citations omitted). The court nonetheless acknowledged that "[c]ourts have consistently held that **[*24]** firms with market shares of less than 30% are presumptively incapable of exercising market power." *Id.* (quoting *Commercial Data Servers, Inc. v. IBM Corp., 262 F. Supp. 2d 50, 74 (S.D.N.Y. 2003))*. Dean's limited market share in Order 1 thus posed a sizable risk that Plaintiffs would be unable to establish Dean's liability for antitrust violations.

This court further recognized that Plaintiffs faced similar challenges with regard to Dean's statute of limitations defense as "[i]t is beyond dispute that many of the acts that Plaintiffs allege caused them injury took place more than four years prior to the filing of Plaintiffs' initial Complaint [and in] the absence of a continuing violation, these acts cannot form the basis of Plaintiffs' antitrust claims." *Id. at 348* (citation omitted). The court further noted that "' ***HN10***[] [a]s a general matter, the continuing violation doctrine is heavily disfavored in the Second Circuit and courts have been loath to apply it absent a showing of compelling circumstances.'" *Id. at 350* (quoting *Stouter v. Smithtown Cent. Sch. Dist., 687 F. Supp. 2d 224, 230 (E.D.N.Y. 2010))*. If the statute of limitations were found to bar all or most of Plaintiffs' claims against **[*25]** Dean, there would be no recovery for the class.

With regard to the risks of maintaining the class action through trial, it bears noting that the court has certified the class for purposes of the Dean Settlement only. The court has not adjudicated Plaintiffs' motion for class certification, which has been vigorously opposed by DFA and DMS, who have standing to oppose it. [6] Accordingly, there is a risk that this lawsuit will not be certified as a class action and will proceed to trial, if at all, as a lawsuit brought by the individual Plaintiffs against DFA and DMS. In such an event, there will obviously be no class recovery.

In light of the cited risks and obstacles, the court need not address whether Plaintiffs would face similar challenges in establishing damages [7] other than to note that, in antitrust class **[*26]** action suits, the task is rarely a simple one and is usually heavily dependent upon competing, complex, expensive, and extensive expert witness testimony. Plaintiffs therefore could be expected to incur additional time, labor, and expense in an effort to establish class members' damages against Dean. *See* *Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 719 (E.D.N.Y. 1989)* (antitrust class action litigation is "notoriously complex, protracted, and bitterly fought"). Granting final approval to the Dean Settlement would thus "grant relief to all class members without subjecting them to the risks, complexity,

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[5] ***HN8***[] The Second Circuit has held that once a relevant market has been established, a defendant's market share may be used "as a proxy for market power." *PepsiCo, 315 F.3d at 108*.

[6] Consistent with controlling precedent, the court ruled that DFA and DMS, as non-settling Defendants, lacked standing to oppose the Dean Settlement. *See* *Allen v. Dairy Farmers of America, Inc., 2011 U.S. Dist. LEXIS 48479, 2011 WL 1706778, at *4 (D.Vt. May 4, 2011)* (citing *Zupnick v. Fogel, 989 F.2d 93, 98 (2d Cir. 1993)* and 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.55 (4th ed. 2002)).

[7] The court has not been provided with damages estimates from either Plaintiffs or Dean.

duration, and expense of continuing litigation [against Dean.]" *In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 456-57 (S.D.N.Y. 2004)*. Accordingly, the fourth, fifth, and sixth *Grinnell* factors also favor approval.

4. *The Ability of Dean to Withstand a Greater Judgment; Reasonableness of Settlement Fund*.

The court must also consider whether Dean could have withstood a greater settlement amount, the reasonableness of the settlement fund in light of the best possible recovery, and the **[*27]** range of the reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation.

Plaintiffs have expressed concern regarding Dean's continued financial viability, citing a news article discussing Dean's large debt. They note that ***HN11***[] "the fact that a defendant is able to pay more than it offers in a settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re Paine Webber Ltd. P'ships Litig., 171 F.R.D. 104, 129 (S.D.N.Y. 1997)*. Instead, this factor "must be weighed in conjunction with all of the *Grinnell* factors, most notably the risk of the class prevailing and the reasonableness of the settlement fund." *In re AOL Time Warner ERISA Litig., 2006 U.S. Dist. LEXIS 70474, 2006 WL 2789862, at *8 (S.D.N.Y. Sept. 27, 2006)*. Here, the court cannot determine whether Dean *could have* paid more, it can only conclude that there is no evidence that Dean *should have* paid more in light of its statute of limitations defense and its limited market share in Order 1.

As far as the reasonableness of the settlement fund, VTAG has questioned whether the $30 million settlement here is reasonable in light of the $140 million settlement in *Southeastern* ***[*28]*** *Milk*. However, because of the factual and procedural differences between the two cases, the court agrees with Plaintiffs and Dean that the *Southeastern Milk* settlement is not a proper benchmark for evaluating the Dean Settlement. The plaintiffs in *Southeastern Milk* are on the eve of trial. Because of Dean's approximately 70% market share in the Southeast, and more numerous allegations of Dean's wrongdoing (which Dean disputes), Dean's financial exposure in that litigation appears greater than its financial exposure in this case. Moreover, Plaintiffs here risk the possibility that their claims against Dean will be dismissed long before trial, but after they have incurred the time, expense, and inconvenience of further litigation. The unpredictability of the likelihood and amount of a potential recovery against Dean in this case thus weighs in favor of finding the Dean Settlement within the range of reasonable outcomes. *See In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 475-76 (S.D.N.Y. 1998)* (***HN12***[] "Antitrust litigation in general, and class action litigation in particular, is unpredictable").

In summary, the Dean Settlement was the result of arm's length negotiations between **[*29]** competent, experienced counsel, fully familiar with an extensive factual record, who have litigated the case in a vigorous and professional manner. Although the best outcome for Plaintiffs is impossible to determine in this case, the court finds the Dean Settlement adequate in light of the risks of no recovery, the possibility that the class will not be certified, and the stage of the litigation at which the settlement was reached. Based upon all of the foregoing factors, the court concludes that the monetary amount and other terms (with the exception of attorney's fees and costs) of the Dean Settlement is "fair, reasonable and adequate." *See Fed. R. Civ. P. 23(e)*.

C. Attorney's Fees and Expenses.

Plaintiffs' counsel request an attorney's fees award in the amount of $8,500,000, as well as accrued interest, plus $1,500,000 as partial reimbursement for costs and expenses. The total award would thus represent approximately one third of the Dean Settlement. For the reasons set forth below, the court concludes that an award of $1,500,000 to cover costs and expenses is appropriate, and that an attorney's fees award comprising 15% of the total settlement ($4,500,000), without accrued interest, **[*30]** is fair and reasonable.

It is beyond dispute that settlement class counsel have created a benefit for the settlement class through the Dean Settlement that might not otherwise exist. ***HN13***[] Courts recognize that when a common fund is created, the party who creates it is generally entitled to a reasonable attorney's fee. *See Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)* (holding "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.")

(citations omitted). "The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." Goldberger, 209 F.3d at 47. Courts further acknowledge the reality that "a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc., 684 F. Supp. 679, 687 (M.D. Ala. 1988)* (citations omitted). Here, the only dispute is the amount of the fee.

HN14[] "Courts have used two distinct methods to determine **[*31]** what is a reasonable attorneys' fee." *Goldberger, 209 F.3d at 47*. "The first is the lodestar, under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Id.* "Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier based on 'other less objective factors,' such as the risk of the litigation and the performance of the attorneys." *Id.* (citation omitted). "The second method is simpler. The court sets some percentage of the recovery as a fee." *Id.* "In determining what percentage to award, courts have looked to the same 'less objective' factors that are used to determine the multiplier for the lodestar." *Id.* (citation omitted).

As Plaintiffs correctly point out, ***HN15***[] "[t]he trend in the Second Circuit has been to express the attorneys' fees as a percentage of the total settlement[.]" *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 2007 U.S. Dist. LEXIS 93423, 2007 WL 4526593, at *13 (S.D.N.Y. Dec. 20, 2007)*. In determining the proper percentage, the Second Circuit has identified six factors:

> (1) the time and **[*32]** labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation[ ]; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (quoting *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig., 724 F. Supp. 160, 163 (S.D.N.Y. 1989))*.

1. *Counsel's Time and Labor*.

Plaintiffs' counsel has expended substantial time and labor on this lawsuit. Plaintiffs estimate that, using the lodestar method of calculation, their attorney's fees exceed $11 million and their costs and expenses exceed $2 million. However, only a portion of these amounts gave rise to the Dean Settlement which in turn gave rise to the common fund from which any attorney's fee must be derived. Plaintiffs do not segregate the fees they incurred in pursuing the Dean Settlement from, for example, the time they spent in litigating the motions to dismiss, the discovery disputes, and the motion to certify the class. Indeed, they acknowledge that much of the discovery they would have otherwise pursued from Dean remains to be completed. The court thus does not find Plaintiffs' lodestar a **[*33]** reliable proxy for a reasonable attorney's fees award with regard to the Dean Settlement. Correspondingly, by awarding Plaintiffs the full amount of their costs and expenses incurred to date, the court arguably may overcompensate them for costs and expenses not incurred in creating the common fund. The court factors these considerations into its overall determination of a reasonable attorney's fees award.

2. *Litigation Complexity, Magnitude, Risk, and Quality of Representation*.

The court has already acknowledged that this litigation is complex, time consuming, and laden with risk regarding its potential outcome. Plaintiffs' counsel is experienced in antitrust litigation and vigorously negotiated the Dean Settlement. To date, Plaintiffs' attorneys have been competent, professional, and cooperative in this lawsuit and have not unnecessarily driven up the cost of litigation through either meritless motion practice, discovery subterfuges, or oppositional tactics. Indeed, counsel for all parties have litigated this case in a professional and courteous manner, on an expedited schedule that would have rendered it difficult for lead counsel to take on and pursue other work. The attorney's fee **[*34]** award in this case should compensate Plaintiffs' counsel's efforts and recognize both the quality of their representation, and the risks they accepted when they decided to pursue claims against Dean.

3. *The Relationship of the Fee to the Settlement*.

The relationship of the fee request to the Dean Settlement is grounds for concern. It leaves a relatively small recovery for each class member with no suggestion by either Plaintiffs or Dean that the Dean Settlement is expected to make class members "whole" insofar as their claims against Dean are concerned. In addition, Plaintiffs' ten million dollar fee request was based in part on the injunctive relief originally contained in the Dean Settlement which Plaintiffs lauded as a major victory for settlement class members. When that provision of the Dean Settlement proved divisive, it was excised. A corresponding reduction in the attorney's fee award properly reflects that the nature of the Dean Settlement has changed.

At the preliminary approval hearing, Plaintiffs candidly admitted that one third of the Dean Settlement fund was the most that they could reasonably expect the court to award as attorney's fees in this case. Although they now point **[*35]** to other attorney's fees awards in excess of this amount (that have been approved by other courts), they concede that it is not uncommon for parties to negotiate a lesser fee award when litigation does not require a trial to produce a common fund. Moreover, ***HN16***[] the Second Circuit has rejected the notion of a "benchmark" for common fund cases. *See* *Goldberger, 209 F.3d at 51* (rejecting counsel's argument that 25% is a proper benchmark for a percentage fee in a common fund case while acknowledging that other jurisdictions have taken this approach). It has also tasked the district courts to act "as a fiduciary who must serve as a guardian of the rights of absent class members[.]" *Id.* (citation omitted). Accordingly, the court must take a hard look at Plaintiffs' fee request because "awards [in common fund] cases are proper only 'if made with *moderation*.'" *Id.* (citation omitted).

Here, the litigation has not reached its conclusion. If Plaintiffs are successful in pursuing their claims against DFA and/or DMS, additional attorney's fees may be awarded. According to Plaintiffs' own calculations, the Dean Settlement is thus only a partial recovery for settlement class members. In light of this fact, **[*36]** the attorney's fees award should be a partial recovery as well.

4. *Public Policy Considerations*.

The merits of this litigation have not been decided, and no injunctive relief has been granted. Dean admits no wrongdoing. In such circumstances, public policy does not play an important role in the attorney's fee award for the Dean Settlement. [8]

Examining all of the foregoing factors and the totality of the circumstances, the court concludes that an attorney's fee award of $4.5 million, or 15% of the total Dean Settlement, without accrued interest, and an additional $1.5 million award for expenses and costs incurred to date is a reasonable and fair award.

D. Incentives for Class Representatives.

HN17[] "An incentive award is meant to compensate the named plaintiff for any personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit." *Dornberger v. Metropolitan Life Ins. Co., 203 F.R.D. 118, 124 (S.D.N.Y. 2001)* (internal citations **[*37]** omitted). Plaintiffs seek an incentive award of $7,500 per class representative (a total of $22,500) for class representatives' provision of documents and information essential to the litigation. They identify no personal risk undertaken by any of the class representatives in pursuing this lawsuit.

At the preliminary approval hearing, Plaintiffs did not ask the court to grant incentive awards to the class representatives, and the order granting preliminary approval is silent on that issue. The Dean Settlement Agreement makes passing references to incentive awards, but does not explicitly call for such awards. [9] The

[8] Public policy weighs in favor of awarding substantial attorney's fees for incurring the risks of meritorious litigation that redresses antitrust violations. At this juncture, no antitrust violations have been found.

[9] Section 10.5 of the Settlement Agreement provides that "In no event shall Settling Defendant be obligated to pay anything in addition to the Settlement Fund described in paragraph 9.1 hereto, including without limitation class notice costs, attorneys' fees, *payments to named Plaintiffs for their efforts on behalf of the Settlement Class* . . . Except as provided in paragraph 10.6 hereto, no **[*38]** payment shall be made out of the Settlement Fund prior to the Effective Date, and then, only as approved by the

possibility of incentives for class representatives is disclosed in the Notice and the Summary Notice but only in the most general terms and without any accompanying monetary amount. [10]

Plaintiffs' motion seeking incentive awards was filed on June 3, 2011 (Doc. 310), a month after the court granted preliminary approval of the Dean Settlement as revised. In the absence of full disclosure of the amount and nature of **[*39]** these incentive awards, the court concludes that it is not appropriate to now include them as part of the Dean Settlement. Class representatives will share in the Dean Settlement *pro rata* payment. Additional compensation for their efforts must await further developments in this case, and must be accompanied by full and accurate notice of any deduction from the class's recovery. In so ruling, the court does not intend to suggest that class representatives have been anything less than vigorous in their pursuit of this lawsuit.

CONCLUSION

For the foregoing reasons, the court:

1. GRANTS Final Approval of the Dean Settlement Agreement, as revised;
2. AWARDS compensation of Plaintiffs' costs and expenses in the amount of $1.5 million and attorney's fees in the amount of $4.5 million;
3. DENIES Plaintiffs' request for an award of accrued interest on the Settlement Fund;
4. STAYS all proceedings against Dean; and
5. DENIES Plaintiffs' request for incentive awards to class representatives.

SO ORDERED.

Dated at Rutland, in the District of Vermont, this 3rd day of August, 2011.

/s/ Christina Reiss

Christina Reiss, Chief Judge

United States District Court

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Court." (Doc. 301) (emphasis supplied). Section 10.6 provides: "Except as otherwise provided in this paragraph, any disbursement from the Settlement Fund, including disbursements for attorneys' fees, costs and expenses, *and incentive fees to named Plaintiffs*, shall be made only upon approval and order of the Court, and only after the Effective Date." (Doc. 301) (emphasis supplied).

[10] In a section entitled "How will the lawyers be paid?" the Notice states "Class Counsel may also request a payment from the Settlement Fund for Class Representatives who sued on behalf of the whole Class." (Doc. 327-3 at 15). The Summary Notice states that class counsel will be requesting "up to one third of the settlement amount ($10 million) in attorneys' fees, plus costs, expenses, and incentive fees for the dairy farmers who brought the lawsuit." (Doc. 327-3 at 7.)

In re Optical Disk Drive Antitrust Litig.

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

August 3, 2011, Decided; August 3, 2011, Filed

CASE NO. 3:10-md-2143 RS

Reporter

2011 U.S. Dist. LEXIS 101763 *; 2011 WL 3894376

IN RE OPTICAL DISK DRIVE ANTITRUST LITIGATION;This Document Relates to: ALL ACTIONS

Subsequent History: Motion denied by *In re Optical Disk Drive Antitrust Litig., 2012 U.S. Dist. LEXIS 55300 (N.D. Cal., Apr. 19, 2012)*

Prior History: *In re Optical Disk Drive Prods. Antitrust Litig., 701 F. Supp. 2d 1382, 2010 U.S. Dist. LEXIS 33622 (J.P.M.L., Apr. 2, 2010)*

Core Terms

conspiracy, purchasers, allegations, Products, indirect, manufactured, price-fixing, prices, co-conspirators, antitrust, plaintiffs', third party, optical, alleged conspiracy, Consolidated, discs, leave to amend, price fixing, stand alone, finished product, Sherman Act, drive, motion to dismiss, fix prices, defendants', camcorders, consoles, damages, pleaded, amended complaint

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For Quanta Storage America, Inc., Defendant: Bruce G. Chapman, Connolly Bove Lodge & Hutz LLP, Los Angeles, CA; Keith Douglas Fraser, Connolly, Bove, Lodge & Hutz LLP, Los Angeles, CA; Minda R. Schechter, Connolly Bove Lodge and Hutz LLP, Los Angeles, CA; Zhun Lu, PRO HAC VICE, Connolly Bove **[*12]** Lodge and Hutz LLP, Wilmington, DE.

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For U.S. Department of J Antitrust Division, Intervenor: Sidney A. Majalya, LEAD ATTORNEY, Lara Meredith Kroop, USDOJ - Antitrust Division, San Francisco, CA; Manish Kumar, Antitrust Division, Deparment of Justice, San **[*13]** Francisco, CA.

Judges: RICHARD SEEBORG, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD SEEBORG

Opinion

ORDER GRANTING MOTIONS TO DISMISS, WITH LEAVE TO DISMISS, WITH LEAVE TO AMEND

I. INTRODUCTION

This Multi-District Litigation arises from an alleged conspiracy beginning in 2006 among defendants to fix the prices of "Optical Disc Drives" ("ODDs") and "Optical Disc Drive Products" ("ODD Products"). Two "master" consolidated complaints have been filed—one on behalf of a putative class of "direct" purchasers of ODDs and ODD Products, and one on behalf of "indirect" purchasers. Defendants who have appeared have jointly filed, or joined in, motions to dismiss each of the complaints. Various smaller groupings of defendants have filed separate additional motions to dismiss, raising arguments particular to each of them. Because plaintiffs have not alleged a plausible factual basis for inferring the existence of a conspiracy of the scope and nature alleged, the complaints must be dismissed, with leave to amend.

II. BACKGROUND[1]

A. The products

An optical disc is a medium for storing data. Familiar forms include CDs (compact discs) typically containing music or computer software, and DVDs (digital video disc or, officially, Digital Versatile Disc), often containing movies or other video content, and also used for computer software. When first introduced to the public, optical discs only contained data files that were recorded onto them during the manufacturing process—they could be "read" but not written to, much like phonograph records of an earlier time ("read only discs"). As the technology advanced, optical discs were developed that allowed an end user to record data on a one-time basis ("recordable discs"). Eventually optical discs appeared on the market that permitted data to be recorded and re-recorded indefinitely ("rewritable discs), which are analogous to magnetic tape, or hard and floppy computer discs. In a broad sense, the technology evolved generationally from CDs to DVDs to Blu-Ray Discs ("BDs"), each with the same progression moving from read only, to recordable, **[*15]** and then to rewritable.

ODDs are devices that allow data to be read from and, where applicable, written to, optical discs. ODDs are typically "backwards-compatible," – that is, an ODD that is designed to read (and perhaps write to) a more recently-

[1] This factual background is largely derived from the allegations of the direct purchasers' complaint. Although substantially similar, the indirect purchasers' complaint defines the alleged conspiracy **[*14]** somewhat differently, and contains some additional factual allegations. These differences are discussed further in Section IV B. below.

developed format of optical disc usually will also be able to process older formats as well. ODDs have applications in a variety of consumer electronic devices, including desktop and laptop computers, game consoles, and camcorders. In these applications, the ODD is typically a built-in component of the device. Some television sets are also sold with built-in ODDs.

ODDs are also available as "stand alone" devices, in at least two forms. First, consumers have been able to purchase stand alone CD, DVD, and Blu-Ray "players" (which may or may not also include recording capabilities), primarily designed for enjoying music or video entertainment, through personal headphones, stereo equipment, or television sets. Second, stand alone ODDs are available that are configured to be connected to computers lacking built-in ODDs, primarily for the purpose of storing data or accessing optical disc-based software, but which can also be used to play music or **[*16]** video on the computers. In such a "stand alone" product, the ODD is the primary component, as contrasted, for example, to an ODD built into a computer that contains many other components performing various functions. Nevertheless, even in such "stand alone" products, the ODD itself can still be thought of as a separate component from such other elements as the power supply, interface circuitry, and the case.[2]

To this point, the term "ODD" has been used to refer to the optical disc drive component itself, whether built-in to another device such as a computer or camcorder, or only incorporated with a power supply and sufficient additional circuitry to function as a "stand alone" device. The Direct Purchasers' Consolidated Complaint, however, defines "ODD" differently. Specifically, plaintiffs allege that an "ODD" is *either* a "drive[] built to be incorporated into notebook and desktop computers, camcorders and/or game consoles" *or* a "stand-alone **[*17]** drive[]"—i.e., a drive component assembled with a power supply and interface circuitry in a case. The distinction is significant for this reason. There is no dispute that in the case of computers, for example, numerous other nondefendant companies purchase ODDs from defendants to be built into those other companies' computers. As discussed below, consequences flow from whether plaintiffs can legitimately be considered "direct purchasers" of the ODDs in such instances. It is unclear from the complaints whether there also exist manufacturers of "stand alone" DVD, CD, and Blu-Ray players who obtain the actual ODD components from defendants rather than manufacturing their own, but there appears to be no reason why that could not occur. In such circumstances, the same issue would arise regarding whether plaintiffs can be considered "direct purchasers" or not.

Furthermore, regardless of whether or not there is any significant number of non-defendant companies producing stand alone DVD, CD, and Blu-Ray players incorporating ODDs made by defendants, there is simply no logical reason to analyze those products separately from other devices that include "built-in" ODDs, such as computers, game **[*18]** consoles, and camcorders. Rather, the only useful distinction is between *any* product that includes an ODD on the one hand, and the actual ODD component on the other hand, regardless of whether it is built into a stand-alone player or into a more complex device with other functions.

The Direct Purchasers' Consolidated Complaint also contains another definitional anomaly that complicates the analysis. As noted above, the direct purchasers allege a conspiracy to fix prices of both ODDs (as they define them) *and* "ODD Products." The latter term is defined as inclusive of the former. Thus, "ODD Product" as used by plaintiffs not only refers to the ODDs themselves, but also to any computer, game console, or camcorder containing an ODD manufactured by defendants. While the actual ODD components in issue in this litigation are only those manufactured by defendants, the computers, game consoles, and camcorders implicated by the complaint include those manufactured by numerous third parties. Again, because it has implications for plaintiffs' designation as "direct purchasers," it is necessary to distinguish between the actual ODD components and other products that incorporate them. Defining "ODD **[*19]** Products" to include "ODDs" impedes that distinction.

Although plaintiffs' factual allegations must be accepted as true on a motion to dismiss, there is no requirement to adopt the nomenclature of the complaint, particularly where doing so would obfuscate rather than illuminate the dispositive issues. Accordingly, in the balance of this order, the term "ODDs" will be used to refer to optical disk

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[2] For example, the indirect purchasers' complaint describes how a "consumer DVD player" can be designed simply by incorporating a "computer-type" ODD with a power supply and interface board in a case. Indirect Purchasers' First Amended Complaint ¶¶ 82-83.

drive mechanisms built to be incorporated into either (1) stand-alone CD, DVD, or Blu-Ray players and recorders, whether for audiovisual or computer use, (2) computers, (3) game consoles, or (4) camcorders. The term "ODD devices" will mean all such products (including the stand-alone players and recorders) that include ODDs.[3]

B. The alleged conspiracy

The charging allegations of the Direct Purchasers' Consolidated Complaint assert that beginning in January of 2004, "Defendants and their Co-conspirators entered into a continuing contract, combination or conspiracy to unreasonably restrain trade and commerce in violation of Section One of the Sherman Act." Specifically, defendants allegedly had meetings and conversations in which they "agreed to charge prices at specified levels and otherwise to fix, increase, stabilize and/or maintain prices of ODD Products sold in the United States," and they thereafter in fact sold "ODD Products" at those artificially inflated prices. Defendants also allegedly engaged in bid rigging, allocation of customers and markets, and artificial limiting of supplies.

As support for these charges, the complaint comprises over fifty pages of description of various aspects of the ODD and ODD devices industry, which plaintiffs assert support an inference of price-fixing. The allegations include all of the following:

• The "ODD industry" is highly concentrated. Four of the named defendants jointly controlled over 80% of worldwide shipments of CD, DVD, and BD drives by volume in 2008, **[*21]** with another two defendants controlling over 13%. Market concentration has been increasing as the result of certain acquisitions and joint ventures. Some of the defendants are also major producers of ODD devices. Sony, as an example, markets Playstation game consoles, which have a large market share.
• Specific joint-ventures and other collaborative efforts between Taiwanese and Korean defendants on the one hand, and Japanese defendants who held key intellectual property rights on the other hand, resulted in forcing most of Taiwan's "second-tier" manufacturers and virtually all of China's manufacturers out of the "ODD industry."
• Various manufacturing and technological issues present high barriers to entry into the market, including high licensing costs imposed by patent pools among the defendants.
• Defendants participate in various specified trade associations that facilitate their alleged anticompetitive conduct and the making of price-fixing agreements.
• Defendants regularly attend certain trade shows, similarly giving them further opportunity to communicate and conspire.

• "ODD Products" are highly standardized, permitting consumers to view them as interchangeable, which "makes it **[*22]** easier to form and sustain a cartel."
• Many of the defendants have been investigated for antitrust violations involving other technology products, and in some cases found guilty.
• Several defendants engaged in bid-rigging in connection with auctions run by Dell and Hewlett-Packard for contracts to supply ODDs for use in their computers. Such bid-rigging occurred over several years, but included three auctions identified by specific dates.
• The U.S. Department of Justice is presently investigating possible criminal antitrust violations in the ODD industry.
• Certain defendants employ "Minimum Advertised Price" policies imposing limits on the prices retailers may actively promote for ODD devices.
• Some economic data purportedly shows that the "ODD market" has experienced unnatural price stability and periods of upward trends.

III. LEGAL STANDARD

[3] Defendants' joint motion to dismiss uses the term "Finished ODD products" similarly, although it is not entirely clear where they would categorize the stand-alone devices. Plaintiffs criticize defendants for using a term not found in the complaint, and suggest they have mischaracterized the nature of the conspiracy allegations by doing so. Because plaintiffs' definitions conflate products made by defendants with those that are not, however, more precise terminology is **[*20]** needed.

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint that fails to state a claim upon which relief may be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. **[*23]** This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir.1987)*. However, the Court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.[4]

IV. DISCUSSION

A. The Direct Purchasers' Consolidated Complaint

1. Illinois Brick

The parties vigorously dispute whether the specific factual allegations of the complaint are sufficient to support the conclusions advanced by plaintiffs that a price-fixing conspiracy existed, or instead whether those allegations amount to no more than a description of ordinary and legal industry activities, combined with irrelevant accusations of unrelated wrongdoing and the inconclusive fact that a DOJ investigation is pending. Underlying those disputes, however, is a more fundamental disagreement as to whether plaintiffs can plausibly allege a conspiracy to fix not only ODD prices, but also those of ODD Devices, and whether plaintiffs can be seen as "direct purchasers" at all.

The distinction between direct purchasers and indirect purchasers is of critical import as a result of the Supreme Court's holding in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In *Illinois Brick,* the Court confronted the problem that in a manufacturing chain, the increased cost of one component of a product resulting from a **[*25]** price-fixing violation may very well be "passed-on" to a consumer further down the chain. Concluding that allocating damages among those potentially injured by the price-fixing would present unworkable complexity, the Court instead adopted a bright line rule that only direct purchasers have standing under federal law to seek damages for price-fixing violations. *See* *id. at 745-746*; *Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1120-21 (9th Cir. 2008)* ("a bright line rule emerged from *Illinois Brick:* only direct purchasers have standing under *§ 4* of the Clayton Act to seek damages for antitrust violations.")

The *Illinois Brick* rule presents a fatal problem to the complaint as it is presently constituted. As noted, plaintiffs have defined "ODD Products" to include *any* ODD device containing an ODD manufactured by one of the named defendants. The allegations make clear, however, that a significant percentage of defendants' ODDs are sold to *other* companies, who are neither named as defendants nor directly affiliated with the named defendants, for incorporation into the ODD devices manufactured and sold by those other companies. All of the named plaintiffs are individuals **[*26]** or companies who allege only that they each purchased "ODD Products" from one or more of the defendants. While under plaintiffs' definitions it is at least possible that some plaintiffs may have purchased actual ODDs from a defendant for incorporation into an ODD device manufactured by such plaintiffs, the likelihood is that

[4] Subsequent to the hearing, the parties have submitted several statements of recent decisions they contend bear on the issues in this action. In at least one instance, such a statement was simply filed, in others, they were accompanied by requests for leave to submit them, as is required **[*24]** by Civil *Local Rule 7-3(d)*. All the statements of recent decision will be deemed properly filed.

most, if not all, the plaintiffs only purchased ODD devices.[5] Furthermore, the named plaintiffs unquestionably do *not* include such major makers of ODD devices as HP and Dell.

Thus, while the complaint presently attempts to encompass ODD devices manufactured and sold by non-defendant companies, plaintiffs simply are not direct purchasers of such devices within the meaning of *Illinois Brick.* Even in the event that one or more named plaintiff contends it is a purchaser of actual ODDs (for its own manufacturing of ODD devices or for replacing a failed ODD), such facts would have to be alleged.

Plaintiffs' response to this *Illinois Brick* conundrum **[*27]** is two-fold. First, plaintiffs invoke a "co-conspirator exception" to *Illinois Brick* permitting suit by persons who would otherwise be considered indirect purchasers if they can allege that the actual direct purchaser conspired with the defendant to set the prices the plaintiffs paid. *See* *Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211 (9th Cir. 1984)*. Plaintiffs then argue they have alleged such cooperation between defendants and unnamed co-conspirators here. The paragraph of the complaint on which plaintiffs rely, however, only alleges that, "Some of the Defendants and their Co-conspirators are also major producers of products that contain ODDs." Other complaint paragraphs that specifically identify three alleged "Co-conspirators" by name fall well short of alleging facts supporting the contention that they conspired with defendants to set consumer prices of DVD devices.

Moreover, even if the allegations were sufficient as to those particular "co-conspirators," plaintiffs have defined "ODD Products" to include devices sold by an untold number of other companies. Not only are there no facts to show such companies were also "co-conspirators," some of the facts specifically pleaded **[*28]** and relied upon by plaintiffs for other purposes are to the contrary. Specifically, plaintiffs plead that HP and Dell were *victims* of the alleged bid-rigging. While pleading in the alternative is permissible in some circumstances, those allegations are flatly incompatible with a theory that HP and Dell were co-conspirators in fixing prices of the ODD devices they sold.

Plaintiffs' second argument against the applicability of *Illinois Brick* relies on the principle that its rule, "does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator." *Royal Printing Co. v. Kimberly Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980)*. Plaintiffs embrace that safe harbor by insisting "defendants include verticallyintegrated manufacturers that make ODD Products" and the complaint purportedly "explains the corporate relationships among Defendants and the joint ventures they formed." Fatally, however, that argument at most applies to those ODD devices sold by subsidiaries and affiliates of the defendants. Once again, by defining "ODD Products" to include ODD devices sold by unrelated third parties, plaintiffs have overreached.

Furthermore, even with **[*29]** respect to ODD devices sold by subsidiaries of the defendants, *Royal Printing* merely permits suit under federal law by *indirect* purchasers notwithstanding *Illinois Brick;* it does not somehow transform indirect purchasers into direct purchasers. This complaint, however, was brought on behalf of a putative class of direct purchasers, by counsel given an interim appointment to represent such persons, not indirect purchasers. While potentially curable, either by expanding this complaint to include indirect purchasers who contend they have standing to assert damage claims under the Sherman Act, or by expanding the indirect purchasers' complaint to allege such claims on behalf of a subclass, amendment of the pleadings will be necessary.[6]

Accordingly, plaintiffs have not shown, and cannot show that the claims they have currently pleaded are viable in light of *Illinois Brick.* For this reason alone, **[*30]** the Direct Purchasers' Consolidated Complaint must be dismissed.

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[5] One other somewhat more likely possibility arises. A plaintiff may have purchased an ODD as a replacement for a failed drive in an existing ODD device. In such circumstances, the plaintiff would qualify as a direct purchaser.

[6] Plaintiffs' counsel for the two groups should decide between them which approach is preferable, if the claims are to be pursued. Should a modification to the interim appointment order be required, the parties make seek one by stipulation or administrative motion brought under Civil *Local Rule 7-11*.

2. Plausibility

The direct purchasers' attempt to include in "ODD Products" devices made and sold by unrelated third parties gives rise to an additional problem, independent of the standing barrier of *Illinois Brick.* Plaintiffs allege that a relatively small number of defendants manufacture and sell nearly all the ODDs presently on the market. Assuming sufficient facts were pleaded to support a conspiracy inference, it likely would be at least plausible that such a group could and would engage in price fixing *of ODDs.* By positing price-fixing of *ODD devices,* however, plaintiffs vastly increase the number of entities that would have to be participating in such a conspiracy, and implicate a far broader range of markets and marketing channels that the conspirators would have to be shown to control. It is one thing to say that a small number of entities have conspired to fix the prices of particular products they directly sell; it is quite another to suggest that those entities have somehow agreed with unnamed parties to fix the prices of products each sells.

Plaintiffs contend that defendants have mischaracterized the complaint **[*31]** by pointing out the implausibility of such a vast conspiracy across different markets and involving so many unnamed co-conspirators. Rather, they insist their allegation is but a "single, intertwined, overarching" conspiracy involving "ODD products" (as they define that term). The issue, however, is not whether there are multiple conspiracies or one, but whether plaintiffs have pleaded facts to make any such "overarching" conspiracy plausible. Plaintiffs rely on *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000)* for the proposition that a price-fixing conspiracy may involve a number of arguably different products. The alleged conspiracy in *Knevelbaard,* however, did not depend for its success on the cooperation of an untold number of additional entities who have the power to set prices for the products in dispute.

Plaintiffs also suggest that courts in this district have "routinely" accepted conspiracy allegations involving price-fixing of both an electronic component and the "finished product" containing the component. The cases on which plaintiffs rely, however, do not go as far as they suggest. For example, in *In re Cathode Ray Tube (CRT) Antitrust Litigation, 738 F.Supp.2d 1011 (N.D.Cal. 2010)* **[*32]** the court declined to dismiss allegations of a conspiracy to fix the price not only of cathode ray tubes ("CRTs") but also of television and computer monitors that incorporated CRTs. The court specifically noted that the purported direct purchaser plaintiffs' allegations of price fixing of finished products arose "in the case of vertically integrated manufacturers who produced both CRTs and CRT Products." *738 F.Supp.2d at 1018*. Once again, the problem here is that plaintiffs are attempting to extend the price-fixing conspiracy to finished products *not* produced by the defendants, an issue not expressly addressed in *Cathode Ray.*[7]

Plaintiffs' citation to *In re TFT-LCD (Flat Panel) Antitrust Litigation, 586 F.Supp.2d 1109 (N.D.Cal. 2008)*, is no more helpful to them. There the court merely relied on allegations of purchases of finished products directly from alleged members of the **[*33]** cartel to reject an argument that plaintiffs lacked standing. *Id. at 1119*. As discussed above, while plaintiffs in this case do not have a standing problem with respect to any ODD devices they may have purchased directly from defendants, that does not address the plausibility of a purported price-fixing conspiracy extending even to ODD devices sold by unrelated third parties.

Finally, plaintiffs fare no better in pointing to the class certification order in the *TFT-LCD* case. *See 267 F.R.D. 291 (N.D.Cal.2010)*. That decision reveals that the direct purchaser plaintiffs sought to define the class as only those persons who purchased "TFT-LCD panels or a product containing a TFT-LCD panel in the United States from the named defendants, any subsidiaries or affiliates thereof, or any co-conspirators as identified in the complaint." *Id. at 298*. While it is not clear from the opinion the extent to which there may in fact have been other producers of finished TFT-LCD products in the market, that narrow class definition largely avoided putting in issue the existence of a broad conspiracy between the named defendants and unnamed third parties.

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[7] The *indirect purchasers*' complaint in *Cathode Ray* also described an economic mechanism whereby the defendants allegedly were able to affect the prices charged by third parties for finished products incorporating defendants' CRTs. *Id.* The direct purchasers' complaint here does not include any similar allegations.

In short, while there is no rule that a conspiracy to **[*34]** fix prices of both a particular component and the finished product containing that component can never exist or be successfully pleaded, there must be a plausible factual basis for contending that the sellers of the finished products were in fact in conspiracy together with the named defendants. Once again, plaintiffs' allegations here suggest the *opposite,* if anything. At least in the specific instance of ODD devices manufactured and sold by Dell and HP, plaintiffs have alleged that those third party sellers were unwitting dupes of the illegal activity, not co-conspirators. The most reasonable inference is that most, if not all, of the other sellers of ODD devices who are not directly affiliated with defendants likewise were victims of any agreement to fix ODD prices, not participants in a conspiracy to fix prices of the ODD devices they sold.

Although not clearly articulated by plaintiffs, it may be they are contending that defendants *in effect* fixed the prices of ODD devices sold by unaffiliated third parties by overcharging for the component ODDs incorporated in those devices, even without their knowledge or cooperation. Any such argument, however, would represent an impermissible **[*35]** end-run around the *Illinois Brick* rule. Indeed, one of the precise underpinnings of that rule is that it can be very difficult to determine how much, if any, of the inflated cost of a price-fixed component will ultimately be passed on to the consumer who buys the finished product. *See* *Illinois Brick, 431 U.S. at 731-733*. Given the uncertainties discussed in *Illinois Brick* as to when and under what circumstances the price of a finished product will reflect the effects of any price-fixing of a component, it simply would not be reasonable to infer from the facts alleged here that defendants' conduct *necessarily* affected the retail prices of all ODD devices, even if there was price-fixing of ODDs.

Accordingly, plaintiffs have not pleaded sufficient facts to make plausible their claim of a conspiracy to fix prices of both ODDs and ODD devices, including those made and sold by unaffiliated third parties. For this reason as well, the complaint must be dismissed.

3. Other Plausibility and Specificity Issues

Apart from the issue regarding the scope of the conspiracy discussed in the preceding section, to proceed on *any* conspiracy theory plaintiffs must also plead "enough factual matter (taken **[*36]** as true) to suggest that an agreement was made" because a "conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-557*. There is no doubt that the existing factual allegations are insufficient to support the inference of a price-fixing agreement among defendants and third party sellers of ODD devices, for the reasons discussed above. It would be premature to reach a definitive conclusion whether allegations substantially similar to those in the existing complaint might be sufficient to support a claim of a narrower conspiracy involving only an agreement by defendants to fix ODD prices. Nevertheless, it is appropriate to offer some observations.

Most of the existing allegations may serve to explain why a price-fixing agreement might be *possible,* and describe avenues of communication through which defendants could carry out such a plan, it is far from apparent that such averments would suffice to "nudge" plaintiffs' "claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*. Allegations that defendants participated in industry trade associations and attended trade shows represent particularly **[*37]** weak support for the existence of any conspiracy. *See* *id., at 567 n. 12* (rejecting suggestion that similar allegations were of particular significance). Pricing trends and economic data present a potentially fertile ground for inferences of price manipulation, but the information plaintiffs have presented at this juncture is ambiguous at best, and does not permit reliable conclusions to be drawn about the pricing of ODDs in particular.

The allegations regarding contraction and consolidation among ODD manufacturers, and the market share held by defendants, as well as their participation in patent pools and various joint ventures, may very well be necessary predicates to showing that defendants had the *power* to fix prices, but they do not show that defendants in fact did so. Descriptions of *other* instances in which some of these defendants were found to have engaged in price-fixing is provocative, but plaintiffs have not shown enough commonalities between those circumstances and the present case to make those allegations probative. *Cf.* *In re Static Random Access Memory (SRAM) Antitrust Litigation, 580*

F.Supp.2d 896, 903 (N.D.Cal. 2008) (finding conspiracy claim to be supported by allegations **[*38]** that the "same actors" associated with defendants were responsible for marketing the products in each instance). Similarly, the allegations that defendants are presently targets of a DOJ investigation is a "non-factor," because, "[i]t is unknown whether the investigation will result in indictments or nothing at all [and] the scope of the investigation is pure speculation." In re Graphics Processing Units Antitrust Litigation, 527 F.Supp.2d 1011, 1024 (N.D.Cal. 2007).

Finally, plaintiffs' allegations of bid-rigging on three specifically-identified occasions perhaps come closest to providing the requisite support for *a* conspiracy, particularly because no alternative innocent explanation for such conduct is readily apparent. Indeed, at oral argument defendants virtually conceded such allegations likely would be sufficient to support the existence of a conspiracy with respect to at least those particular auctions. As defendants point out, however, those auctions involved only a small subset of defendants. Even assuming those auctions, and perhaps others, were rigged, that is a far cry from establishing plausibility for a broad six year continuing agreement among all defendants to fix the **[*39]** prices of all ODDs sold through innumerable other channels.[8]

In sum, while the allegations of the existing complaint are actually *inconsistent* with the existence of a conspiracy to fix prices on all ODD devices, they do suggest that a conspiracy to fix ODD prices is at least conceivable. Further allegations of fact, however, likely would be required to cross the line into the realm of the plausible, even if plaintiffs elect to limit their claims to alleged price fixing of ODDs.

4. FTAIA

Defendants further contend that the Direct Purchaser's Consolidated Complaint should also be dismissed for failure to plead sufficient facts to establish subject matter jurisdiction under the Foreign Trade Antitrust Improvement Act ("FTAIA"), 15 U.S.C. § 6a. FTAIA generally excludes from the reach of **[*40]** the Sherman Act anti-competitive conduct that causes only foreign injury. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985 (9th Cir. 2008)*. Because the existing compliant fails to allege a plausible conspiracy of the scope claimed at all, it is technically not possible to say that plaintiffs have alleged a conspiracy with the requisite domestic effects to support jurisdiction under FTAIA. The failure, however, lies more in the issues identified above than in any particular requirement of FTAIA. Unless and until the parameters of any plausible conspiracy plaintiffs may be able to allege is known, the potential impact of FTAIA cannot be meaningfully evaluated.

5. Leave to amend

Defendants urge dismissal without leave to amend, pointing out that plaintiffs have had ample time and the benefit of filing a consolidated complaint to articulate a plausible claim. As the preceding discussion reflects, however, while it is far from apparent that plaintiffs necessarily will be able to address the identified defects successfully, it is not a foregone conclusion that they cannot advance facts sufficient to support a conspiracy of a more limited scope, assuming any **[*41]** of them can allege they bought ODDs or ODD devices directly from any defendants or co-conspirators. Accordingly, leave to amend will be granted.

B. The Indirect Purchasers' First Amended Complaint

1. Plausibility

Recognizing that they are barred by *Illinois Brick* from recovering damages under federal law, the indirect purchasers instead assert claims for, (1) *injunctive* relief under the Sherman Act, (2) damages, under a proposed

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[8] Of course, as set out above, the Direct Purchaser plaintiffs do not even have standing to pursue claims arising from any bid-rigging at those auctions. While that does not necessarily foreclose them from pointing to defendants' alleged conduct at those auctions as support for the possible existence of a broader agreement to fix prices generally, it does somewhat lessen the significance of those allegations.

nation-wide class that would rely on California state antitrust and unfair competition law, and (3) in the alternative, damages, under 29 proposed state-specific classes that would rely on the antitrust laws, and in some instances, unfair competition laws, of those states.[9]

The indirect purchasers define ODDs and ODD Products in substantially the same way as do the direct purchasers, although they do not expressly make the latter term inclusive of the former. While those definitions leave some room for ambiguity, it appears that the indirect purchasers intend to bring their claims on behalf of persons who purchased ODD devices from third parties, other than the named defendants, their affiliates, and any co-conspirators.[10] It does not appear that any of the indirect purchasers are claiming that they purchased ODDs that were not already incorporated into ODD devices.

The opening paragraphs of the Indirect Purchasers' First Amended Complaint suggest that they may intend to allege only a conspiracy to fix prices of ODDs, and that their injuries would arise from the fact that some or all of the allegedly inflated price of the ODDs may have been passed through to them when they purchased ODD devices. Read as a whole, however, the complaint plainly advances a claim of an alleged conspiracy to fix prices of both ODDs and ODD devices. See, *e.g.* ¶ 317 ("Defendants and their co-conspirators . . . agree[d] to manipulate prices and supply of ODDs and ODD Products.").

For the same reasons as discussed above, plaintiffs have alleged no plausible basis for inferring a conspiracy between defendants and unnamed independent third parties who manufacture and sell ODD Devices. Again, the allegations of bid-rigging in auctions conducted by HP and Dell actually support a strong inference to the contrary. While the indirect purchasers point to factual details in their complaint that go beyond those offered by the direct purchasers (regarding defendants' participation in patent pools, trade associations, and pricing and economic data), **[*44]** those allegations do not fill the gap. At best, the indirect purchasers have come closer to alleging a factual predicate that might support a claim of a conspiracy to fix ODD prices than have the direct purchasers. Even for such a more circumscribed conspiracy, however, the barometer points to conceivable, rather than plausible. Accordingly, the complaint must be dismissed, with leave to amend.

2. Associated General Contractors

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*"), the Supreme Court articulated a multi-factor balancing test for evaluating a plaintiff's standing to bring antitrust claims under federal law generally. Because of the bright-line *Illinois Brick* rule that indirect purchasers lack standing to bring damages claims in price-fixing cases, resort to an *AGC* analysis ordinarily is not necessary with respect to federal claims. Defendants argue, however, that the *AGC* factors can and do apply to indirect purchasers' price-fixing claims under state law in any jurisdiction that has generally embraced the *AGC* antitrust standing requirements. Listing eighteen states that they contend have in fact adopted **[*45]** the *AGC* test, defendants move to dismiss those particular state law claims for lack of antitrust standing.

Plaintiffs respond that defendants are effectively attempting to override the decisions made in the legislatures or courts of those states to reject *Illinois Brick* as a bar to indirect purchasers' claims under state law. Defendants, in

[9] Each of the 29 states is a so-called "*Illinois Brick* repealer" jurisdiction, having by statute or judicial decision expressed a determination that standing under that state's law is not to be limited by the rule announced in *Illinois Brick.* Because *Illinois Brick* addressed federal prudential standing issues, individual states are free to adopt a contrary rule under their own laws. Such state statutes and judicial decisions, of course, could not "repeal" the Supreme Court's holding in a literal **[*42]** sense.

[10] It may be that at this juncture there could be uncertainty as to whether a particular manufacturer or seller of ODD devices constitutes an affiliate or co-conspirator or can only be seen as an independent third party, and therefore it might not be clear whether persons who purchased from such entities are potential members of a direct purchaser class or an indirect purchaser class. Any such questions will have to be resolved eventually, because a person who purchased an ODD device from a particular entity should either be deemed a direct purchaser or an indirect purchaser as to that **[*43]** particular purchase, but not both.

turn, argue that the *Illinois Brick* and *AGC* courts were addressing different sets of policy and legal issues, and that there is no conflict in applying *AGC* to preclude an indirect purchaser from going forward even in a state that declines to follow *Illinois Brick.* While defendants may be correct that the issues the *Illinois Brick* and *AGC* addressed were not co-extensive, the application of the *AGC* test they advocate would appear, in effect, to "repeal" the *Illinois Brick* "repealers," as it is difficult to imagine an indirect purchaser ever having antitrust standing under defendants' formulation.

Defendants' basic contention that *AIG* may bar claims in circumstances like these has gained some traction in this district. *See, e.g., In re Dynamic Random Access Memory (DRAM) Antitrust Litigation* ("*DRAM I* "), *516 F.Supp.2d 1072 (N.D. Cal.2007)*, and *DRAM II, 536 F.Supp.2d 1129 (N.D.Cal. 2008)*. **[*46]** The careful and persuasive analysis in *In re TFT-LCD (Flat Panel) Antitrust Litigation, 586 F.Supp.2d 1109 (N.D.Cal. 2008)*, however, warrants the conclusion that plaintiffs' claims here should not be dismissed for lack of antitrust standing under *AIG.* As explained in more detail in *TFT-LCD,* this is both because "it is inappropriate to broadly apply the *AGC* test to plaintiffs' claims under the repealer states' laws in the absence of a clear directive from those states' legislatures or highest courts," and because even if the *AGC* test were to be applied, it does not conclusively rule out standing, at least at the pleading stage, on facts like those present here. *See* *TFT-LCD, 586 F.Supp.2d at 1123-24*.

3. FTAIA

As in **[*47]** the case of the direct purchasers, the indirect purchasers' failure to allege a plausible conspiracy at all necessarily means they have failed to allege a conspiracy with the requisite domestic effects to permit jurisdiction over their Sherman Act claims under the FTAIA. Whether the FTAIA will continue to stand as a bar to Sherman Act claims under any plausible conspiracy plaintiffs may ultimately be able to allege will depend on the contours and details of such purported conspiracy.

As plaintiffs point out, on its face, the FTAIA only serves to limit the jurisdictional reach of the Sherman Act. As such, it is not immediately apparent that it would serve as a bar to claims brought under state law in any event. Defendants, however, have advanced an argument that under the Foreign *Commerce Clause*, the congressional policy expressed in FTAIA should effectively preempt state ***antitrust law*** from having a greater reach than that of the Sherman Act. Because defendants' arguments on this point have not been fully developed, at this juncture the FTAIA cannot be said to foreclose plaintiffs' state law claims. Defendants are not precluded, however, from raising the point again in any subsequent **[*48]** motion practice should it otherwise be appropriate to do so.

4. Nationwide class under California law

The Supreme Court's decision in *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*, precludes nation-wide class actions based on the laws of a particular state where there is a material conflict of law between the forum jurisdiction and that of other states. Here, the fact that plaintiffs do not even attempt to advance claims under the laws of non-"repealer" states highlights the substantial difference between those jurisdictions and California. Non-"repealer" states have effectively endorsed *Illinois Brick's* prohibition against indirect purchasers recovering antitrust damages.[11] As plaintiffs point out, however, it is not immediately apparent that such states have any particular interest in protecting out-of-state parties such as the defendants here from such suits. The issue calls for a careful analysis under conflict of laws principles. While *Shutts* provides the foundational rule that nationwide classes are permissible only in the absence of a material conflict, it is too factually dissimilar to provide guidance as to whether a material conflict exists in this instance or not.

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[11] Although **[*49]** not every non-"repealer" state necessarily elected to follow *Illinois Brick* through a conscious balancing of policy interests, at least some have. See *Vacco v. Microsoft Corp., 260 Conn. 59, 793 A.2d 1048, 1059-60 (Conn. 2002)* (noting that Connecticut's legislature has declined several times to enact bills that would have provided for an *Illinois Brick* "repealer").

Because of the number of substantive issues raised in these motions, the parties have not been able to brief the conflict of law issues sufficiently to permit a definitive determination on whether or not a nationwide class under California law can proceed. Accordingly, this prong of the motion to dismiss will be denied, without prejudice to defendants' right to raise the issue again either in a subsequent motion to dismiss or at the class certification stage.

5. Representative resident plaintiffs

Defendants have adequately shown that dismissal of state law claims is appropriate with respect to those jurisdictions in which none of the named class representatives reside, notwithstanding plaintiffs' arguments that it would not contravene standing requirements to allow those claims to proceed. *See* *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009)* **[*50]** ("Where, as here, a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal."). Plaintiffs represent that they have found additional class representatives that can be added to represent Hawaii and Nebraska, and they request time to locate representatives for the remaining jurisdictions. In view of the time plaintiffs have already had since defendants raised this issue, the thirty days leave to amend being afforded by this order is sufficient.

6. Other individual state claims

Defendants level a scattershot of additional arguments directed at particular individual state claims. In light of the fact that the entire complaint must be dismissed, the sufficiency of the existing allegations to withstand any or all of these arguments does not warrant further examination. Plaintiffs are advised, however, that in preparing any amended complaint, they should plead with an eye to addressing the arguments defendants have made, whether or not any of them would warrant dismissal, standing alone.

C. Additional motions to dismiss

A series of separate motions have been filed by various defendants arguing, in essence, that regardless of whether **[*51]** the complaints might be adequate to state a claim against *some* defendants, they do not state sufficient facts to implicate the moving parties. Several of these motions were each filed by two or more related entities, and one is a joint motion by defendants who contend they were named for no reason other than that they are each a parent or a subsidiary of a more-directly involved defendant.

Even assuming that some or all of these motions have merit with respect to the allegations as the conspiracies as presently pleaded, as plaintiffs are being given leave to amend, it would serve little purpose to engage in a detailed analysis of the current allegations made against each moving party, particularly given that any subsequent complaints may significantly alter the scope of the claimed conspiracy. In pleading any amended complaints, however, plaintiffs should bear in mind that while, as they note, detailed "defendant by defendant" allegations are not required, they nonetheless "must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." **[*52]** *In re TFT-LCD (Flat Panel) Antitrust Litigation, supra, 586 F.Supp.2d at 1117* (quoting *In re Elec. Carbon Prods. Antitrust Litig., 333 F.Supp.2d 303, 311-12 (D.N.J. 2004)*. As such, plaintiffs must "include allegations specific to each defendant alleging that defendant's role in the alleged conspiracy." *Id.*

V. CONCLUSION

The Direct Purchasers' Consolidated Complaint and the Indirect Purchasers' First Amended Complaint are dismissed for the reasons set out above, with leave to amend. Any amended complaints shall be filed within 30 days.

IT IS SO ORDERED.

Dated: 8/3/11

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

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Am. Airlines, Inc. v. Sabre, Inc.

United States District Court for the Northern District of Texas, Fort Worth Division

August 4, 2011, Decided; August 4, 2011, Filed

NO. 4:11-CV-488-A

Reporter

2011 U.S. Dist. LEXIS 86830 *; 2011 WL 3468418

AMERICAN AIRLINES, INC., Plaintiff, vs. SABRE, INC., ET AL., Defendants.

Subsequent History: Affirmed by *Am. Airlines, Inc. v. Sabre, Inc., 2012 U.S. App. LEXIS 18637 (5th Cir. Tex., Sept. 5, 2012)*

Core Terms

removal, state court, cause of action, attorney's fees, federal issue, notice, state-law, objectively reasonable, temporary injunction, state court action, federal law, consolidate, emergency, federal court, costs, cases

LexisNexis® Headnotes

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Motions for Remand

HN1[] **Costs & Attorney Fees, Attorney Fees & Expenses**

The U.S. Supreme Court held in Martin v. Franklin Capital Corporation that, absent unusual circumstances, attorneys' fees should not be awarded under *28 U.S.C.S. § 1447(c)* when the removing party has an objectively reasonable basis for removal. Pre-Martin, the Fifth Circuit said that the question to be considered in applying *§ 1447(c)* is whether the defendant had objectively reasonable grounds to believe the removal was legally proper.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN2[] **Regulated Practices, Monopolies & Monopolization**

See *Tex. Bus. & Com. Code Ann. § 15.04* (2011).

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN3[] **Specific Cases Removed, Federal Questions**

The U.S. Supreme Court's decision in Grable stands for the proposition that federal-question jurisdiction can exist in limited circumstances even if only a state-law claim is being asserted by the plaintiff. The Supreme Court defined the factors to be considered in determining whether the removal was proper as follows: Does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Motions for Remand

HN4[] **Costs & Attorney Fees, Attorney Fees & Expenses**

In Martin, the U.S. Supreme Court explained that the appropriate test for awarding fees under *28 U.S.C.S. § 1447(c)* should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress's basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied. In Martin, the Supreme Court went on to explain that, in light of the objectives set forth immediately above, the standard for awarding fees should turn on the reasonableness of the removal.

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For Sabre Inc, Sabre Holdings Corporation, Sabre Travel International Limited, Defendants: Ralph H Duggins, LEAD ATTORNEY, Philip A Vickers, Scott A Fredricks, Cantey Hanger LLP, Fort Worth, TX; Andrew Polovin, Chris Lind, Katherine M Swift, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL.

Judges: JOHN McBRYDE, United States District Judge.

Opinion by: JOHN McBRYDE

Opinion

MEMORANDUM OPINION and ORDER

Before the court is the motion of plaintiff, American Airlines, Inc. ("American"), for recovery of costs, expenses, and attorneys' fees under *28 U.S.C. § 1447(c)* for being required to pursue a remand after defendants, Sabre, Inc., Sabre Holdings Corp., and Sabre Travel International Limited ("Sabre Travel") (sometimes collectively referred to as "Sabre"), removed to this court the state court action that was carried under the above caption after removal and before remand. For the reasons given in this order, the court has concluded that American should recover from Sabre the amount specified in this memorandum opinion and order as attorneys' **[*2]** fees under *§ 1447(c)*.

I.

Pertinent Historical Facts

A. State Court Activity Before Removal

The removed action was commenced in the District Court of Tarrant County, Texas, 67th Judicial District, in November 2010 by the filing by American against Travelport Inc., of a pleading for declaratory judgment. By an amended pleading filed January 10, 2011, American added Sabre as defendants. The causes of action alleged against Sabre were breach of contract and tortious interference with prospective business relations. American sought a temporary restraining order ("TRO") and temporary injunction against Sabre Travel.

The state court signed an order on January 10, 2011, granting American's request for a TRO and scheduling a hearing on American's request for a temporary injunction for January 24, 2011. On January 13, 2011, American took a nonsuit as to (dismissed) Travelport, Inc. On January 21, 2011, the state court entered an order extending the temporary restraining order and resetting the temporary injunction hearing for February 14, 2011. On January 26, 2011, the court, pursuant to agreement of the parties, ordered the February 14, 2011, hearing on American's request for a temporary injunction **[*3]** canceled, and that all discovery and pleading deadlines be abated until June 1, 2011.

On June 8, 2011, Sabre filed their answer to American's amended pleading and their counterclaim against American asserting two breach of contract counts. On June 14, 2011, the state court ordered the action restyled "American Airlines, Inc. v. Sabre, Inc., Sabre Holdings, Inc., and Sabre Travel International Limited." On June 23, 2011, American filed its second amended pleading, again naming Sabre as defendants. The causes of action alleged were breach of contract, tortious interference with prospective business relations, and for declaratory relief related to what is referred to in the pleading as an Amended PCA. On July 1, 2011, American filed its answer to Sabre's counterclaim.

On July 8, 2011, American filed its third amended pleading, again naming Sabre as defendants, alleging causes of action against Sabre for breach of contract, tortious interference with prospective business relations, and monopolization in violation of the Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA"), and seeking declaratory relief against Sabre.

On July 13, 2011, American filed motions to compel Sabre to respond **[*4]** to a previously served request for production of documents and asking the state court to require expedited discovery for the hearing on American's request for temporary-injunction, which the state court had set for August 22, 2011. Also on July 13, American notified Sabre that its motions for expedited discovery, for a temporary injunction hearing, and to compel production of documents were to be heard at 2:00 p.m. on July 18, 2011, and that the hearing on American's application for temporary injunction was scheduled to begin at 9:30 a.m. on August 22, 2011.

B. The Removal and Related Activity by Sabre

Sabre filed its notice of removal on the morning of July 18, 2011, a few hours before the state court hearing on American's motions for expedited discovery, for the temporary injunction hearing, and to compel production of documents was scheduled to begin.

Later in the day on July 18 Sabre filed a motion in an action pending on the docket of the Honorable Terry R. Means, the other district judge presiding in the Fort Worth Division, urging Judge Means to consolidate the removed action into his Case No. 4:11-CV-244-Y, styled "American Airlines, Inc., Plaintiff, v. Travelport Limited, Travelport, **[*5]** L.P., Travelport, Orbitz Worldwide, LLC, Sabre Inc., Sabre Holdings Corp., Sabre Travel International Limited, Defendants." [1] The ground of the motion was that the action pending before Judge Means and the removed action involved common questions of law and fact regarding identical issues of federal ***antitrust law***, and that consolidation would promote the just and efficient conduct of the litigation by-preventing duplicative actions from proceeding in multiple forums. Sabre explained in its motion that the motion was being filed in Judge Means's case instead of the removed action because, according to Sabre, Judge Means's action was the first-filed of the two

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[1] Contemporaneously with the filing of the notice of removal, Sabre filed a Notice of Related Case notifying the court of the pendency of the action on the docket of Judge Means.

actions, with the consequence that, under Fifth Circuit authority, Judge Means was the one to determine whether there would be a consolidation. No hearing was sought on the motion. The next morning, July 19, Sabre filed a notice in the removed action of its filing of the motion to consolidate.

C. The Emergency Motion to Remand

At around noon on July 19, 2011, **[*6]** American filed its emergency motion to remand and alternative motion to consolidate. American called the court's attention in the emergency motion to the timing of the removal from state court, and the extent to which the removal disrupted the state court activities. The court interpreted the motion, which requested a ruling without a hearing, to present a legitimate need for an immediate remand if the removal was improper.

As an alternative to be considered if the court were to conclude that the case should not be remanded, American argued that any consolidation of the removed action with the one pending before Judge Means should be ordered by the undersigned inasmuch as the removed action would be viewed under applicable law to be the first-filed action. [2]

D. Actions Taken by the Court in Response to the Emergency Motion to Remand

Even though the court tentatively concluded from the papers before it that the emergency motion to remand had merit, instead of ruling on the motion without a hearing, the court arranged for a telephone conference/hearing on the afternoon of July 19, 2011. Lead counsel for American, along with another attorney from his firm, and lead counsel for Sabre, were on the line at the outset. After the court explained its tentative conclusion that there should be a remand, the court invited lead counsel for Sabre to express his views in the event there was something the court might have overlooked. When lead counsel made known that he was not prepared to discuss the legal basis for Sabre's removal of the action and suggested that another lawyer in his office was the one who had been working on the research, he arranged for the other lawyer to enter into the conversation.

The other lawyer reiterated the recitation in **[*8]** the notice of removal that Sabre took the position that removal was proper under the Supreme Court's ruling in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)*. He emphasized that Sabre was of the belief that the facts in the removed action satisfied the three-part test expressed by the Supreme Court at *page 314* of the Grable opinion. Because the court already had concluded that the Grable opinion did not justify Sabre's removal of the action, the court informed the parties that the action was being remanded to the state court. Later in the afternoon of July 19, the court signed an order and final judgment of remand, remanding the action to the state court from which it was removed.

E. The Motion for Attorneys' Fees and Sabre's Response

Plaintiff requested in its emergency motion to remand that it be awarded fees and costs incurred as a result of the removal. Rather than to act on that request, by an order signed July 20, 2011, the court gave American until July 25, 2011, to file a formal motion asking for an award of fees and costs if American wished to pursue that matter further. Sabre was given until July 27, 2011, to file a response to **[*9]** the motion.

On July 25, American filed its motion asking for an award of $18,515.00 in costs, expenses, and attorneys' fees against Sabre under *28 U.S.C. § 1447(c)*. The ground of American's motion was that Sabre lacked an objectively reasonable basis for removal of the action from state court. The motion was supported by an appendix containing

[2] Case No. 4:11-CV-244-Y was initiated on April 12, 2011, by American's filing of a complaint naming three defendants. None of the Sabre companies was named. Sabre filed a motion to intervene in the action on June 1, 2011. By an amended complaint filed June 9, 2011, American added Sabre as defendants. Among other things, American complained in the amended complaint of anti-competitive conduct of Sabre and the other defendants in violation **[*7]** of sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2*. On July 13, 2011, Sabre filed a motion to dismiss American's complaint, as amended, for failure to state a claim upon which relief could be granted.

affidavits and itemizations concerning the work done by American's attorneys, per-hour billing rates for the attorneys doing the work, and total fees.

Sabre timely responded to plaintiff's motion, maintaining, as it had before, that the Grable case provided justification for its decision to file the notice of removal, and that, therefore, Sabre's decision to remove was not objectively unreasonable. American's reply to Sabre's opposition added little substance to the contents of its motion, other than perhaps to inform the court of the effect on the state court action of the expeditious remand.

II.

Analysis

HN1[] The Supreme Court held in Martin v. Franklin Capital Corp. that, absent unusual circumstances, attorneys' fees should not be awarded under *28 U.S.C. § 1447(c)* when the removing party has an objectively reasonable basis for removal. *546 U.S. 132, 136, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)*. **[*10]** Pre-Martin, the Fifth Circuit said that the question to be considered "in applying *§ 1447(c)* is whether the defendant had objectively reasonable grounds to believe the removal was legally proper." *Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290, 293 (5th Cir. 2000)*.

The first step in Sabre's attempted justification for the removal is to note that in the removed action American asserted a cause of action under the TFEAA, codified in chapter 15 of the Texas Business and Commerce Code. The next step is to call the court's attention to the provisions of *section 15.04 of the Texas Business and Commerce Code*, which reads, in pertinent part, as follows:

> ***HN2***[] The purpose of [the TFEAA] is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of [the TFEAA] shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

Tex. Bus. & Com. Code Ann. § 15.04 (West 2011) (emphasis added). The final steps are to call **[*11]** the court's attention to the Supreme Court's holding in Grable, and to contend that the Grable holding justifies removal of the state court action inasmuch as American asserted a TFEAA cause of action against Sabre in the removed action. The court was not persuaded by Sabre's attempted justification when deciding the motion to remand, nor is the court any more persuaded that such justification for removal was objectively reasonable.

HN3[] Grable stands for the proposition that federal-question jurisdiction can exist in limited circumstances even if only a state-law claim is being asserted by the plaintiff. In Grable, an essential element of the plaintiff's quiet title claim was whether the Internal Revenue Service had given the plaintiff adequate notice, as defined by the Internal Revenue Code, that it was seizing his property to satisfy a federal tax delinquency. *545 U.S. at 310-11, 315*. Thus, "the claim of title depended on the interpretation of the notice statute in the federal tax law." *Id. at 311*. That was the basis for the removal of the state court action to the federal court. Id.

The Supreme Court defined the factors to be considered in determining whether the removal was proper as **[*12]** follows:

> [D]oes a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

Id. at 314. Explaining why those factors were present in Grable, the Court reasoned:

> This case warrants federal jurisdiction. Grable's state complaint must specify the facts establishing the superiority of [its] claim, and Grable has premised its superior title claim on a failure by the IRS to give it

> adequate notice, as defined by federal law. Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case. The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the prompt and certain collection of delinquent taxes, and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers **[*13]** like Darue to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters. Finally, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.

Id. at 314-15 (internal citations and quotation marks omitted). There is no similarity in principle or otherwise between the facts that led to the Grable ruling of federal-question jurisdiction and the facts confronting Sabre when it gave its notice of removal.

In *Grdable*, the federal issue the state court had to decide was clearly defined and was an essential element of plaintiff's state court cause of action. In contrast, here the state court is not obligated to decide any federal issue, but merely is to construe the TFEAA "in harmony with federal judicial interpretations of comparable federal **[*14]** antitrust statutes to the extent consistent" with the purpose of the TFEAA. *Tex. Bus. & Com. Code Ann. § 15.04*. The unreasonableness of Sabre's removal contention becomes obvious when one recognizes that, if Sabre were correct, every cause of action brought in state court under the TFEAA would automatically be removable to federal court. [3]

The absurdity of the contention would not stop **[*15]** there. If Sabre were correct, most employment discrimination cases brought in a Texas state court based solely on Texas anti-discrimination statutes would arguably be removable to federal court inasmuch as Texas employment discrimination decisions are guided by both state law and federal precedent, and "federal law may be applied in the absence of state decision of law." See *Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 739 (5th Cir. 1999)*; see also *Tex. Lab. Code Ann. § 21.001 (1)-(3)* (West 2006); *NME Hosps., Inc. v. Rennels, 994 S.W.2d 142, 144 (Tex. 1999)*. And, if Sabre were correct, federal courts could be burdened with removals from state courts of tort actions based on state-law causes of action in which the plaintiff is relying on a federally mandated standard of conduct to establish fault on the part of the defendant. [4] Not only that, if Grable meant what Sabre says it does, every time a case filed in state court presents a cause of action the outcome of which turns on the interpretation of a rule of the Texas Rules of Evidence, a removability issue could well be presented because "in the construction of the Texas rules, persuasive value is accorded the federal decisions interpreting **[*16]** the federal rules." *Callaway v. State, 818 S.W.2d 816, 831 (Tex. App.—Amarillo 1991, pet. ref'd)*;

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[3] In *Waste Control Specialists v. Envirocare, 199 F.3d 781 (5th Cir.)*, modified in part, *207 F.3d 225 (5th Cir. 2000)*, the Fifth Circuit reversed the district court's denial of a motion to remand an action brought in state court under the TFEAA. The Fifth Circuit explained:

> Although WCS *could* have alleged a federal cause of action in its state petition, it did not. It filed a complaint in state court alleging wholly state claims in a non-preempted field. Its choice is entitled to respect and precluded removing the case to federal court absent circumstances not presented here.

Id. at 784. In addition to ordering the district court to remand the action, the Fifth Circuit ordered the district court to award the plaintiff costs and fees pursuant to *28 U.S.C. § 1447(c)* upon submission of proper proof. *Id. at 788*.

[4] In *Bennett v. Southwest Airlines Co., 484 F.3d 907, 912 (7th Cir. 2007)*, the Seventh Circuit in effect rejected the line of reasoning advanced by Grable, saying "[t]hat some standards of care used in tort litigation come from federal law does not make the tort claim one 'arising under' federal law."

accord *Rodda v. State, 745 S.W.2d 415, 418 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd)*. The examples the court has given are only a few that readily come to mind. Undoubtedly there are many more.

The first of the three factors mentioned in Grable is "does a state-law claim necessarily raise a stated federal issue." *545 U.S. at 314*. Sabre has not, and cannot, define any "stated federal issue" raised by American's state-law cause of action under the TFEAA. No reasonable argument can be made that the mere fact that a federal standard is to be referenced by a state court in determining whether there has been a state-law violation causes a state-law claim to "necessarily raise a stated federal issue." Id. The issue remains a state-law issue throughout, which might or might not be resolved by **[*17]** reference to federal law. There is no way to determine at the removal stage for certain whether federal law will be involved, nor, if it is involved, the nature and extent of its involvement.

Moreover, Sabre has not, and cannot, point to any federal issue that would qualify as satisfying the "actually disputed and substantial" factor expressed in Grable. Id. As the Fifth Circuit explained in *New Orleans & Gulf Coast Railway Co. v. Barrois, 533 F.3d 321, 328 (5th Cir. 2008)*, in the absence of a specific argument that attempts to address the standard outlined in Grable, the court cannot conclude that any state court action raises a significant federal issue sufficient to establish federal-question jurisdiction. No reasonable argument can be made that this second Grable factor can be satisfied in this instance. Without a definition of a stated federal issue raised by American's cause of action, there is no way to say whether it is or is not "actually disputed and substantial."

Finally, referring to the third Grable factor, there is no reasonable argument that giving the federal court subject-matter jurisdiction over American's TFEAA claim would not disturb any congressionally approved balance **[*18]** of federal and state judicial responsibilities. Obviously, such a balance would be disturbed considering the wide-ranging effect that adoption of Sabre's view of things would have on congressionally approved balance of federal and state judicial responsibilities. Furthermore, no reasonable argument can be made that the government has a strong interest in the outcome of a cause of action brought under the TFEAA, including the matter of whether a state court has given proper weight to federal law. Sabre makes no reasoned argument that the government has a direct interest in the availability of a federal forum in which litigants can resolve causes of action asserted under the TFEAA. Particularly is this so when there has been no identification of any specific federal issue that might be raised in the litigation.

Sabre cites in its opposition to a number of district court cases denying an award of fees under *§ 1447(c)* when the basis for the improper removal was reliance on Grable. Opp'n to Mot. for Fees at 4-5. Those cases cut more than one way. In virtually every one of those cases, the reliance by the removing party on Grable had a better chance at objective reasonableness than Sabre's **[*19]** reliance on Grable in this case. And, those cases appear to the court to provide strong authority that, by the time Sabre chose to invoke Grable in support of its removal of American's state-law case, any reasonable party would have known that the reliance was inappropriate.

Considering the exigencies created from Sabre's standpoint by the upcoming state court hearings, perhaps Sabre's conduct might be viewed to have been subjectively reasonable in the sense that perhaps the potential gain Sabre had from the removal more than offset in their minds any risk they might have incurred by a wrongful removal. [5] But the standard is objective reasonableness; and, the court cannot find that Sabre's conduct was objectively reasonable. The court makes the affirmative finding that Sabre's removal of American's state court action was objectively unreasonable. [6]

HN4[] In Martin, the Supreme Court explained:

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[5] In Valdes v. Wal-Mart Stores, Inc., the Fifth Circuit said: "To be sure, the district court may award fees even if removal is made in subjective good faith." *199 F.3d 290, 292 (5th Cir. 2000)*.

[6] Sabre's argument that the fact that counsel for American anticipated the possibility that Sabre might seek a removal of the action provides evidence **[*20]** of the objective reasonableness of the removal is not persuasive. The court has no way of knowing why counsel for American anticipated Sabre's conduct, but the court is satisfied that whatever caused them to have that foresight does not cause Sabre's removal conduct to be objectively reasonable.

> The appropriate test for awarding fees under *§ 1447(c)* should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

546 U.S. at 140. The court has applied that test, and finds that it justifies, indeed compels, an award of attorneys' fees against Sabre. In Martin, the Supreme Court went on to explain that, in light of the objectives set forth immediately above, "the standard for awarding fees should turn on the reasonableness of the removal." In this instance, the removal was not reasonable.

For the reasons stated above, the court has concluded that American should receive an award of attorneys' fees under *§ 1447 (c)*. However, the court **[*21]** is unwilling to award the full $18,515.00 amount sought by American. The court is eliminating from consideration the fees that were incurred in anticipation of the removal, amounting to $2,920.00. While those fees probably were reasonable and necessary for the representation of American, *§ 1447(c)* contemplates an award for costs, expenses, and attorneys' fees "incurred as a result of the removal." *28 U.S.C. § 1447(c)*. Consequently, the court cannot make an award of attorneys' fees incurred before the removal.

While there appears to be duplication of effort between the attorneys as to some of the legal work done after the removal, when the court takes into account the time pressure placed on American's counsel to promptly respond by an emergency motion to remand and alternative motion to consolidate, the court has concluded that what might appear to be duplication of effort at first blush probably was a reasonable utilization of attorney resources that took into account the need for an immediate remand in order to avoid complete disruption of the orderly handling by the state court of the removed action. Therefore, the court has concluded that all other charges listed and verified in **[*22]** the items contained in the appendix in support of American's motion should be awarded. Those items total $15,595.00. The court finds that such amount constitutes reasonable attorneys' fees necessarily-incurred as a result of the removal.

III.

Order

Therefore,

The court ORDERS that American have and recover from Sabre, Inc., Sabre Holdings Corp., and Sabre Travel International Limited, jointly and severally, $15,595.00 as reasonable attorneys' fees incurred by American as a result of Sabre's removal of the state court action from state court to this court.

SIGNED August 4, 2011.

/s/ John McBryde

JOHN McBRYDE

United States District Judge

End of Document

Dynegy Mktg. & Trade v. Multiut Corp.

United States Court of Appeals for the Seventh Circuit

January 12, 2011, Argued; August 4, 2011, Decided

No. 10-2811

Reporter

648 F.3d 506 *; 2011 U.S. App. LEXIS 16089 **; 2011-2 Trade Cas. (CCH) P77,554

DYNEGY MARKETING AND TRADE, a Colorado Partnership, Plaintiff-Appellee, v. MULTIUT CORPORATION, an Illinois Corporation, and NACHSHON DRAIMAN, an Illinois Resident, Defendants-Appellants.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 02 C 7446—John A. Nordberg, Judge.

Dynegy Mktg. & Trade v. Multiut Corp., 2008 U.S. Dist. LEXIS 45700 (N.D. Ill., June 11, 2008)

Core Terms

district court, damages, prices, Energy, natural gas, counterclaims, declaration, summary judgment, manipulation, customers, invoices, guaranty, parties, discovery, confidentiality agreement, computation, FERC, contracts, indices, therm, reconsideration motion, fixed price, calculation, fixed-price, grant summary judgment, competitors, disclosures, profits, oral contract, Robinson-Patman Act

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Briefs

HN1[] **Appeals, Appellate Briefs**

A scattergun approach generally does not serve appellants well. Not only does the kitchen sink approach to briefing cause distraction and confusion, it also consumes space that should be devoted to developing the arguments with some promise.

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

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

Fed. R. Civ. P. 26(a)(1)(A)(iii) requires litigants to disclose to one another a computation of each category of damages claimed by the disclosing party—who must also make available the documents or other evidentiary material on which each computation is based, including materials bearing on the nature and extent of injuries suffered. *Rule 26(e)(1)* requires parties to supplement their initial disclosures as more information becomes available to them. If a party does not follow these rules, the party is not allowed to use that information to supply evidence on a motion, at a hearing, or at a trial unless the failure was substantially justified or was harmless. *Fed. R. Civ. P. 37(c)(1)*. Whether a failure to comply with *Rule 26(a)* or *(e)* is substantially justified, harmless, or warrants sanctions is left to the broad discretion of the district court. *Rule 37(c)(1)(A)-(C)* lists the sanctions courts may impose. An appellate court reviews all discovery sanctions for abuse of discretion and will uphold a district court's decision so long as it could be considered reasonable.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN3[] **Offers, Definite Terms**

Unilateral understandings are not enough to give rise to an enforceable oral contract in Illinois. A feeling of certainty that a party in position to contract would surely agree to terms present in the situation disclosed does not evoke a contract from a plausible situation for contract. The agreement must actually be made by the parties to the alleged contract. It must be shown that those parties selected and concurred in the terms of the contract, or no contract exists. In order for there to be a contract between parties, there must be a meeting of the minds or mutual assent as to the terms of the contract.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN4[] **Offers, Definite Terms**

The essential terms of a contract must be definite and certain in order for a contract to be enforceable.

Contracts Law > Contract Formation > General Overview

HN5[] **Contracts Law, Contract Formation**

A letter of intent or a similar preliminary writing that reflects an agreement contingent upon the successful completion of negotiations that are ongoing does not amount to a contract that binds the parties.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN6[] **Offers, Definite Terms**

If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Contracts Implied in Fact

HN7[] **Types of Contracts, Contracts Implied in Fact**

Contracts implied in fact arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. In a contract implied in fact, a contractual duty is imposed by reason of a promissory expression inferred from facts, circumstances, and expressions by the promisor showing an intent to be bound. Such contract may be proved by circumstances showing that the parties intended to contract and by the general course of dealing between them.

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

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

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

HN8[] **Standards of Review, De Novo Review**

Summary judgment is appropriate if the admissible evidence considered as a whole shows that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law, *Fed. R. Civ. P. 56(a)*, even after all reasonable inferences are drawn in the nonmovant's favor. An appellate court reviews de novo a district court's determination that this standard has been met.

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Evidence > Burdens of Proof > Allocation

Contracts Law > Breach > General Overview

HN9[] **Remedies, Damages**

Under Illinois law, plaintiffs alleging breaches of contract bear the burden of proving that they sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement. Plaintiffs are not required to prove damages to the exact cent; they must merely establish a reasonable basis for computing damages and may do so in any reasonable manner.

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

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

HN10[] **Entitlement as Matter of Law, Genuine Disputes**

More than speculation, no matter how righteous, is required to create a genuine issue of material fact. A nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Guaranty Contracts

HN11[] **Types of Contracts, Guaranty Contracts**

A guaranty is a third party's promise to answer for payment on or fulfill an obligation if the person primarily liable fails to perform.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

HN12[] **Burdens of Proof, Absence of Essential Element**

Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

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

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

HN13[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo, drawing all reasonable inferences in the non-movant's favor.

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Evidence > Burdens of Proof > Allocation

Contracts Law > Breach > General Overview

HN14[] **Remedies, Damages**

Under Illinois law, a party who seeks damages for breach of contract has the burden not only to establish that he sustained damages, but also to establish a reasonable basis for computation of those damages.

Civil Procedure > Remedies > Damages > General Overview

HN15[] **Remedies, Damages**

Damages may not be awarded on the basis of speculation and conjecture.

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN16[] **Robinson-Patman Act, Coverage**

Section 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, makes it illegal to discriminate in price when an injury to competition is the consequence. It is a prophylactic statute which is violated merely upon a showing that the effect of such discrimination may be substantially to lessen competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN17[] **Robinson-Patman Act, Claims**

Proof of a violation under § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, requires (1) a difference in price, (2) in sales to two buyers purchasing from a single seller, (3) involving commodities, (4) of like grade and quality, (5) that may injure competition. The "competitive injury" prong of this showing may be inferred from evidence that a favored competitor received significantly better prices over an extended period of time; the hallmark of such injury is the diversion of sales or profits from a disfavored purchaser to a favored purchaser.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

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

HN18[] **Competitive Injuries, Primary Line Injuries**

There are three categories of competitive injury that may give rise to Robinson-Patman Act claims: primary line, secondary line, and tertiary line. Primary-line cases involve price discrimination that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases like this one involve price discrimination that injures competition among customers of the discriminating seller. Tertiary-line cases involve injury to competition among the customers of the differently treated purchasers.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN19[] **Remedies, Damages**

Mere demonstration of a competitive injury and the other elements of a violation does not mean that a disfavored purchaser has been actually "injured" within the meaning of § 4 of the Clayton Act, *15 U.S.C.S. § 15*. Plaintiffs seeking to recover treble damages pursuant to *§ 15* must prove more than a violation of § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, since such proof establishes only that injury may result. The burden of showing damages is not unduly rigorous, but plaintiffs must present some evidence of injury attributable to the price discrimination. If there has been a violation of the Robinson-Patman Act, a petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation is established, that burden is to some extent lightened.

Civil Procedure > Appeals > Appellate Briefs

HN20[] **Appeals, Appellate Briefs**

An appellate court cannot make a party's arguments for him or force him to make arguments he seems determined not to raise.

Counsel: For DYNEGY MARKETING AND TRADE, a Colorado Partnership, Plaintiff - Appellee: Barry S. Hyman, Attorney, SCHIFF HARDIN LLP, Chicago, IL.

For MULTIUT CORPORATION, an Illinois Corporation, NACHSHON DRAIMAN, an Illinois Resident, Defendants - Appellants: Joseph E. Tighe, Attorney, LATIMER LEVAY JURASEK, Chicago, IL.

Judges: Before KANNE and TINDER, Circuit Judges, and HERNDON, District Judge.*

Opinion by: TINDER

Opinion

[*509] TINDER, *Circuit Judge*. The relationship between Dynegy Marketing and Trade ("Dynegy"), a natural gas supplier, and Multiut Corporation, a natural gas distributor headed by Nachshon Draiman, has become as volatile as the commodity in which they once dealt. Dynegy and Multiut adhered to their written contract for a time, but their relationship unraveled in the face of a failed acquisition, several million dollars' worth of unpaid invoices, and frequent disputes over pricing, which were later inflamed by allegations that Dynegy **[**2]** and other natural gas suppliers were manipulating the indices on which natural gas price quotes are based. When Multiut's outstanding bills remained unpaid notwithstanding Draiman's personal guaranty, Dynegy cut off Multiut's gas supply and brought suit, alleging breach of contract and guaranty as well as fraudulent transfer claims. Multiut and Draiman fired back with six counterclaims, which included a number of contract-related claims and a Robinson-Patman antitrust claim. After contentious discovery, Dynegy moved for summary judgment on its contract and guaranty **[*510]** claims and all of the defendants' counterclaims. Multiut and Draiman tried to oppose summary judgment by submitting a declaration from Draiman, but the district court excluded the declaration as a sanction for Multiut's discovery violations. The district court granted Dynegy's summary judgment motion and ultimately issued a Rule 54(b) judgment on the contract and guaranty claims and the counterclaims. Multiut and Draiman filed two motions to reconsider, but the district court denied both motions and rejected their belated submission of affidavits relating to the alleged price index manipulation. Multiut and Draiman challenge **[**3]** nine of the district court's rulings. We affirm in full.

I. Background

Draiman solely owns and controls Multiut, an Illinois corporation that acts as a middleman between utility providers and end-users. Multiut obtains wholesale quantities of natural gas from national suppliers and allocates the gas to its smaller local customers. Dynegy, a Colorado partnership that markets energy products, is the main supplier from which Multiut obtained gas. Multiut first established a contractual relationship with Dynegy's predecessor-in-interest, Natural Gas Clearinghouse, in 1988. In 1994, Multiut and Dynegy entered into a Natural Gas Sales Agreement ("the agreement"). (Technically, Multiut entered into the agreement with Natural Gas Clearinghouse, but the parties agree that Dynegy, as Natural Gas Clearinghouse's successor, is bound by the agreement.) Pursuant to the agreement, Multiut would contact Dynegy periodically and make "nominations" of natural gas, measured in units called "therms." Dynegy would quote Multiut a price, based on an applicable natural gas index, and if Multiut

* The Honorable David R. Herndon, Chief Judge of the United States District Court for the Southern District of Illinois, sitting by designation.

accepted the price Dynegy would pipe the gas to an agreed-upon delivery point and send monthly invoices to Multiut, **[**4]** which was obligated to pay for the gas delivered. Its obligation was backstopped both by an interest provision in the agreement and a separate personal guaranty Draiman executed in 1995. The parties were supposed to formally memorialize their transactions by completing forms called "Exhibit Bs," but in practice the invoices were typically the only written records.

The parties' arrangement worked well enough that Dynegy expressed an interest in acquiring Multiut in 1997. The parties signed a confidentiality agreement and conducted due diligence, but Dynegy ultimately bowed out of the deal. It instead created a joint venture, Nicor Energy, with one of Multiut's competitors, Nicor, Inc. Dynegy began providing natural gas to Nicor Energy in 1998, which Multiut and Draiman pinpoint as the beginning of the demise of the Dynegy-Multiut relationship. Multiut claims that Dynegy gave Nicor Energy sweetheart pricing, in violation not only of the antitrust laws but also of an alleged oral contract promising Multiut "most-favored nations" or "best" pricing.

Notwithstanding its apparent dissatisfaction with Dynegy and Nicor Energy, Multiut continued buying gas almost exclusively from Dynegy and making **[**5]** "progress payments" toward its balance owed. Multiut hit a few financial bumps, however, and by December 2000 owed Dynegy at least $1,620,178 in payments and interest. Multiut's bookkeepers met with representatives from Dynegy in March 2001 and agreed that Dynegy's calculation of the arrearage was accurate despite Dynegy's failure to include interest on Multiut's invoices during most of 1999 and 2000. From roughly that point forward, Dynegy refused to offer Multiut monthly price quotes; to mitigate its risk, it would agree **[*511]** only to provide Multiut gas on a day-to-day basis. Multiut preferred longer-term, fixed-price deals, however, so as to better hedge its own risk against fluctuating energy prices and manage customers with whom it had entered into fixed-price contracts. It made repeated efforts to persuade Dynegy to offer it longer-term price guarantees. In June 2001, Draiman sent Dynegy an unsolicited fax stating, "This is to confirm the Multiut order for 12 months. A total of 8 million therms (800,000 MMBTU's) @ __." Dynegy did not send a return fax, but Draiman testified that he spoke with Dynegy employee Mark Ludwig and gleaned that Multiut "would have to wait a little bit of **[**6]** time to bring some of the balance down" before fixed pricing would be available.

Draiman again sought fixed pricing at a September 2001 meeting with Dynegy employees Ludwig and Pete Pavluk. According to Draiman, Pavluk and Ludwig told him they would "work on" locking-in a fixed price, or that they "would get it done." They also asked him to develop a payment schedule to address Multiut's growing arrearage. By letter dated September 17, 2001, Draiman proposed a tentative payment schedule and added for Dynegy's review "a report of customers on Fixed Cost contracts." Draiman noted that these customers were committed to paying Multiut an average of 47.5 cents per therm and expressed interest in acquiring gas from Dynegy at a fixed price of 30 cents per therm to "insure [Multiut] an additional annual profit of 2,000,000." Dynegy responded by letter dated October 4, 2001, explaining that its relationship with Multiut had become "one of concern" and requested a "detailed formal payment plan by no later than Wednesday, October 10, 2001." It did not mention Draiman's fixed-price proposal. Draiman testified that he nonetheless relied on Ludwig and Pavluk's assurances and did not seek out alternative **[**7]** sources of gas for Multiut.

Though it proposed a payment plan (on October 12), Multiut continued to fall further behind in its payments as wholesale natural gas prices climbed above the prices it was receiving from its own fixed-price customers. Dynegy kept the gas flowing (and arrearage growing) for another year but shut off the spigot in December 2002 after filing suit against Multiut and guarantor Draiman.

Multiut and Draiman responded by denying Dynegy's allegations and raising affirmative defenses to its breach of contract and breach of guaranty claims. They also filed a bevy of counterclaims against Dynegy. Those relevant here alleged that Dynegy breached the 1997 confidentiality agreement by "inevitably disclosing" to Nicor Energy valuable information it had obtained from Multiut; breached an oral agreement to supply gas at fixed prices; breached an implied agreement not to charge interest; breached an oral agreement to offer "most favored nations" pricing; and violated the Robinson-Patman Act, *15 U.S.C. § 13(a)*, by offering lower gas prices to Multiut's competitors.

In March 2003, the Federal Energy Regulatory Commission (FERC) issued a lengthy report summarizing its year-long **[**8]** investigation of energy markets in the western United States. *See* Staff of the Federal Energy Regulatory Commission, *Final Report on Price Manipulation in Western Markets* (2003), *available at* *http://www.ferc.gov/industries*/ electric/indus-act/wec.asp ("FERC report"). According to the FERC report, which was commissioned to "determine whether and, if so, the extent to which California and Western energy markets were manipulated during 2000 and 2001," *id*. at ES-1, "[d]ysfunctions in the natural gas market appear to stem, at least in part, from **[*512]** efforts to manipulate price indices compiled by trade publications," *id*. Dynegy was one of many energy firms implicated in the alleged price index manipulation. The FERC report quoted several Dynegy employees, who stated they felt pressured to report inflated volumes or prices to the industry-produced indices, *see id*. at III-5, which were the bases for the prices Dynegy and other suppliers charged their customers, including Multiut. The FERC report highlighted Dynegy's alleged manipulations in Oregon and San Francisco, but did not mention Dynegy in connection with "the Great Lakes" or Chicago. *See id*. at III-54.

After the FERC report became public, **[**9]** Multiut sought in discovery information and documents regarding Dynegy's calculation and reporting of price index information. Dynegy opposed its efforts. The magistrate judge overseeing discovery determined that Dynegy was not required to supplement its responses to these requests because "Multiut has not provided any basis for the assertion that Dynegy could independently influence the index price."

Dynegy eventually moved for summary judgment on Multiut and Draiman's counterclaims and its own breach of contract and guaranty claims. (Dynegy's fraudulent transfer and breach of fiduciary duty claims were not included in the summary judgment motion and are not part of this appeal.) As part of their response to Dynegy's statement of undisputed facts, Multiut and Draiman submitted for the district court's consideration, notwithstanding its discovery rulings, excerpts from the FERC report, documents from a related criminal proceeding against one of Dynegy's former traders, and a lengthy declaration by Draiman. The declaration from Draiman contained Multiut and Draiman's first and only estimates of Multiut's lost profits and some of its other alleged damages.

Pointing to the untimeliness **[**10]** of the Draiman declaration and Multiut's failure to comply with *Fed. R. Civ. P. 26(a)(1)(A)(iii)* & *(e)*, which require parties to disclose and supplement "a computation of each category of damages," Dynegy argued that the declaration should be excluded pursuant to *Fed. R. Civ. P. 37(c)(1)*. The district court agreed and excluded the declaration in its entirety. It also granted in full Dynegy's motion for summary judgment. Draiman and Multiut moved for reconsideration. In their motion, they asserted that the "centerpiece" of their opposition to the breach of contract claim was "evidence that Dynegy had systematically overcharged Multiut for its natural gas purchases due to its complicity in a nationwide conspiracy to inflate gas index prices" and argued that the price manipulation evidence was relevant. They also challenged Dynegy's computation of damages, which was based on an expert's review and analysis of invoices and payment records largely produced by Multiut. Dynegy responded with a *Rule 54(b)* motion for entry of final judgment on the claims and counterclaims resolved by the summary judgment order.

After considering briefing on both motions, the district court denied Multiut's motion **[**11]** and granted Dynegy's. The district court found that reconsideration was not appropriate because Multiut had done little more than rehash its previously rejected arguments. The district court also rejected for want of evidence Multiut's assertion that the price index manipulation in California and other western states "carried over" into the Chicago market, though it recognized that such a conclusion was "not illogical." The district court granted Dynegy's Rule 54(b) motion after finding that the fraudulent transfer claims were legally and factually distinct from the **[*513]** other claims and that there was no just reason for delay.

Multiut and Draiman promptly appealed. We dismissed the appeal for lack of jurisdiction, however, because the district court's judgment did not specify the amount of pre-judgment interest the defendants owed and was therefore not final. *See* *Osterneck v. Ernst & Whinney, 489 U.S. 169, 175-76, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)*. The case therefore returned to the district court, whereupon Dynegy filed a Rule 60(a) motion to amend the judgment to include interest calculated pursuant to a formula in the agreement. Multiut and Draiman retorted that any interest due should be calculated pursuant to **[**12]** an Illinois statutory provision. They also filed a second motion to reconsider the grant of summary judgment and moved to supplement the record with affidavits from former Dynegy employee Jeffrey Hornback and economist Michael Harris. Multiut and Draiman argued that these affidavits, which they obtained in connection with ongoing multi-district litigation prompted by the FERC report, *see* In re W. States Wholesale Natural Gas Antitrust Litig., 290 F. Supp. 2d 1376 (J.P.M.L. 2003), supported their contention that the prices Dynegy charged for natural gas were "artificially influenced or contaminated by plaintiff's wrongful conduct."

The district court denied the defendants' second motion for reconsideration. It cited finality concerns as well as hesitation to "construe [the remand order from the Seventh Circuit] as an open invitation to allow the parties to delve back into the substantive issues of the case." The district court granted Dynegy's Rule 60(a) motion to amend the judgment and sided with Dynegy as to the method by which the interest should be computed. The district court entered judgment for Dynegy, awarding it $8,929,449 in pre-judgment interest on top of its damages of $13,693,943.18, **[**13]** for a total of $22,623,392.18. Multiut and Draiman promptly appealed.

II. Discussion

Multiut and Draiman have presented nine issues for our consideration, disregarding our repeated counsel that "the equivalent of a laser light show of claims may be so distracting as to disturb our vision and confound our analysis." United States v. Lathrop, 634 F.3d 931, 936 (7th Cir. 2011) (collecting cases), *petition for cert. filed*, No. 10-11044 (U.S. June 13, 2011) [cert. denied, *181 L. Ed. 2d 111 (2011)*]; *see also* Cole v. Comm'r, 637 F.3d 767, 772 (7th Cir. 2011) (noting that the ***HN1***[] "scattergun approach" generally does not serve appellants well). Not only does the "kitchen sink" approach to briefing cause distraction and confusion, it also "consumes space that should be devoted to developing the arguments with some promise." Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). We focus on the minimally developed claims as best we can, grouping like contentions where possible and addressing the many claims of error in turn.

A. Exclusion of Draiman Declaration

As part of their response to Dynegy's summary judgment motion, Multiut and Draiman submitted a seventeen-page declaration by Draiman. They submitted the declaration many months after **[**14]** discovery closed, but relied on it to prove the damages they allegedly suffered at Dynegy's hand. The district court declined to consider the declaration "because Multiut failed to make timely disclosures [of its computation of damages] during discovery." It reasoned, "Multiut has not provided any explanation for its failure to make earlier disclosures, and to allow it to make late disclosures now, after a lengthy discovery process, would prejudice Dynegy." **[*514]** Multiut and Draiman disagree with this reasoning. They contend that their failure to produce the Draiman declaration more expediently was harmless because the information it contained was otherwise made available to Dynegy.

HN2[] *Rule 26(a)(1)(A)(iii) of the Federal Rules of Civil Procedure* requires litigants to disclose to one another "a computation of each category of damages claimed by the disclosing party—who must also make available . . . the documents or other evidentiary material . . . on which each computation is based, including materials bearing on the nature and extent of injuries suffered." *Rule 26(e)(1)* requires parties to supplement their initial disclosures as more information becomes available to them. If a party does not **[**15]** follow these rules, "the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or was harmless." Fed. R. Civ. P. 37(c)(1). Whether a failure to comply with *Rule 26(a)* or *(e)* is substantially justified, harmless, or warrants sanctions is left to the broad discretion of the district court. David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003); cf. Fed. R. Civ. P. 37(c)(1)(A)-(C) (listing sanctions courts may impose). "[W]e review all discovery sanctions for abuse of discretion and will uphold a district court's decision so long as it could be considered reasonable." Collins v. Illinois, 554 F.3d 693, 696 (7th Cir. 2009).

Multiut and Draiman do not challenge the district court's conclusion that they violated *Rule 26*, nor do they contend that they were justified in doing so. They argue only that their violation should be excused because it was harmless: they assert that information relating to damages contained in the declaration was made available to Dynegy "in light of the exhaustive documentation produced by Multiut during discovery and the extensive deposition testimony of **[**16]** Draiman and [expert] James Alerding on the subject of damages." This argument cannot carry the day logically (if the information contained in the declaration is already in the record, then there should be no problem with the district court's decision to exclude the declaration) or legally.

Multiut and Draiman started off discovery on the right foot by providing Dynegy with rough estimates of the damages associated with their counterclaims in their original disclosures. At that time, they averred, "As a result of Dynegy's breach of an agreement to supply gas at a fixed price, Multiut has sustained damages in an amount that Multiut believes exceeds $6 million. Multiut will supplement with a computation of these damages when they are ascertained through the course of continuing discovery." They made a similar statement with respect to their breach of confidentiality agreement counterclaim, for which they estimated at least $1 million in damages. But even after Dynegy filed several motions to compel and repeatedly sought (and occasionally obtained) sanctions, Multiut and Draiman failed to disclose how they arrived at those numbers. Even if we fully credit the defendants' contention that **[**17]** the numerical information in Draiman's declaration was duplicative of that already disclosed in spreadsheet form, nothing in the record—not even Draiman's declaration— shines light into the black box of their damages calculation process. A reasonable district court could and did conclude that exclusion of the declaration, which contained the only ballpark estimates of Multiut's lost profits and alleged credits due, was an appropriate sanction for the defendants' continued dilatory and opaque behavior. Without an idea of where the defendants' numbers were coming **[*515]** from, Dynegy was unable to investigate and raise arguments against the claimed damages; the district court did not err in concluding the omissions were not harmless.

B. Breach of Oral & Implied Contract Counterclaims

Multiut and Draiman assert that the relationship between Dynegy and Multiut ran deeper than the pages of their written agreement. According to Multiut and Draiman, Dynegy and Multiut were also bound by three unwritten contracts: two oral and one implied in fact. Pursuant to the first alleged oral contract, Dynegy agreed to offer Multiut "most-favored-nations" pricing. That is, it agreed to charge Multiut "(i) a price **[**18]** equal to or 1/2 cent per therm higher than the index price, or (ii) the lowest price contemporaneously being charged by Dynegy to any of Multiut's competitors." Pursuant to the second alleged oral contract, Dynegy agreed to lock-in the price it charged Multiut for gas such that the fixed price Multiut was obligated to pay Dynegy was less than the fixed prices Multiut's customers were obligated to pay it. Pursuant to the alleged implied-in-fact agreement, Dynegy implicitly agreed to waive Multiut's obligation to pay interest on its arrearage, as evidenced by the omission of interest charges from several months' worth of invoices. The district court concluded that there was no evidence establishing the existence of the alleged agreements and granted summary judgment in Dynegy's favor on all three counterclaims. We review these decisions de novo, drawing every reasonable inference in Multiut and Draiman's favor. *E.g.,* *India Breweries, Inc. v. Miller Brewing Co., 612 F.3d 651, 658 (7th Cir. 2010)*. We apply the substantive law of the state of Illinois. *See id*. (citing *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938))*.

1. Oral "Most-Favored-Nations" Contract

Multiut claims that it had an "understanding," **[**19]** dating back to "the mid-1990s," that Dynegy would charge it either "(i) a price equal to or 1/2 cent per therm higher than the index price, or (ii) the lowest price contemporaneously being charged by Dynegy to any of Multiut's competitors." It alleges that Dynegy fostered this understanding by repeatedly assuring one of Multiut's employees that Multiut was "getting the best price there is," though it acknowledges that Dynegy refused its requests to include a most-favored-nations clause in either the 1988 or 1994 agreements. Multiut claims that Dynegy violated part (i) of the understanding by charging Multiut five to twelve cents more than the index price per therm, and violated part (ii) by charging Multiut's competitor Nicor Energy lower prices than it charged Multiut.

HN3[] Unilateral "understandings" are not enough to give rise to an enforceable oral contract in Illinois. "A feeling of certainty . . . that a party in position to contract would surely agree to terms present in the situation disclosed, does not evoke a contract from a plausible situation for contract. The agreement must actually be made by the parties to the alleged contract. It must be shown that those parties selected **[**20]** and concurred in the terms of the contract, or no contract exists." *Richton v. Farina, 14 Ill. App. 3d 697, 303 N.E.2d 218, 223 (Ill. App. Ct. 1973)* (quoting *Bartlett v. Lauff, 271 Ill. App. 551, 554 (Ill. App. Ct. 1933))*. "In order for there to be a contract between parties there must be a meeting of the minds or mutual assent as to the terms of the contract." *Midland Hotel Corp. v. Reuben H. Donnelley Corp., 118 Ill. 2d 306, 515 N.E.2d 61, 65, 113 Ill. Dec. 252 (Ill. 1987)*. **[*516]** No reasonable jury could find any such meeting or mutual assent here. Although Multiut has asserted that the "essential terms" of the alleged contract were "definite and certain," *id*., it has not pointed to any evidence from which a jury could infer that Dynegy assented to them. Vague statements about "best" prices do not an agreement make, particularly where the proponent of the contract cannot pinpoint even the year in which the agreement was purportedly reached. Nor does the parties' course of conduct tally with the existence of such an agreement; if Multiut were guaranteed a pertherm price of index plus 1/2 cent, there would have been no reason for it to get price quotes from Dynegy or repeatedly seek fixed pricing. Summary judgment was properly entered in Dynegy's **[**21]** favor on this counterclaim.

2. Oral Contract to Lock-in Prices

The second alleged oral contract also involves the prices Dynegy promised to offer Multiut. During a September 2001 meeting with Dynegy employees, Draiman floated the idea of locking-in Multiut's pricing for an extended period of time. He testified that the Dynegy employees said "something along th[e] lines" of they would "work on it" or "would get it done" and requested a list of Multiut's customers and profit margins. Draiman testified that although Dynegy did "not explicitly" agree to lock-in a price, he walked away from the meeting with the "impression and understanding" that Multiut would be getting fixed prices "for whatever period [its own fixed-price] contracts were." Based on that understanding, Multiut did not seek out other sources of natural gas for its fixed-price customers. On September 17, 2001, Draiman sent a letter to Dynegy in which he provided for Dynegy's "review" a list of the prices paid by Multiut's fixed-price customers and pointed out that if Multiut could lock-in a price of about 15 cents per therm below what its average customer was paying, it could increase its profits by $2 million. Dynegy's response **[**22]** to the letter did not mention fixed prices, and Draiman took no further steps to ensure that Multiut would actually receive locked-in prices. The district court concluded that this evidence was not enough to show that Dynegy agreed to provide gas at a set price and granted summary judgment.[1] We agree that summary judgment is warranted.

The evidence Multiut and Draiman presented does not demonstrate the existence of an agreement between Dynegy and Multiut. Multiut was able to more precisely identify the timeframe in which the alleged agreement was reached, and the actors who allegedly made it, but there is no evidence as to what price the agreement locked in or how long the agreement was in effect. ***HN4***[] "The essential terms of a contract must be definite and certain in order for a contract to be enforceable." *Midland Hotel Corp., 515 N.E.2d at 65*. Both price and duration are unquestionably "essential terms," at least in this sort of contract. Even if a jury ignored Dynegy's **[**23]** oral use of prospective preliminary language, *cf. Ocean Atl. Dev. Corp. v. Aurora Christian Schs., Inc., 322 F.3d 983, 995-96 (7th Cir. 2003)* (applying Illinois law) (***HN5***[] "[A] letter of intent or a similar preliminary writing that reflects an agreement contingent upon the successful completion of negotiations that are ongoing, does not amount to a contract that binds the parties."), and concluded that an agreement had been reached during **[*517]** or after the September meeting, it would be unable to glean from the evidence presented the parameters or duration of that agreement. ***HN6***[] "[I]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Acad. Chi. Publishers v. Cheever, 144 Ill. 2d 24, 578 N.E.2d 981, 984, 161 Ill. Dec. 335 (Ill. 1991)*.

[1] The district court also found summary judgment warranted on the "separate and independent" ground that Multiut failed to offer evidence of its damages stemming from the alleged breach. We need not address that ground here.

3. Implied Contract to Waive Interest

The third unwritten contract purportedly governing Dynegy and Multiut's relationship grew out of Dynegy's failure to invoice Multiut for interest during most of 1999 and 2000. Multiut and Draiman contend that through this conduct, Dynegy impliedly agreed to forgo the collection of interest, notwithstanding its subsequent submission to Multiut of corrected interest invoices **[**24]** and supporting schedules. The district court granted summary judgment for Dynegy after finding that Multiut and Draiman failed to demonstrate that any such agreement existed. We agree that summary judgment was proper.

HN7[] "Contracts implied in fact arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract." *Mowatt v. City of Chicago, 292 Ill. 578, 127 N.E. 176, 177 (Ill. 1920)*; *see also* *Schivarelli v. Chi. Transit Auth., 355 Ill. App. 3d 93, 823 N.E.2d 158, 165-66, 291 Ill. Dec. 148 (Ill. App. Ct. 2005)* ("In a contract implied in fact, a contractual duty is imposed by reason of a promissory expression inferred from facts, circumstances and expressions by the promisor showing an intent to be bound. Such contract may be proved by circumstances showing that the parties intended to contract and by the general course of dealing between them." (citation omitted)). No such intention can be reasonably inferred from the evidence presented here. Despite its failure to invoice interest for many months, Dynegy sought to rectify its mistake by sending Multiut a letter and updated invoices as soon as it discovered the omission. (The parties' written agreement contained **[**25]** a provision allowing the parties up to 24 months to correct any billing errors.) It also invoiced Multiut for interest consistently both before and after the 1999-2000 period. These are not the actions of a party seeking to be bound. Moreover, and perhaps more damaging to this claim, Multiut met with Dynegy in March 2001 and agreed that it owed the amount Dynegy claimed it did; the agreed-upon amount included the interest Multiut now claims is waived. Perhaps Multiut hoped that Dynegy would overlook some of the interest it was accruing, but Dynegy's actions do not objectively indicate that it had any such intention.

C. Breach of Contract & Guaranty Claims

The district court granted summary judgment in Dynegy's favor on both its breach-of-contract and breachof-guaranty claims. ***HN8***[] Summary judgment is appropriate if the admissible evidence considered as a whole shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," *Fed. R. Civ. P. 56(a)*, even after all reasonable inferences are drawn in the nonmovant's favor. We review de novo the district court's determination that this standard has been met. *E.g.,* *Davis v. Time Warner Cable of Se. Wis., L.P., 651 F.3d 664, No. 10-1423, 2011 U.S. App. LEXIS 13636, 2011 WL 2611303, at *5 (7th Cir. July 5, 2011)*.

1. [26] Breach of Contract**

Multiut and Draiman take an unusual tack in challenging summary judgment on the breach-of-contract claim. Rather than **[*518]** dispute the validity of the agreement, Dynegy's interpretation of its provisions, or Dynegy's allegations that Multiut was in breach, they contend that Dynegy is not entitled to recover damages because it offered insufficient proof of those damages, participated in improper manipulation of natural gas price indices, and breached other alleged oral and implied contracts. Though novel, none of these arguments gets Multiut and Draiman past the absence of evidence demonstrating a genuine issue for trial.

Multiut and Draiman first contend that Dynegy inadequately proved its damages because it based its calculations not on (largely nonexistent) Exhibit Bs but instead had an expert review invoices and tabulate a total due. ***HN9***[] Under Illinois law, plaintiffs alleging breaches of contract "bear[ ] the burden of proving that [they] sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement." *Ollivier v. Alden, 262 Ill. App. 3d 190, 634 N.E.2d 418, 422, 199 Ill. Dec. 579 (Ill. App. Ct. 1994)*. Plaintiffs **[**27]** are not required to prove damages to the exact cent; they must merely establish a "reasonable basis for computing damages," *Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 854*

N.E.2d 607, 626, 305 Ill. Dec. 15 (Ill. 2006) (quotation omitted), and may do so "in any reasonable manner," id. at 627. Here, the record unequivocally indicates that Dynegy did just that. It provided a qualified expert with invoices from Multiut's as well as its own records, and the expert checked them against the handwritten records of Multiut's bookkeeper, which she testified were accurate. The expert then compared the invoices with Multiut's payment records and calculated interest charges pursuant to a provision in the agreement to arrive at a damage figure of roughly $15.3 million as of October 2004. Multiut and Draiman object to the expert's calculation because it rested on documents other than the Exhibit Bs, though they simultaneously concede that "[t]he parties were free to depart from the procedures contemplated by the written contract and . . . then rely on their contemporaneous notes to confirm each other's record of quantities or price." Reply Br. 10. The parties through their course of conduct mutually eschewed the formality of Exhibit **[**28]** Bs; Multiut cannot now hold that decision against Dynegy in a one-sided fashion. Nor is there any basis for the argument that Dynegy's damages computation is flawed because it rests in large part on Multiut's concededly accurate data rather than Dynegy's own records.

Multiut and Draiman next contend that even if Dynegy adequately computed its damages, it should be barred from recovering them because of its alleged manipulation of gas price indices. Even if the invoices accurately reflected the prices charged, the argument goes, they improperly reflected inflated prices and therefore create a genuine issue of material fact as to the amount that would have been due had the price indices been left to the mercy of the invisible hand. Moreover, Multiut and Draiman continue, Dynegy "bears the burden of proving that the amounts of the invoices it seeks to collect are accurate based on free and open market indices." Appellants' Br. 27. The district court rejected these arguments, finding that "the causal chain that Multiut seeks to prove is too attenuated and diffuse," and noting, "it is not clear how damages would apply in that Multiut's theory is that fraud was perpetrated on the whole marketplace **[**29]** so that the price charged by all suppliers presumably would have been equally affected by the alleged manipulation."

[*519] We agree with the sound reasoning of the district court. Multiut and Dynegy's argument has some intuitive appeal, and echoes the equitable doctrine of unclean hands, but there is no evidence in the record from which a reasonable jury could conclude that Dynegy's alleged price manipulation out west so significantly affected the prices it was quoting Multiut in Chicago that it should not be paid for the gas it distributed. Multiut has offered little more than indignant speculation that the prices it was charged were impermissibly inflated. They may well have been. But Multiut has not presented any evidence showing how much they were inflated, what portion of that inflation might reasonably be attributable to Dynegy's alleged misdeeds, or what price it would have been charged had the market been functioning normally. The FERC report, Multiut's only real evidence of the alleged manipulation, focuses predominantly on the western United States, implicates more than a dozen firms, and mentions Chicago and the "Great Lakes" region only twice in roughly 400 pages and never in **[**30]** connection with Dynegy. Multiut makes a logical point, but ***HN10***[] more than speculation, no matter how righteous, is required to create a genuine issue of material fact. *See* Delapaz v. Richardson, 634 F.3d 895, 901 (7th Cir. 2011); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (noting that nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

Multiut and Draiman's final argument against the entry of summary judgment is similar to their previous one. They contend that the invoices are inaccurate and therefore unenforceable because they do not take into account the provisions of three alleged unwritten contracts: an oral "most-favored-nations" contract, an oral fixed-price contract, and an implied-in-fact contract to waive interest. We have already seen, however, that the record does not support the inference that such binding contracts existed. *See supra* Part II.B. If they did not exist, they could not possibly have hampered Dynegy's ability to abide by the concededly valid written agreement.

2. Breach of Guaranty

Dynegy also alleged that Multiut and Draiman breached a 1995 guaranty by failing **[**31]** to satisfy the debts Multiut incurred in connection with the agreement. Draiman signed the guaranty in both his official and individual capacities, and he and Multiut concede that it is a valid document. They argue that it should not be enforced against them, however, because Dynegy failed to comply strictly with the agreement's Exhibit B requirements. This argument gets them no further here than it did in connection with Dynegy's breach of contract claim.

HN11[] A guaranty is a "third party's promise to answer for payment on or fulfill an obligation if the person primarily liable fails to perform." *Panno v. Nicolau, 174 Ill. App. 3d 890, 529 N.E.2d 95, 98, 124 Ill. Dec. 378 (Ill. App. Ct. 1988)*. Multiut and Draiman do not contest that the guaranty here subjects them to liability if Multiut fails to perform its obligations under the agreement; they challenge neither its validity nor scope. We have already determined that Dynegy is entitled to summary judgment on its breach of contract claim; there is no genuine issue as to whether Multiut failed to fulfill its obligations. We recognized Multiut's concern with the lack of Exhibit Bs, but concluded that their absence was no impediment to finding Multiut liable under the contract. **[**32]** *See supra* Part II.C.1. Since Multiut and Draiman do not raise an independent **[*520]** argument or present any independent evidence as to why they should not be held to the terms of the guaranty, we need not continue our analysis beyond this point. They have failed to demonstrate that a material issue of genuine fact exists for trial, so summary judgment is appropriate on this claim.

D. Breach of Confidentiality Agreement Counterclaim

In 1997, Dynegy expressed an interest in acquiring Multiut. Multiut was keen on the deal but insisted that Dynegy sign a confidentiality agreement before it would divulge any sensitive information. The confidentiality agreement prohibited Dynegy from disclosing any confidential or proprietary information provided by Multiut without first obtaining Multiut's written consent. The confidentiality agreement further restricted Dynegy's use of the information to "evaluating a Proposed Transaction between Multiut and [Dynegy]." Dynegy signed the agreement and gained access to Multiut's confidential information, including "contracts, pricing, volumes, and terms" in addition to "customer information." Dynegy copied much of the information and pursued the acquisition for a **[**33]** time, but ultimately decided not to pull the trigger. It opted instead to enter into a joint venture with one of Multiut's competitors, Nicor Inc., a possibility it had been considering while courting Multiut. A handful of high-level executives at Dynegy had at least some involvement with both the Multiut due diligence and the Nicor joint venture. Citing the overlap in staffing, and cases from this court, *PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995)*, and the Pennsylvania Superior Court, *Den-Tal-Ez, Inc. v. Siemens Capital Corp., 389 Pa. Super. 219, 566 A.2d 1214 (Pa. Super. Ct. 1989)*, Multiut contends in one of its many counterclaims that its "confidential information was inevitably disclosed to Dynegy's Nicor Energy subsidiary." This alleged breach of the confidentiality agreement further resulted in Nicor Energy gaining a significant though unquantified competitive advantage over Multiut and wooing its customers away.

The district court did not evaluate Multiut's "inevitable disclosure" arguments, concluding that Multiut could not survive summary judgment even if the doctrine applied because Multiut failed to present any evidence of its damages. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* **[**34]** (noting that ***HN12***[] summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Multiut contends this decision was erroneous because the district court placed too high a burden on it; in its view, "[a]ll Multiut need establish is factual support for the proposition that it suffered an injury in fact." ***HN13***[] We review the district court's grant of summary judgment de novo, drawing all reasonable inferences in Multiut's favor. *E.g.,* *Davis, 2011 U.S. App. LEXIS 13636, 2011 WL 2611303, at *5*.

There is no need to delve into the murky waters of the "inevitable disclosure" doctrine here. Like most of Multiut's other counterclaims, this claim against Dynegy is a standard breach of contract claim. Under Illinois law, plaintiffs alleging breaches of contract "bear[ ] the burden of proving that [they] sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement." *Ollivier, 634 N.E.2d at 422*; *see also* *Perfection Corp. v. Lochinvar Corp., 349 Ill. App. 3d 738, 812 N.E.2d 465, 470-71,* ***[*521]*** *285 Ill. Dec. 645 (Ill. App. Ct. 2004)* **[**35]** (***HN14***[] "The party who seeks damages has the burden not only to establish that he sustained damages, but also to establish a reasonable basis for computation of those damages."). Assuming there was a breach—Multiut has not presented any evidence beyond its assertion that Dynegy "inevitably disclosed" information it obtained pursuant to the confidentiality agreement—Multiut has not carried this burden.

It is a bedrock principle that ***HN15***[] "[d]amages may not be awarded on the basis of speculation and conjecture." *Perfection Corp., 812 N.E.2d at 471*. Yet the only evidence Multiut has that it was damaged, let alone how much or by whom, is unspecified "indications from the market or from its customers that Nicor Energy always seemed to know what Multiut could offer and then undercut that price." No admissible evidence puts even a ballpark figure on the damages Multiut endured. And even if we assume Multiut lost profits as a result of a breach of the confidentiality agreement, Draiman testified that he did not know how many customers left Multiut to do business with Nicor Energy. He further acknowledged that numerous other factors, including his brother, Yehuda; customer relations issues; and changes **[**36]** in customer ownership contributed to Multiut's weakened presence in the Chicago natural gas market. Without something linking Multiut's downfall to Dynegy's divulgence or inappropriate use of information in violation of the confidentiality agreement, there is no issue warranting trial on this claim.

E. Robinson-Patman Price

Discrimination Counterclaim

Multiut and Draiman's final counterclaim alleges that Dynegy violated section 2(a) of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, by charging Multiut more for gas than it charged Nicor Energy. They point to price differentials of up to ten cents per therm and contend that Multiut was injured by them. Proceeding under *section 4* of the Clayton Act, *15 U.S.C. § 15*, they seek treble damages and attorneys' fees. The district court found that Multiut and Draiman failed to offer any evidence that Multiut suffered injury and therefore granted summary judgment in Dynegy's favor even though it was not persuaded by Dynegy's other arguments. We review this determination de novo, drawing all reasonable inferences in Multiut and Draiman's favor. *E.g., Davis, 2011 U.S. App. LEXIS 13636, 2011 WL 2611303, at *5*.

HN16[] "Section 2(a) of the Robinson-Patman Act makes it illegal to discriminate **[**37]** in price when an injury to competition is the consequence." *Reserve Supply Corp. v. Owens- Corning Fiberglas Corp., 971 F.2d 37, 41 (7th Cir. 1992)* (citation omitted). It is a "prophylactic statute which is violated merely upon a showing that 'the effect of such discrimination may be substantially to lessen competition.'" *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* (quoting *15 U.S.C. § 13(a)*). To establish the "secondary-line"[2] violation of **[*522]** which they complain, Multiut and Draiman must show (1) that Dynegy's sales of natural gas to Multiut and Nicor Energy were made in interstate commerce; (2) that the gas was of like grade and quality; (3) that Dynegy discriminated in price between Multiut and Nicor Energy; and (4) that the discrimination may have injured competition, to Nicor Energy's advantage. *See Volvo Trucks, 546 U.S. at 176-77* (citing *15 U.S.C. § 13(a)*); *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)* (same); *see also* ABA Section of ***Antitrust Law***, 1 ***Antitrust Law*** *Developments* 490 (6th ed. 2007) (***HN17***[] "Proof of a violation under Section 2(a) requires (1) a difference in price, (2) in sales to two buyers purchasing from a single seller, (3) involving commodities, **[**38]** (4) of like grade and quality, (5) that may injure competition."). The "competitive injury" prong of this showing may be inferred from evidence that a favored competitor received significantly better prices over an extended period of time; the hallmark of such injury "is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." *Volvo Trucks, 546 U.S. at 177*.

[2] ***HN18***[] There are three categories of 2 competitive injury that may give rise to Robinson-Patman Act claims: "primary line," "secondary line," and "tertiary line." Primary-line cases involve price discrimination that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases like this one involve price discrimination that injures competition among customers of the discriminating seller. Tertiary-line cases involve injury to competition among the customers of the differently treated purchasers. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)*.

But ***HN19***[] mere demonstration of a "competitive injury" and the other elements of a violation "does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4 [of the **[**39]** Clayton Act]." *J. Truett Payne Co., 451 U.S. at 562*. Plaintiffs (here, counter-plaintiffs) seeking to recover treble damages pursuant to *15 U.S.C. § 15* "must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result." *Id*.; *cf. Texaco, 496 U.S. at 572* (noting distinction between liability and damages issues in the Robinson-Patman context). The burden of showing damages is not "unduly rigorous," *Texaco, 496 U.S. at 573* (quoting *J. Truett Payne Co., 451 U.S. at 562*), but plaintiffs must present some evidence of injury attributable to the price discrimination, *see Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 437, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983)*; *J. Truett Payne Co., 451 U.S. at 568* ("[I]f there has been a violation of the Robinson-Patman Act, petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation is established, that burden is to some extent lightened."). As on their breach of confidentiality agreement counterclaim, Multiut and Draiman have failed to satisfy this obligation.

Multiut and Draiman devote much of their briefing on this issue to an argument that they established a prima facie violation **[**40]** of the Robinson-Patman Act. The district court rejected Dynegy's arguments for summary judgment on those grounds, however, so we are unsure why Multiut and Draiman have pursued this line of argument at the expense of attempting to establish an actual injury resulting from Dynegy's alleged price discrimination, an argument to which they dedicate a mere five sentences between their opening and reply briefs. In those five sentences, Multiut and Draiman contend that they have "identified evidence of lost sales and profits resulting from Dynegy's price discrimination." They do not, however, give any indication of what that evidence was, or how it tied to Dynegy's actions. We assume they are referring to the $5 million lost profits figure reported only in the properly excluded Draiman declaration, and their expert's computation that the long-term difference in prices charged amounted to roughly $1.86 million, **[*523]** even though the expert expressly testified that he did no work relating to the Robinson32 Patman counterclaim and, moreover, such computation is insufficient evidence of damages. *See Texaco, 496 U.S. at 551*. Even if Multiut and Draiman are able to ultimately prove that Dynegy violated **[**41]** the Robinson-Patman Act, they have not presented admissible evidence from which a jury could find that Multiut was injured as a result. The district court properly entered summary judgment on this counterclaim. *See Celotex, 477 U.S. at 322*.

F. Denial of Second Motion to Reconsider

After we dismissed Multiut and Draiman's first appeal for lack of jurisdiction, the case returned to the district court and both sides submitted briefing on the proper computation of prejudgment interest. While the district court was considering that issue, Multiut and Draiman filed a motion asking the district court to reconsider its summary judgment rulings. They recognized that the district court had denied their previous motion to reconsider, but asserted that new evidence they obtained in connection with their multi-district litigation action against Dynegy rendered the grants of summary judgment inappropriate. The new evidence included an affidavit and a memorandum from former Dynegy employee Jeffrey Hornback, which demonstrated that Dynegy was aware of the alleged price index manipulation while it was contracting with Multiut, and an affidavit from Dr. Michael Harris, an economist who reviewed the FERC **[**42]** report and concluded that manipulation of the gas price indices out west would have impacted prices in Chicago. The district court ordered briefing on the motion to reconsider but denied it (and its accompanying evidentiary submissions) without reaching the merits. In doing so, the district court first cited concerns of finality and noted that it had already visited the issue of price index manipulation at least twice. The district court gave as an alternative ground the limited scope of the mandate we issued, which instructed the district court only to determine prejudgment interest. The district court reasoned, "[i]t would be contrary to the spirit of [the mandate] to construe it as an open invitation to allow the parties to delve back into the substantive issues of the case, issues that were the subject of the appeal in the first place." Multiut and Draiman now contend that the district court erred in disregarding their new evidence and denying their motion. But they do not challenge either of the district court's asserted bases for denying their motion. Instead, they assert that the district court "should have reconsidered its summary judgment ruling in light of the Hornback and **[**43]** Harris affidavits." They then walk us through the evidence and reiterate that the evidence was not in their possession when summary judgment briefs were filed. These "arguments" do not get them very far, as they have failed to articulate a ground on which we could find that the district court abused its discretion. The district court did not deny their motion because the evidence was not "newly discovered," or because it failed to find a nexus between the evidence and the summary judgment motion; it denied it for other grounds that Multiut and Draiman wholly disregard. ***HN20***[] "We cannot make a party's arguments for him, or force him to make arguments he seems determined not to raise." *United States v. Foster, 577 F.3d 813, 816 (7th Cir. 2009)*. Multiut and Draiman have waived any relevant argument. We affirm the district court's denial of their motion to reconsider.

III. Conclusion

The district court appropriately granted summary judgment in Dynegy's favor on **[*524]** its two claims. It was also correct to grant summary judgment in Dynegy's favor on Multiut's barrage of counterclaims. The district court also stayed well within the bounds of its discretion when it excluded the Draiman declaration, and **[**44]** Multiut and Draiman failed to argue that the court stepped over the line in resolving their second motion to reconsider for the reasons it did. We AFFIRM the district court's judgment in full.

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ZF Meritor LLC v. Eaton Corp.

United States District Court for the District of Delaware

August 4, 2011, Decided

Civ. No. 06-623-SLR

Reporter

800 F. Supp. 2d 633 *; 2011 U.S. Dist. LEXIS 85709 **; 2011-2 Trade Cas. (CCH) P77,560

ZF MERITOR LLC and MERITOR TRANSMISSION CORPORATION, Plaintiffs, v. EATON CORPORATION, Defendant.

Subsequent History: Vacated by *Zf Meritor v. Eaton Corp., 2012 U.S. App. LEXIS 20342 (3d Cir. Del., Sept. 28, 2012)*

Prior History: *ZF Meritor LLC v. Eaton Corp., 646 F. Supp. 2d 663, 2009 U.S. Dist. LEXIS 121826 (D. Del., 2009)*

Core Terms

injunction, antitrust, damages, plaintiffs', reconsideration motion, discounts, expert report, Clayton Act, penetration, reliability, linking, targets, merits

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Evidence > Burdens of Proof > Allocation

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN1[] **Relief From Judgments, Altering & Amending Judgments**

The purpose of a motion for reargument or reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Accordingly, a court should alter or amend its judgment only if the movant demonstrates at least one of the following: (1) a change in the controlling law; (2) availability of new evidence not available when the court issued its order; or (3) a need to correct a clear error of law or fact or to prevent manifest injustice.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN2[] **Relief From Judgments, Altering & Amending Judgments**

A motion for reargument is not properly premised on a request that a court rethink a decision already made. Motions for reargument may not be used to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided. Reargument, however, may be appropriate where the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension.

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN3[] **Admissibility, Expert Witnesses**

Experts are allowed to rely on admissible evidence, but its admissibility does not change its sufficiency or reliability under *Fed. R. Evid. 702* and *703*. A court still has a duty to conduct an independent evaluation in to the reasonableness of the expert's reliance on the evidence.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN4[] **Remedies, Injunctions**

Monetary damages are not the only form of relief that a court can grant in an antitrust action. Under both the Sherman Antitrust Act, *15 U.S.C.S. §§ 1* and *2*, as well as the Clayton Act, *15 U.S.C.S. § 14*, a court has broad discretion to issue an injunction preventing the defendant from engaging in such anticompetitive conduct.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Evidence > Burdens of Proof > Allocation

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN5[] **Grounds for Injunctions, Likelihood of Success**

In determining whether to grant a request for a permanent injunction, the court must consider whether: (1) the moving party has shown actual success on the merits; (2) the moving party will be irreparably injured by the denial of injunctive relief; (3) the granting of the permanent injunction will result in even greater harm to the defendant; and (4) the injunction would be in the public interest.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN6[] **Remedies, Injunctions**

The irreparable harm factor with regard to a permanent injunction can be more difficult to show in the antitrust context as the antitrust laws are enacted for the protection of competition not competitors. Antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent, flows from that which makes a defendant's acts unlawful. Some courts have considered that to be irreparable harm.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN7[] **Remedies, Injunctions**

Antitrust law is one of the few instances in civil actions where the public interest factor may have as much, if not more, weight as any other factor in the balancing test for injunctive relief. The reason for that is simple. A claim under the antitrust laws is not merely a private matter. The Sherman Act, *15 U.S.C.S. § 1 et seq.*, is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.

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Judges: Sue L. Robinson, United States District Judge.

Opinion by: Sue L. Robinson

Opinion

[*635] MEMORANDUM OPINION

Dated: August 4, 2011

Wilmington, Delaware

/s/ Sue L. Robinson

ROBINSON, District Judge

I. INTRODUCTION

Plaintiffs ZF Meritor LLC ("ZFM") and Meritor Transmission Corporation ("Meritor") (collectively, "plaintiffs") filed this action against defendant Eaton Corporation ("defendant") on October 5, 2006, alleging violations **[**2]** of *§§ 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1-2*, and § 3 of the Clayton Act, *15 U.S.C. § 14*. (D.I. 1) At all times relevant prior to trial, plaintiffs and defendant were rival manufacturers of Class 8 commercial truck transmissions.

Following a trial, defendant was found to have violated *§§ 1* and *2* of the Sherman Antitrust Act and § 3 of the Clayton Act. (D.I. 226) The issue of damages was not tried. *(Id.)* Currently before the court is plaintiffs' motion for reconsideration (D.I. 158) of the court's order (D.I. 145) excluding the damages opinion testimony of plaintiffs' expert, Dr. David W. DeRamus ("DeRamus"). For the reasons stated below, plaintiffs' motion is denied.

II. BACKGROUND

The court incorporates by reference its *Daubert* opinion of August 20, 2009. (D.I. 144, 145) In that opinion and its accompanying order, the court granted defendant's motion to exclude DeRamus' expert report on damages because it was based on faulty underlying data: a single page from the "Revised Strategic Business Plan." (D.I. 144 at 7) However, the court found that the nature of defendant's conduct (in terms of antitrust injury) was adequately addressed by DeRamus and, therefore, the case **[**3]** was bifurcated, and trial on liability was conducted during the subsequent weeks. On October 8, 2009, the jury found that defendant had violated *§§ 1* and *2* of the Sherman Antitrust Act, and § 3 of the Clayton Act. (D.I. 217) After trial, defendant renewed its motion for judgment as a matter of law (D.I. 245), which was denied by the court on March 10, 2011. (D.I. 259, **[*636]** 260) Plaintiff's motion for reconsideration of the court's *Daubert* order was then administratively closed as moot.

As it turns out, the court was in error to not decide the merits of plaintiffs' motion for reconsideration, as the issue of damages must be resolved before a final judgment is entered, *see DL Resources, Inc. v. FirstEnergy Solutions, Corp., 506 F.3d 209, 213 (3d Cir. 2007)* (citing *Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 744, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976))*, and trial on the issue of damages cannot go forward in the absence of expert testimony. Therefore, the court has "resurrected" the motion in order to substantively rule on plaintiffs' contentions that the court should reconsider its ruling to exclude Deramus' expert testimony under *Daubert.*

III. LEGAL STANDARD

HN1[ ] The purpose of a motion for reargument or reconsideration is **[**4]** to correct manifest errors of law or fact or to present newly discovered evidence. *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)*. Accordingly, a court should alter or amend its judgment only if the movant demonstrates at least one of the following: (1) a change in the controlling law; (2) availability of new evidence not available when the court issued its order; or (3) a need to correct a clear error of law or fact or to prevent manifest injustice. *See Id.; see also, Schering Corp. v. Amgen, Inc., 25 F. Supp. 2d 293, 295 (D. Del. 1998)*.

HN2[ ] A motion for reargument is not properly premised on a request that a court rethink a decision already made. *Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)*. Motions for reargument may not be used "to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." *Brambles USA, Inc., v. Blocker, 735 F. Supp. 1239, 1240 (D. Del. 1990)*. Reargument, however, may be appropriate where "the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an **[**5]** error not of reasoning but of apprehension." *Id. at 1241*.

IV. DISCUSSION

A. Motion for Reconsideration

Plaintiff's motion for reconsideration is divided into two parts: the first was filed before trial (D.I. 158), and the second is a modification of the first in light of developments at trial. (D.I. 227) Plaintiffs make several arguments in support of admitting DeRamus' expert report. First, they argue that the report is admissible in its current form because the Strategic Business Plan on which it is based is reliable in view of the testimony of witnesses at trial.

(Id. at 5-7) Next, plaintiffs argue that the report is admissible in its current form because the Strategic Business Plan itself was admitted at trial, and experts are allowed to rely on evidence that is admitted at trial in forming their opinions. *(Id.* at 7-11) Finally, plaintiffs argue that DeRamus should be allowed to modify his report to reflect reliance on different data (such as ZFM profits) because the court found only that the data he relied on was flawed, not his underlying methodology. (*Id.* at 11-14)

1. Reliability of the Strategic Business Plan in view of witness testimony

Plaintiffs argue that witness testimony established **[**6]** the reliability of the Strategic Business Plan and, therefore, DeRamus should be allowed to rely on it in his expert report. (D.I. 227 at 5-7) However, there is nothing new in the witnesses' **[*637]** testimony that provides the court with a reason to reverse its previous finding. The witnesses' testimony only states that the Strategic Business Plan was prepared at the behest of Martello, and was revised several times. *(Id.)* It says nothing about the plan's accuracy, or the reasonableness of its estimates. Furthermore, the court was already well aware of the circumstances surrounding the creation of the plan as DeRamus had testified to its source during an evidentiary hearing, and wrote about it in his declaration. (D.I. 158 at 3)

2. DeRamus' ability to rely on the Strategic Business Plan after it was admitted into evidence during trial.

Plaintiffs misinterpret the effect of the admission of the Strategic Business Plan on DeRamus' ability to rely on it in his expert report. While plaintiffs are generally correct that ***HN3***[] experts are allowed to rely on admissible evidence, its admissibility does not change its sufficiency or reliability under *Rules 702* and *703 of the Federal Rules of Evidence.* A court **[**7]** still has a duty to "conduct an independent evaluation in to the reasonableness" of the expert's reliance on the evidence. *In re Paoli RR Yard PCB Litig., 35 F.3d 717, 748 (3d Cir. 1994)*. The fact that the Strategic Business Plan was part of plaintiffs' "story" does not mean, ipso facto, that it is the type of reliable evidence upon which an expert can base millions of dollars' worth of damages. Here, the court found that the Strategic Business Plan was insufficient and unreliable and, therefore, could not form the basis of DeRamus' opinion. Admissibility did not change this calculus.

3. Modification of DeRamus' report to rely on different underlying data

Plaintiffs' request to modify DeRamus' report to rely on different underlying data would be tantamount to reopening expert discovery. DeRamus would need to be deposed once again, and defendant would need to prepare another rebuttal expert report. The court would then be subject to another *Daubert* motion, and DeRamus' report could be found faulty once again. Furthermore, when the court gave plaintiffs leave to move for clarification as to what DeRamus could testify, leave was granted to show that DeRamus' report **already** contained an **[**8]** alternate damages calculation. (D.I. 161 at 3) Plaintiffs had a chance to espouse alternate damages calculations when they first prepared DeRamus' report and, instead, they chose to rely on data that generated wildly inflated numbers. At this stage of litigation, the court will not give plaintiffs another opportunity to modify their damages estimation.

B. Permanent Injunction

While the plaintiffs are unable to prove monetary damages due to a lack of expert testimony, ***HN4***[] monetary damages are not the only form of relief that a court can grant in an antitrust action. In the case at bar, the jury found that defendant had engaged in conduct that violated *§§ 1* and *2* of the Sherman Antitrust Act, as well as § 3 of the Clayton Act, that is, the use of Long Term Agreements ("LTAs") that contained discounts linked to market penetration targets. (D.I. 216, 259) Under both of these acts, the court has broad discretion to issue an injunction preventing defendant from engaging in such anticompetitive conduct.

1. Standard of review

HN5[] In determining whether to grant a request for a permanent injunction, the court must consider whether:

> (1) the moving party has shown actual success on the merits;
>
> **[*638]** (2) the moving **[**9]** party will be irreparably injured by the denial of injunctive relief;
>
> (3) the granting of the permanent injunction will result in even greater harm to the defendant; and
>
> (4) the injunction would be in the public interest.

Gucci Am., Inc. v. Daffy's, Inc., 354 F.3d 228, 236-37 (3d Cir. 2003); *Shields v. Zuccarini, 254 F.3d 476, 482 (3d Cir. 2001)*.

2. Discussion

a. Actual success on the merits

In the case at bar, actual success on the merits has already been shown. As discussed *supra*, defendant has been found liable for violating *§§ 1* and *2* of the Sherman Antitrust Act, as well as § 3 of the Clayton Act. Therefore, this factor favors a injunction.

b. Irreparable harm

HN6[] The irreparable harm factor can be more difficult to show in the antitrust context as the antitrust laws "were enacted 'for the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (citations omitted). Here, competition was effectively excluded from the marketplace, which constitutes "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant['s] acts unlawful." *Id. at 489*. *See also* *Xerox Corp v. Media Sciences Intern., Inc., 511 F. Supp. 2d 372, 383 (S.D.N.Y. 2007)* **[**10]** (plaintiff adequately alleged an antitrust injury for defendant's alleged use of loyalty rebates to exclude plaintiff from the market.). Some courts have considered this to be irreparable harm. *See* *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co. Inc., 600 F. Supp. 1326, 1331 (D.C. Mich. 1985)*. Therefore, this factor slightly favors an injunction.

c. Injunction will not cause greater harm to defendant

Defendant's harm is, at most, minimal. The court's injunction only prohibits defendant from linking discounts to market penetration targets. It does not prohibit defendant from giving other forms of discounts such as volume discounts. Defendant will still be able to operate its business as usual with the caveat that it cannot exclude others from the market. Therefore, this factor favors an injunction.

d. Public interest

HN7[] ***Antitrust law*** is one of the few instances in civil actions where the public interest factor may have as much, if not more, weight as any other factor in the balancing test. The reason for this is simple. "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the **[**11]** plaintiff asserting his rights under the Act has been likened to a private attorney-general who **protects the public's interest**. . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 655, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* (emphasis added) (citations omitted).

In the case at bar, the public has a substantial interest in strong competition in the truck transmission market. As originally written, the LTAs constituted de-facto exclusive dealing contracts which had the effect of excluding others from the market, thus creating a situation where prices could be raised in the future and innovation could be stifled. Therefore, this factor heavily favors an injunction.

3. Conclusion

Given the strong public interest in promoting competition, the minimal harm to defendant, and plaintiffs' showing of success **[*639]** on the merits, defendant is enjoined from linking discounts or other benefits to market penetration targets.

V. CONCLUSION

For the reasons stated herein, plaintiffs' motion for reconsideration (D.I. 158) of the court's order excluding the damages opinion testimony of DeRamus is denied. Furthermore, defendant is enjoined from linking discounts to market penetration targets. [1] An appropriate order shall **[**12]** issue.

ORDER

At Wilmington this 4th day of August, 2011, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that:

1. Plaintiffs' motion for reconsideration (D.I. 158) is denied.

2. Plaintiffs are awarded $0 in damages.

3. On or before August 18, 2011, defendant shall show cause why the court should not enter an injunction pursuant to *15 U.S.C. § 26* and *28 U.S.C. § 1291*, wherein Eaton Corporation and its successors, assigns, officers, agents, servants, employees, attorneys, and persons in active concert or participation with them, including any affiliated entities, will be ENJOINED and RESTRAINED from linking discounts and other benefits to market penetration targets. FAILURE TO TIMELY RESPOND TO THIS ORDER SHALL RESULT IN ENTRY OF SUCH AN INJUNCTION.

/s/ Sue L. Robinson

United States District Judge

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[1] While plaintiffs are no longer in business and are unable to directly benefit from an injunction, here, an injunction is appropriate because of the public's interest in robust competition and the possibility that plaintiffs may one day reenter the market.

Lorillard Tobacco Co. v. R.J. Reynolds Tobacco Co.

North Carolina Superior Court, Guilford County

August 8, 2011, Decided

10 CVS 11471

Reporter
2011 NCBC 30 *; 2011 NCBC LEXIS 31 **; 2011 WL 3477155

LORILLARD TOBACCO COMPANY and LORILLARD LICENSING COMPANY, LLC, Plaintiffs, v. R.J. REYNOLDS TOBACCO COMPANY, Defendant.

Core Terms

PLEASURE, Counterclaim, objectively reasonable, unfair trade practice, tobacco product, baseless, damages, prayer, unfair, attorney's fees, brand, composite, deceptive, utterly, sham, breach of contract, subjective intent, use of a term, asserts, lawsuit

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN1[] **Trade Practices & Unfair Competition, State Regulation**

A plaintiff who files an "objectively reasonable" lawsuit cannot be held liable for an unfair trade practice under *N.C. Gen. Stat. § 75-1.1* regardless of the plaintiff's subjective intent and even if the suit was instituted for "no legitimate purpose."

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

The appropriate inquiry upon a motion to dismiss pursuant to *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)* is whether, as a matter of law, the allegations of a complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. The complaint is to be liberally construed, and a court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. The court need not determine that the plaintiff will ultimately prevail in order to deny the motion to dismiss; it need only determine whether the plaintiff has adequately pled a claim that allows the plaintiff to introduce evidence in support of the claim. However, dismissal is warranted when the complaint consists of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim. When considering a motion under *Rule 12(b)(6)*, the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN3[] **State Regulation, Claims**

The essential elements of a claim under *N.C. Gen. Stat. § 75-1.1* are: 1) an unfair or deceptive act or practice; 2) affecting commerce; and 3) which proximately causes actual injury. A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. The fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others. For a practice to be deceptive, it must possess the tendency or capacity to mislead. Whether a particular commercial act or practice constitutes an unfair or deceptive trade practice is a question of law.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

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

HN4[] **State Regulation, Claims**

It is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. Gen. Stat. ch. 75. To become an unfair trade practice, a breach of contract must be characterized by some type of egregious or aggravating circumstance.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

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

HN5[] **State Regulation, Claims**

A litigant can be sheltered from liability under *N.C. Gen. Stat. § 75-1.1* for committing an unfair trade practice by application of the federal Noerr-Pennington doctrine.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

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

HN6[] **State Regulation, Claims**

A reasonably objective lawsuit can never be an unfair trade practice. A lawsuit is objectively reasonable if an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome. The "sham litigation" exception to the Noerr-Pennington doctrine applies to claims under *N.C. Gen. Stat. § 75-1.1*, regarding unfair trade practices, when 1) the claim asserted is "objectively meritless" and 2) a court finds the litigant's subjective motivation was an unlawful intent to interfere directly with the business relationships of a competitor.

However, the inquiry into subjective intent only follows a finding that the suit is objectively baseless and does not inform that initial objective determination.

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Kilpatrick Townsend & Stockton LLP, by Daniel R. Taylor, Jr., Adam H. Charnes, and Chad D. Hansen, for Defendant R.J. Reynolds Tobacco Company.

Opinion

ORDER

[*1] THIS MATTER is before the Court on Plaintiffs' Motion to Dismiss Count III of Counterclaim Pursuant to *Rule 12(b)(6)* And To Strike Portions of Defendant's Prayer for Relief ("Motion"). For the reasons stated below, the Motion is GRANTED in part and DENIED in part.

I. INTRODUCTION

[*2] The North Carolina Court of Appeals has held that ***HN1***[] a plaintiff who files an "objectively reasonable" lawsuit cannot be held liable for an unfair trade practice under *N.C. Gen. Stat. § 75-1.1* regardless of the plaintiff's subjective intent and even if the suit was instituted for "no legitimate purpose." *Reichhold Chems., Inc. v. Goel, 146 N.C. App. 137, 157, 555 S.E.2d 281, 293 (2001)*. The Motion requires the Court to determine whether Count III of Defendant's Counterclaim alleges facts adequate to state **[**2]** a claim for an unfair trade practice that falls within the "sham litigation" exception to the *Noerr-Pennington* immunity doctrine on which the *Reichhold* opinion rests. That inquiry, in turn, requires the Court to consider whether, accepting the allegations of the Counterclaim as true and allowing all favorable factual inferences from those facts, the Court can and should make that determination as a matter of law without need for further discovery. The controlling ultimate issue is whether Plaintiffs' Complaint is "objectively reasonable." If it is, Plaintiffs' subjective intent in filing the suit is irrelevant, and further inquiry into that intent is not necessary. Plaintiffs contend that the inquiry is pursuant to an objective standard that can be satisfied on the face of the pleadings; Defendant contends that the inquiry necessarily includes fact considerations which must at least await summary judgment.

[*3] The controversy centers on the provisions of the "Settlement Agreement," which was entered into between Plaintiffs Lorillard Tobacco Company and Lorillard Licensing Company, LLC (collectively, "Lorillard") and Defendant R.J. Reynolds Tobacco Company ("RJRT") to resolve *inter partes* **[**3]** litigation before the United States Patent and Trademark Office ("USPTO") and which relates to the use of the term "pleasure" in connection with the advertisement and sale of tobacco products. The Settlement Agreement provides restrictions on both RJRT's use of the term in some respects and on Lorillard's right to challenge RJRT's use of the term in other respects. The Settlement Agreement by its release language resolved claims regarding uses prior to its effective date. Lorillard complains that RJRT has used the term inconsistently with the Settlement Agreement. RJRT counterclaims that Lorillard has brought a suit it promised not to bring, and that its doing so was a deliberate and willful effort to restrain competition. That is, Count III of RJRT's Counterclaim asserts that the suit is "sham litigation" outside of any protection afforded by the *Noerr-Pennington* doctrine.

[*4] The Motion does not require the Court to determine whether Lorillard may ultimately prevail on the issue of whether RJRT's uses of which it complains are proscribed by the Settlement Agreement. The Court need only decide whether the pleadings demonstrate that Lorillard's claim is objectively reasonable. The Court **[**4]** concludes that it is.

II. PROCEDURAL HISTORY

[*5] Plaintiffs filed their action in Guilford County Superior Court on November 5, 2010, after which the matter was designated as a Complex Business Case. Plaintiffs assert three claims: 1) breach of contract based on the Settlement Agreement; 2) common law unfair competition; and 3) unfair and deceptive trade practices under *N.C. Gen. Stat. Section 75-1.1* ("*Section 75-1.1*"). On January 10, 2011, RJRT answered and asserted three Counterclaims: 1) Declaratory Judgment seeking to interpret the Settlement Agreement; 2) Breach of Contract by reason of Plaintiffs filing the Complaint in contravention of promises in the Settlement Agreement; and 3) a *Section 75-1.1* claim that Lorillard's filing of its Complaint was an unfair trade practice. On May 23, 2011, Lorillard filed its Motion. The Motion has been fully briefed, the Court heard oral argument, and the matter is ripe for disposition.

III. STATEMENT OF FACTS [1]

[*6] Lorillard Tobacco Company and Lorillard Licensing Company, LLC are corporations organized and existing under the laws of the State of North Carolina, based in Greensboro, North Carolina. (Countercl. ¶¶ 6-7.) The former manufactures and sells tobacco products, including NEWPORT brand cigarettes; the latter owns all relevant trademark and trade dress rights associated with the NEWPORT cigarette brand. (*Id.*) RJRT is a corporation organized and existing under the laws of the State of North Carolina, with its principal place of business in Winston-Salem, North Carolina. RJRT [2] is engaged in the business of manufacturing and selling tobacco products, including CAMEL brand cigarettes and CAMEL brand snus, a smokeless tobacco product. (*Id.* ¶ 5.)

[*7] In 2005, Lorillard applied to the USPTO to register the mark, PLEASURE [3] for use in connection with its cigarette products, which application RJRT opposed. (*Id.* ¶ 13.) In 2007, while Lorillard's application was pending, RII applied **[**6]** to the USPTO to register certain phrases that included the word "pleasure" in connection with smokeless tobacco products, which application Lorillard opposed. (*Id.* ¶ 14.) The parties resolved this *inter partes* litigation by the Settlement Agreement with an effective date of July 16, 2009. [4] (*Id.* ¶ 16.)

[*8] The Settlement Agreement provided that RJRT agreed to withdraw with prejudice its opposition to Lorillard's application (*Id.* ¶ 17), and Lorillard agreed to withdraw with prejudice its opposition to RII's application. (*Id.* ¶ 18.) The Settlement Agreement had several provisions regarding RJRT's future use of the term "pleasure." RJRT agreed that it "will **[**7]** not use the term PLEASURE alone or in conjunction with any other words as the name of a brand of a tobacco product." (*Id.* ¶ 19.) RJRT further agreed that it "will not use the term PLEASURE alone in the advertising or promotion of any tobacco product, or in any manner creating a commercial impression associating the term PLEASURE alone with the brand name of a tobacco product." (*Id.* ¶ 20.) The Settlement Agreement elaborated that "by 'the term PLEASURE alone,' the Parties mean that RJRT will only use the term PLEASURE as part of a composite phrase and not in a way that creates a commercial impression in the term PLEASURE separate and apart from such composite phrase." (*Id.* ¶ 21.) The Parties further provided that "[b]y way of example, RJRT will not significantly distinguish the term PLEASURE from other words in a composite phrase in a way that makes the term PLEASURE significantly more prominent than the other words in the composite phrase." (*Id.* ¶ 22.) The Parties specified an example of an advertisement that would not be permitted because of the comparative emphasis on the term "PLEASURE." (*Id.* ¶ 23.)

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[1] The statement of facts assumes all the allegations of the Counterclaim are true and construes inferences from such facts in Defendant-Counterclaimant's favor. *See Regions Bank v. Reg'l Prop. Dev. Corp.*, 2008 NCBC ¶¶40-41 (N.C. Super. Ct. Apr. 21, 2008). **[**5]**

[2] The Settlement Agreement defined RJRT to include Reynolds Innovations Inc. ("RII"), a trademark holding company and subsidiary of RJRT. Likewise, this Order includes RII within the term RJRT where appropriate.

[3] The parties variously use the terms "pleasure" and "PLEASURE." The Court understands that the distinction between the two is not relevant to the current controversy.

[4] RJRT incorporated the Settlement Agreement into its Counterclaim by attaching as an "Exhibit 1" so it is properly considered as part of the pleadings for purposes of this Motion. *See Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 60, 554 S.E. 2d 840, 847 (2001)*.

[*9] In return for these restrictions on RJRT's use, Lorillard agreed that "[it] will **[**8]** not assert its rights under any registration issuing from the Lorillard PLEASURE Application, or any other alleged federal or state statutory or common law rights in the term PLEASURE alone . . . against: (a) the use by RJRT of any permitted composite phrase incorporating the term PLEASURE . . . ." [5] (*Id.* ¶ 24.) Lorillard further released RJRT from any liability for the use of the term "pleasure" up to the date of the Settlement Agreement. (*Id.* ¶ 25.) RJRT alleges that it has used the term "pleasure" since the Settlement Agreement, but only consistently with the uses permitted by that agreement. (*Id.* ¶¶ 26-29.) Some of the uses of which Lorillard complains were in use by RJRT before the Settlement Agreement, although Lorillard denies having knowledge of those uses at that time. Particularly, Lorillard catalogs some of RJRT's internet domain and sub-domain names which incorporate the term "pleasure" such as, for example, "camel.tobaccopleasure.com." (Compl. ¶¶19-20; Countercl. ¶¶ 27-28.)

[*10] Lorillard and RJRT now each contend that the other has breached the Settlement Agreement. Lorillard contends that RJRT has, since the date of the Settlement Agreement, used the term "pleasure" in ways that it undertook not to do by the Settlement Agreement. RJRT contends that it has only used the term as expressly permitted by the Settlement Agreement, and Lorillard has breached the Settlement Agreement by bringing a suit that it promised not to bring. RJRT, in Count II of its Counterclaim, asserts that Lorillard breached its contractual promise not to assert a trademark claim because of an RJRT use permitted by the Settlement Agreement. (*Id.* ¶ 37.) In Count III, RJRT amplifies its claim by asserting that Lorillard committed an unfair trade practice by deliberately and willfully filing the complaint to stifle competition. (*Id.* ¶ 46.)

[*11] RJRT's prayer for relief seeks punitive damages, treble damages, and attorneys' **[**10]** fees. In addition to its request to dismiss Count III, Lorillard seeks to strike each of these elements of damages from RJRT's prayer for relief. RJRT concedes that the prayers for punitive damages and treble damages depend on Count III of the Counterclaim, but it contends that the prayer for attorneys' fees may be supported by other claims. [6]

IV. STANDARD OF REVIEW

[*12] ***HN2***[] The appropriate inquiry upon a motion to dismiss pursuant to *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure* is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Crouse v. Mineo, 189 N.C. App. 232, 237, 658 S.E.2d 33, 36 (2008)*; *Harris v. NCNB Nat'l Bank of N.C., 85 N.C. App. 669, 670-71, 355 S.E.2d 838, 840-41 (1987)*. "The complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond a doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.'" *Holloman v. Harrelson, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353* **[**11]** (quoting *Dixon v. Stuart, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987))*, *disc. review denied*, *355 N.C. 748, 565 S.E.2d 665 (2002)*. The Court need not determine that the plaintiff will ultimately prevail in order to deny the motion to dismiss; it need only determine whether plaintiff has adequately pled a claim that allows plaintiff to introduce evidence in support of the claim. *Johnson v. Bollinger, 86 N.C. App. 1, 4, 356 S.E.2d 378, 381 (1987)* (citation omitted). However, dismissal is warranted when the complaint "may consist . . . of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim." *Sutton v. Duke, 277 N.C. 94, 102-03, 176 S.E.2d 161, 166 (1970)*. "When considering a motion under *Rule 12(b)(6)*, the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint." *Branch Banking & Trust Co. v. Lighthouse Fin. Corp., 2005 NCBC 3 ¶ 8 (N.C. Super. Ct. July 13, 2005)*.

V. ANALYSIS

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[5] The Court has accepted for purposes of the present Motion that each of RJRT's uses of the term "pleasure" of which Lorillard complains is as a part of a "composite phrase." However, this does not necessarily **[**9]** end the inquiry. The Settlement Agreement provides that the use of "the term PLEASURE alone" means that it is <u>both</u> in a composite phrase <u>and</u> not in a manner creating a commercial impression associating the term alone with the brand name of a tobacco product. (Countercl. ¶ 21.)

[6] (*See* Defendant's Mem. In Opp'n to Pls.' Mot. to Dismiss and Mot. to Strike 20 n.6.)

[*13] Lorillard's Motion asserts that RJRT cannot state a claim for an unfair trade practice based on the filing of the Complaint which is, on its face, "objectively reasonable," and that **[**12]** further discovery seeking to determine Lorillard's subjective intent in bringing the suit or its belief in its chances for success are irrelevant. That is, Lorillard claims that it is immune from any *Section 75-1.1* claim grounded on its having brought the litigation.

[*14] If immunity does not apply, Count III of RJRT's Counterclaim alleges ***HN3***[] the essential elements of a *Section 75-1.1* claim, which are: 1) an unfair or deceptive act or practice; 2) affecting commerce; and 3) which proximately causes actual injury. *Poor v. Hill, 138 N.C. App. 19, 27, 530 S.E.2d 838, 844 (2000)*; *see also, Strickland v. Lawrence, 176 N.C. App. 656, 665, 627 S.E.2d 301, 307 (2006)*. "[A] practice is unfair when it offends established public policy" and "when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc., 139 N.C. App. 360, 367, 533 S.E.2d 827, 832 (2000)* (quoting *Warfield v. Hicks, 91 N.C. App. 1, 8, 370 S.E.2d 689, 693*, *disc. review denied*, *323 N.C. 629, 374 S.E.2d 602 (1988))* (citations omitted). "The fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual **[**13]** human experience and by determining its intended and actual effects upon others." *McDonald v. Scarboro, 91 N.C. App. 13, 18, 370 S.E.2d 680, 684 (1988)*. For a practice to be deceptive, it must "possess the tendency or capacity to mislead." *Forsyth Mem'l Hosp. v. Contreras, 107 N.C. App. 611, 614, 421 S.E.2d 167, 170 (1992)*. Whether a particular commercial act or practice constitutes an unfair or deceptive trade practice is a question of law. *Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998)*; *see also*, *First Union Nat'l Bank v. Brown, 166 N.C. App. 519, 603 S.E.2d 808, 819 (2004)*.

[*15] Consistent with the *Rule 12(b)(6)* standard of review, the Court must assume that Lorillard had an anti-competitive intent in bringing the suit. Likewise, the Court for purposes of the present Motion, assumes that RJRT will ultimately prove that Lorillard breached the Settlement Agreement by filing its Complaint. Proof of that breach of contract would not alone mean that RJRT would have proven an unfair trade practice. ***HN4***[] "It is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach **[**14]** of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [Chapter 75]." *Eastover Ridge, L.L.C., 139 N.C. App. at 367, 533 S.E.2d at 832*; *Branch Banking and Trust Co. v. Thompson, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700*, *disc. review denied*, *332 N.C. 482, 421 S.E.2d 350 (1992)* (citations omitted). To become an unfair trade practice, the breach of contract must be "characterized by some type of egregious or aggravating circumstance." *Norman Owen Trucking, Inc., 131 N.C. App. at 177, 506 S.E.2d at 273*. Here, the alleged egregious or aggravating circumstance is Lorillard's alleged anti-competitive intent. The inquiry, then, is whether an unfair practice has been proven based on such breach coupled with anti-competitive intent, or whether Lorillard is immunized from such a finding.

[*16] The North Carolina Court of Appeals in *Reichhold* held that ***HN5***[] a litigant can be sheltered from liability under *Section 75-1.1* by application of the federal *Noerr-Pennington* doctrine. *146 N.C. App. at 156-57, 555 S.E.2d at 293* (referring to *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* and *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993))*. **[**15]** Noting that Chapter 75 was modeled on federal ***antitrust law***, the court held that "federal decisions may provide guidance in determining [its] scope and meaning" and then applied the *Noerr-Pennington* doctrine to *Section 75-1.1*. [7] *Id.* The court upheld dismissal of the *Section 75-1.1* claim, affirming the trial court's conclusion that "though filed for no legitimate purpose, the lawsuit was not utterly baseless." *Id. at 157, 555 S.E.2d at 293*. Because it was not utterly baseless, the suit was "objectively reasonable, and thus . . . did not constitute an unfair trade practice under *N.C.G.S. § 75-1.1*." [8] *Id.* In so holding, the Court implicitly agreed with the

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[7] The federal *Noerr-Pennington* Doctrine arose under the federal Sherman Act, on which certain provisions of Chapter 75 are modeled, whereas Chapter *75-1.1* was based on Section 5 of the FTC Act.

[8] However, because the suit was not filed for a legitimate purpose, the court found that the defendant remained exposed to liability for tortious interference with contract **[**17]** claims because there is "no relation" between the state tort and "legislative intent behind federal anti-trust law." *Reichhold Chems., Inc., 146 N.C. App. at 148, 555 S.E.2d at 288*.

plaintiff's assertion "that ***HN6***[] a reasonably objective lawsuit can never be an unfair trade practice, under the reasoning of *Noerr* and *PRE." Id. at 156, 555 S.E.2d at 293*. The court explained that a lawsuit is objectively reasonable "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome." *Id. at 146 N.C. App. at 157, 555 S.E.2d at 293* (citation omitted). The court's adoption of *PRE's* reasoning to control *Section 75-1.1* means that it conversely follows that the "sham litigation" exception **[**16]** to the *Noerr-Pennington* doctrine would apply to claims under that section when 1) the claim asserted is "objectively meritless" and 2) the court finds "the litigant's subjective motivation" was an unlawful intent to "interfere directly with the business relationships of a competitor." *See Prof'l Real Estate Investors, Inc., 508 U.S. at 60, 113 S. Ct. at 1928* (describing "sham litigation" as that which is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"). However, the inquiry into subjective intent only follows a finding that the suit is objectively baseless and does not inform that initial objective determination. *Id.*; *see also United States v. Ward, 618 F. Supp. 884, 907 (E.D.N.C. 1985)*, *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 2003 NCBC 4 ¶ 333 (2003)*.

[*17] The Court then turns to the controlling inquiry: whether Lorillard's suit is "objectively reasonable" as a matter of law or whether that determination must await further factual development. While it is true that *Reichhold* arose upon review of rulings made on a motion for summary judgment and at trial, *Reichhold* was later followed by a North Carolina federal district court opinion which resolved the immunity issue upon a *Rule 12(b)(6)* motion. *See GoldToeMoretz, LLC v. Implus Footcare, LLC, No. 5:09-CV-0072, 2010 U.S. Dist. LEXIS 90828, 2010 WL 3474792 (W.D.N.C. Aug. 31, 2010.)* [9] RJRT cites federal cases from other circuits for the proposition that the determination of whether the plaintiff's complaint is a sham or a genuine effort to seek judicial redress is inherently a fact question. *Aydin Corp. v. Loral Corp., 718 F.2d 897, 903 (9th Cir. 1983)*; *Scooter Store, Inc. v. SpinLife.com LLC, No. 777 F. Supp. 2d 1102, 2011 WL 1460438, at *8 (S.D. Ohio Apr. 18, 2011)*; *Pactiv Corp. v. Perk-Up, Inc., No. 08-05072 (DMC), 2009 U.S. Dist. LEXIS 72796, 2009 WL 2568105, at *14 (D.N.J. Aug. 18, 2009)*. **[**18]** However, here, the critical "fact" is a determination of the language of the Settlement Agreement compared to the alleged uses of the term "pleasure" complained challenged in the Complaint. The Court concludes that the *Reichhold* standard of whether Lorillard's lawsuit is "utterly baseless" can be determined from the face of the Counterclaim and its incorporated Settlement Agreement. Even if the Court assumes that the suit was otherwise brought "for no legitimate purpose" and with a subjective anti-competitive intent, it can still conclude that the suit is "objectively reasonable" because it is not "utterly baseless."

[*18] The issue is to be determined by looking through a lens of reasonable objectivity. That objective perspective demonstrates that Lorillard has a reasoned basis from which to argue **[**19]** that RJRT's use of the term "pleasure" after the Settlement Agreement are not permitted, even though they are used only in composite phrases, because the Settlement Agreement also proscribes a use "in any manner creating a commercial impression associating the term PLEASURE alone with the brand name of a tobacco product." The language of the Settlement Agreement does not so clearly foreclose an argument that the uses catalogued in the pleadings are outside these proscriptions so as to render the Complaint "utterly baseless." Lorillard's subjective intent does not change that initial objective determination.

[*19] The Motion would present a much more difficult challenge to Lorillard if Lorillard's claim rested entirely on claimed liability for acts taken by RJRT before the date of the Settlement Agreement. RJRT correctly notes that the release language of the Settlement Agreement would extend to such acts whether or not Lorillard was aware of them when entering the Settlement Agreement. But Lorillard counters that by releasing past liability it did not ratify such acts in the future, and a claim based on acts after the Settlement Agreement are not then "utterly baseless." The Court can agree **[**20]** that this position is not baseless without also concluding that Lorillard's position should ultimately prevail. It need only conclude that asserting the claim is "objectively reasonable." Because it is, liability

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[9] Without citing *Reichhold*, another North Carolina federal district court held that "parties bringing or threatening to bring meritorious, good faith claims cannot by definition be subject to liability under *[Section 75-1.1]*. As such, parties bringing good faith claims . . . do not need the protections of the *Noerr-Pennington* doctrine." *DIRECTV, Inc. v. Cephas, 294 F. Supp. 2d 760, 767 (M.D.N.C. 2003)*.

under *Section 75-1.1* based on the "sham litigation" exception is foreclosed. The Motion to dismiss Count III should be granted.

[*20] As to the Motion's request to strike portions of RJRT's prayer for relief, RJRT has conceded that it has no claim for punitive damages or treble damages if Count III is dismissed. RJRT does not make the same concession as to attorneys' fees, and the Court concludes that it is premature to determine whether there is any basis to award attorneys' fees other than pursuant to this Count III. Therefore, that prayer for attorneys' fees in the Counterclaim will not be stricken at this time.

[*21] IT IS THEREFORE ORDERED that:

1. Lorillard's Motion to Dismiss Count III of RJRT's Counterclaim pursuant to *Rule 12(b)(6)* is GRANTED.
2. Lorillard's Motion to Strike RJRT's prayer for punitive damages and treble damages is GRANTED.

3. Lorillard's Motion to Strike the prayer for attorneys' fees is DENIED without prejudice to the Court's later consideration of the issue of **[**21]** whether either party is entitled to an award of attorneys' fees.

It is so ORDERED this 8th day of August, 2011.

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In re: Cathode Ray Tube Antitrust Litig.

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

August 9, 2011, Decided; August 9, 2011, Filed

Master File No. CV-07-5944 SC; MDL No. 1917

Reporter

2011 U.S. Dist. LEXIS 118951 *; 2011-2 Trade Cas. (CCH) P77,593

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION. This document relates to: ALL INDIRECT PURCHASER ACTIONS

Prior History: Crago, Inc. v. Chunghwa Picture Tubes, Ltd. (In re Cathode Ray Tube (CRT) Antitrust Litig.), 536 F. Supp. 2d 1364, 2008 U.S. Dist. LEXIS 12204 (J.P.M.L., Feb. 15, 2008)

Core Terms

Settlement, Notice, settlement fund, purposes, class member, Purchaser, Indirect, approves

Counsel: **[*1]** Mario N. Alioto (56433), Lauren C. Russell (241151), TRUMP, ALIOTO, TRUMP & PRESCOTT, LLP, San Francisco, California, Interim Lead Counsel for the Indirect Purchaser Plaintiffs.

Judges: Hon. Samuel Conti, United States District Judge. Special Master: Hon. Charles A. Legge (Ret.).

Opinion by: Samuel Conti

Opinion

ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANT CHUNGHWA PICTURE TUBES, LTD.

Judge: Hon. Samuel Conti

Special Master: Hon. Charles A. Legge (Ret.)

It is hereby ORDERED AND DECREED as follows:

The motion of the Indirect Purchaser Plaintiffs ("Plaintiffs") for preliminary approval of the proposed settlement with Chunghwa Picture Tubes, Ltd. ("Chunghwa") is hereby GRANTED.

1. For purposes of the settlement with Chunghwa, the Special Master preliminarily finds that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been satisfied with respect to the Settlement Class. At this preliminary certification phase, and only for purposes of the settlement with Chunghwa, the Settlement Class is defined as follows:

> All persons and or entities who or which indirectly purchased in the United States CRT Products [1] manufactured and/or sold by the Defendants, or any subsidiary, **[*2]** affiliate, or co-conspirator thereof, at any time during the period from at least March 1, 1995 through at least November 25, 2007, except, for purposes of claims on behalf of Illinois persons (as defined by 740 ILCS 10/4) under 740 Ill. Comp. Stat. § 10/7(2) and Oregon natural persons under ORS §§ 646.775(1)(a) and 646.780(5)(a). Such Illinois and Oregon persons (as identified in the preceding sentence) shall instead be represented by the Attorney General of their state pursuant to the *parens patriae* authority granted to each Attorney General by those statutes. Specifically excluded from this Class are claims on behalf of Washington persons (as defined by RCW 19.86.010) for purposes of claims under RCW 19.86.080(1); the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and, any affiliate, legal representative, heir or assign of any Defendant. Also excluded are any federal, state or local government entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

2. The Special Master concludes that, for the sole purpose of the settlement with Chunghwa, and without adjudication on the merits, the Settlement Class is sufficiently well-defined and cohesive to merit preliminary approval. Neither this Order nor any final order regarding the settlement with Chunghwa shall have any effect on the Special Master's consideration and determination of class certification or any other issue with respect to the non-settling Defendants.

3. Pursuant to Rule 23(a)(1), the Special Master determines that the Settlement Class is so numerous that joinder of all members is impracticable.

4. For purposes of preliminary approval, the commonality requirement of Rule 23(a)(2) is satisfied because Plaintiffs have alleged one or more questions of fact and law common to the Settlement Class, including whether Chunghwa violated the Sherman Antitrust Act, 15 U.S.C. § 1, et seq., and the antitrust and/or various other laws of the following states: Arizona, California, Florida, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, **[*4]** Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin and the District of Columbia.

5. The Special Master hereby approves the Plaintiffs named in the Third Consolidated Amended Complaint, filed December 11, 2010, as Representative Plaintiffs of the Settlement Class pursuant to Rule 23(a)(3), and finds that, for settlement purposes only, these Representative Plaintiffs' claims are typical of the claims of the Settlement Class. The claims of the Representative Plaintiffs and absent class members rely on the same legal theories and arise from the same alleged conspiratorial conduct by Defendants, namely, the agreement to fix, raise, maintain and/or stabilize prices of CRT Products sold in the United States.

6. The Special Master preliminarily finds that the Representative Plaintiffs will fairly and adequately protect the interests of the Settlement Class in satisfaction of the requirements of Rule 23(a)(4) because: (1) the interests of the Representative Plaintiffs are consistent with those of the Settlement Class members; (2) there appear to be no conflicts between or among the Representative Plaintiffs **[*5]** and the other Settlement Class members; (3) the Representative Plaintiffs have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of this litigation; and (4) the Representative Plaintiffs and the Settlement Class members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class action cases, including those concerning violations of ***antitrust law***.

7. The Special Master preliminarily finds that, for purposes of this settlement only, questions of law or fact common to members of the Settlement Class predominate over questions affecting only individual members of the Settlement Class under Rule 23(b)(3). Further, a class action resolution in the manner proposed in the Settlement Agreement would be superior to other available methods for a fair and efficient adjudication of the litigation with

[1] CRT Products are defined in the settlement agreement **[*3]** to mean Cathode Ray Tubes of any type (e.g. color display tubes, color picture tubes and monochrome display tubes) and products containing Cathode Ray Tubes.

respect to the Chunghwa. In making these preliminary findings, the Special Master has considered, *inter alia,* (1) the interest of the Settlement Class members in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of **[*6]** prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning these claims already commenced; and (4) the desirability of concentrating the litigation of the claims in a particular forum.

8. The Special Master hereby approves Mario N. Alioto and Trump, Alioto, Trump & Prescott, LLP as Settlement Class Counsel pursuant to *Rule 23(g)*, and finds that this Settlement Class Counsel has and will fairly and adequately protect the interests of the Settlement Class, as defined in paragraph 1.

9. The Special Master finds that the proposed settlement with Chunghwa, as set forth in the Settlement Agreement, subject to final determination following proper notice and a fairness hearing, is sufficiently fair, reasonable and adequate to authorize dissemination of notice to the Settlement Class.

10. The Special Master approves the proposed allocation of the Net Settlement Fund. [2] Each state listed in the operative complaint for which damage claims are being asserted, plus the states of Illinois and Oregon, shall receive a pro rata share of the Net Settlement Fund. Each state's pro rata share shall be determined by computing its population as a percentage of the total **[*7]** population of all states listed below. Each state's percentage allocation shall be determined using census figures from the year 2000 (approximately the middle of the alleged class period), which are as follows:

State	Population (2000 Census)	Percentage
Arizona	5,130,632	3.55
California	33,871,648	23.42
District of Columbia	572,059	0.39
Florida	15,982,378	11.05
Hawaii	1,211,537	0.84
Illinois	12,419,293	8.59
Iowa	2,926,324	2.02
Kansas	2,688,418	1.86
Maine	1,274,923	0.88
Michigan	9,938,444	6.87
Minnesota	4,919,479	3.4
Mississippi	2,844,658	1.97
Nebraska	1,711,263	1.18
Nevada	1,998,257	1.38
New Mexico	1,819,046	1.26
New York	18,976,457	13.12
North Carolina	8,049,313	5.57
North Dakota	642,200	0.45
Oregon	3,421,399	2.37
South Dakota	754,844	0.52
Tennessee	5,689,283	3.93
Vermont	608,827	0.42
West Virginia	1,808,344	1.25
Wisconsin	5,363,675	3.71

[2] The Net Settlement Fund means the $10,000,000 settlement amount, plus interest, minus 25% for attorneys' fees, reimbursement of expenses, $2.5 million for a costs set-aside, **[*8]** including the costs of giving notice to class members and administration of the settlement fund, all of which shall be subject to court approval. The Net Settlement Fund shall be no less than $5 million.

This percentage allocation may change to the extent that additional state indirect purchasers provide legal authority to assert damage claims in this action. Each of the states shall receive its allocable share at a future date to be approved by the Court.

11. The distribution of the Net Settlement Fund shall be deferred until a later date when there might be additional settlement funds from other settling defendants to distribute. At the time of distribution, or at such later time as Plaintiffs, Illinois and Oregon may agree, the States of Illinois and Oregon will each receive their allocable share of the Net Settlement Fund. Plaintiffs shall propose a method of distribution at that time, which shall be subject to court approval. Until that time, any settlement funds not used to pay prior out of pocket expense or future litigation costs will accrue interest for the benefit of the Class.

12. The Special Master approves the form and content of the Detailed Notice, attached hereto as Exhibit A, and the Summary Notice, attached hereto as Exhibit B.

13. The Special Master finds that the publication of the Detailed Notice on the internet along with copies of the Settlement Agreement, and the publication of the Summary Notice in various newspapers **[*9]** and/or magazines throughout the United States which will direct potential class members to the Detailed Notice, constitutes the best notice practicable under the circumstances, is due and sufficient notice to the Indirect Purchaser Settlement Class and complies fully with the requirements of *Federal Rule of Civil Procedure 23* and the due process requirements of the Constitution of the United States.

14. By November 1, 2011, Plaintiffs' counsel are hereby directed to cause the Summary Notice to indirect purchasers, substantially in the form attached hereto as Exhibit B, to be published in various newspapers and/or magazines throughout the United States. The Summary Notice shall direct interested parties to a website *www.CRTSettlement.com*, maintained by the settlement administrator, where the Detailed Notice, substantially in the form of Exhibit A attached hereto, will be provided.

15. All requests for exclusion from the Settlement must be postmarked no later than February 1, 2012, and must otherwise comply with the requirements set forth in the Detailed Notice.

16. Any member of the Settlement Class who objects to the settlement must do so in writing. The objection must include the caption **[*10]** of this case, be signed, and be sent to the Special Master, Plaintiffs' Counsel, and Counsel for Chunghwa postmarked no later than February 1, 2012 and shall otherwise comply with the requirements set forth in the Detailed Notice. Any member of the Settlement Class who wishes to speak at the Fairness Hearing must submit a letter notifying the Special Master, Plaintiffs' Counsel, and Counsel for Chunghwa postmarked no later than February 1, 2012 and shall otherwise comply with the requirements set forth in the Detailed Notice.

17. Each member of the Settlement Class shall retain all rights and causes of action with respect to claims against all Defendants other than Chunghwa, regardless of whether such member of the Settlement Class decides to remain in the Settlement Class or to exclude itself from the Settlement Class.

18. By March 1, 2012, Plaintiffs' Counsel shall file with the Court and serve on the parties their motion for final approval of the Settlement Agreement, and any other papers provided for in this settlement, including Plaintiffs' request for $2.5 million for a costs set aside. Plaintiffs shall also be entitled to request attorneys' fees at a later date. Said request shall **[*11]** be based upon Plaintiffs' recovery of $10 million and other relief as provided for in this settlement.

19. At the time Plaintiffs' Counsel file their motion for final approval of the Settlement Agreement, Plaintiffs' Counsel shall cause to be filed with the Court, and served upon counsel for Defendants, affidavits or declarations of the person under whose general direction the publication of the Summary Notice and the Detailed Notice were made, showing that publication and issuance were made in accordance with this Order.

20. By March 1, 2012, Plaintiffs' Counsel shall file with the Court and serve on the parties their responses to any objections to the settlement.

21. The Special Master will hold a Fairness Hearing on March 15, 2012 at 2:00 p.m., at JAMS, Two Embarcadero Center, Suite 1500, San Francisco, CA 94111, to determine the fairness, reasonableness, and adequacy of the proposed settlement with Chunghwa. Any member of the Settlement Class who follows the procedure set forth in the notices may appear and be heard at this hearing. The Fairness Hearing may be continued without further notice to the Settlement Class.

22. The Special Master approves the establishment of an escrow account, **[*12]** as set forth in the Settlement Agreement, as "Qualified Settlement Funds" pursuant to *Treas. Reg. § 1.468B-2(b)(1)*. The Special Master retains continuing jurisdiction over any issues regarding the formation or administration of the escrow account. Plaintiffs' Counsel and their designees are authorized to expend funds from the escrow accounts to pay Taxes, Tax Expenses and notice and administration costs, as set forth in the Settlement Agreement.

23. The Special Master grants Plaintiffs' Counsel the right to use up to $500,000 of the settlement fund for payment of the cost of notice(s) to potential members of the Settlement Class regarding the Settlement Agreement and related matters, and other costs and expenses reasonably incurred in connection with the administration of the Settlement Agreement (the "Administrative Expenses"), without the approval of the Court in each instance, so long as (a) the Administrative Expenses incurred or contracted for are reasonable and necessary to carry out the transactions contemplated by the Settlement Agreement, and (b) counsel for Chunghwa shall receive from Settlement Class Counsel a full accounting of all expenditures made in the event funds are returned **[*13]** to Chunghwa under the terms of the Settlement Agreement.

24. The Notice Company, Inc. is approved to serve as Settlement Administrator for the Indirect Purchaser Settlement Class.

25. The litigation against Chunghwa in this action is hereby stayed, pending further order of the Court.

SO ORDERED this 5 day of AUGUST, 2011.

/s/ Charles A. Legge

Hon. Charles A. Legge (Ret.)

REVIEWED AND [APPROVED]

Dated: August 9, 2011

/s/ Samuel Conti

Hon. Samuel Conti

United States District Judge

End of Document

Loren Data Corp. v. GXS, Inc.

United States District Court for the District of Maryland

August 9, 2011, Filed

Civil Action No. DKC 10-3474

Reporter
2011 U.S. Dist. LEXIS 88222 *

LOREN DATA CORP. v. GXS, INC.

Subsequent History: Motion denied by, Reconsideration denied by *Loren Data Corp. v. GXS, Inc., 2011 U.S. Dist. LEXIS 97253 (D. Md., Aug. 30, 2011)*

Affirmed by *Loren Data Corp. v. GXS, Inc., 2012 U.S. App. LEXIS 26471 (4th Cir. Md., Dec. 26, 2012)*

Core Terms

interconnect, alleges, monopolization, Sherman Act, antitrust, monopoly power, competitor, mailbox, terms, anticompetitive, courts, network, geographic, relevant market, alleged facts, monopoly, parties, argues, motion to dismiss, customers, state law claim, contracts, combined, reasons, peer, anti trust law, market share, messages, boycott, prices

Counsel: **[*1]** For Loren Data Corp, Plaintiff: David P Bird, LEAD ATTORNEY, David P Bird Attorney at Law, Fulton, MD.

For GXS, Inc., Defendant: David Howard Evans, LEAD ATTORNEY, James A Stenger, Chadbourne and Parke LLP, Washington, DC.

Judges: DEBORAH K. CHASANOW, United States District Judge.

Opinion by: DEBORAH K. CHASANOW

Opinion

MEMORANDUM OPINION

Presently pending and ready for review in this antitrust case is the motion to dismiss filed by Defendant, GXS, Inc. (ECF No. 9). The issues have been fully briefed and the court now rules, no hearing deemed necessary. *See* Local Rule 105.6. For the following reasons, the motion to dismiss will be granted.

I. Background

A. Factual Background[1]

Plaintiff Loren Data Corporation and Defendant GXS, Inc. are Electronic Data Interchange providers. Loren Data is a California corporation with its principal place of business in Indian Rocks Beach, Florida, while GXS is a Delaware corporation with its principal place of business in Gaithersburg, Maryland.

Electronic Data Interchange ("EDI") is described by Loren Data as "the electronic exchange of business **[*2]** data and documents, such as purchase orders or invoices, in a standardized digital format that can be processed via the Internet by computer systems." (ECF No. 1 ¶ 1). EDI messages are generated, sent, received, and ingested into enterprise computing systems for parties engaged in commercial trading, such as retailers and suppliers, shippers and receivers, and manufacturers and vendors. These messages travel over a system of private networks interconnected to each other with network protocols called Value Added Networks ("VANs") that are secure. For example a shipper might send a purchase order formatted in EDI over a VAN to its trading partners. Although VANs are privately owned, trading partners on different VANs can still communicate with each other if their VANs are connected. One common way this occurs is through an interconnect jointly maintained by two VAN providers; another option is through a commercial mailbox. Plaintiff contends that it is long standing practice in the EDI industry for VANs to grant "non-settlement peer Interconnects" to each other to facilitate the flow of EDI data. In a non-settlement peer Interconnect, EDI messages are transferred from one VAN to another **[*3]** with each VAN absorbing its own costs. A commercial mailbox is a paid service for transmitting messages sent on one VAN to trading partners using a different VAN. The VAN typically charges for use of a commercial mailbox based on the amount of data being transmitted. Mailboxes also differ from interconnects in that the messages are not delivered to the receiving trading partner with the same ease and speed.

Loren Data and GXS both operate VANs. Loren Data's VAN has the brand name of ECGrid and has been in operation for over ten years. It currently serves approximately 18,000 IDs (akin to phone numbers or email addresses) primarily in North America. GXS manages a significantly larger VAN branded as "TGMS" and also controls the legacy VANs IE, InovisWorks, and Tradanet that it obtained through merger or acquisition from former VAN providers. In 2002 GXS' predecessor, GEIS, controlled approximately 25% of the EDI IDs. Since that time, GXS acquired the Information Exchange (IE) VAN, a former division of IBM, and it merged with Inovis. Accordingly to Loren Data, it is now generally accepted that GXS controls 50% or more of the EDI market when measured by revenue, customer base, or IDs.

In **[*4]** November 2000, Loren Data approached GXS to request an interconnect. At that time GXS told Loren Data that it was in the process of rewriting its VAN Interconnect Agreement and a new agreement would be available soon. In February 2001, while the parties continued negotiations regarding a potential interconnect, GXS made an EDI mailbox available to Loren Data as a temporary measure. Then in August 2001, GXS notified Loren Data that it would not provide a peer interconnect to the GXS network and that Loren Data's temporary mailbox would be terminated if Loren Data did not pay the $30,000 due in fees. Loren Data's mailbox was terminated two weeks later, and it was forced to make alternate arrangements for its customers with trading partners on the GXS VAN or lose their business. In 2002 Loren Data made a similar request to interconnect with the GXS Van that was also denied.

In February 2003, IBM contracted with Loren Data to provide interconnect outsourcing for its federal government and Department of Defense EDI traffic. When GXS acquired IBM's EDI network in 2005, GXS honored the agreement for several years and Loren Data was able to maintain its interconnect with the former IBM VAN. **[*5]** Loren Data alleges that the contract was terminated on October 31, 2009, however, leaving Loren Data due $24,832.89 in unpaid invoices.

In August 2003, one of Loren Data's customers, Covisint, required routing to GXS' IDs and, thus, Loren Data had to settle its outstanding accounts with GXS and initiate a new formal agreement with GXS. GXS still refused to provide

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[1] The facts are taken from Loren Data's initial complaint (ECF No. 1) and the supplemental statement of facts in the amended complaint. (ECF No. 13).

an interconnect and instead set up a metered mailbox with manual web interfaces. Loren Data maintains that "GXS' technical network interfaces were regularly degraded and modified to cripple the relationship, causing vexing, serious and damaging system-wide failure with the Loren Data network" and that these failures would not have occurred if Loren Data had been permitted to interconnect with GXS. (*Id.* ¶ 19). Loren Data further alleges that during this time period GXS granted non-settlement peer interconnects to other VANs, large and small, and that because Loren Data was denied an interconnect it missed market opportunities, attained reduced market footprint, lost revenue, and incurred extraordinary expenses.

In March 2009, Inovis, Inc. offered Loren Data the option to route to GXS' customers through the InovisWorks VAN at **[*6]** a monthly rate of $3500.00. Loren Data accepted this agreement and all its GXS traffic was re-routed through InovisWorks by June 30, 2009. Loren Data alleges that this arrangement was only marginally better than the metered mailbox, however, because it resulted in a loss of message visibility and tracking across networks, creating confusion and loss of name recognition for Loren Data. In addition, in June 2010, GXS announced the completion of its merger with InovisWorks and expressed its intent to renegotiate the terms of the Loren Data/Inovis interconnect when it expired in May 2011. In particular, GXS expressed its intent to return to using a metered mailbox for Loren Data messages. Loren Data alleges that through its current mailbox arrangement GXS charges it $.04 per kilo character (kc) of transmitted data, amounting to as much as $25,000-$30,000 per month in charges since 2001. Under its agreement with Inovis Loren Data was only charged $.01 per kc. Loren Data further alleges that with a typical non-settlement interconnect there is no charge per kc.

B. Procedural Background

On December 13, 2010, Loren Data filed a six count complaint in federal district court alleging that: (1) **[*7]** GXS violated section 1 of the Sherman Act, *15 U.S.C § 1*, by entering into contracts, combinations and/or conspiracies in restraint of trade or commerce; (2) GXS violated *section 2* of the Sherman Act, *15 U.S.C. § 2*, by attempting to create a monopoly in the EDI industry; (3) GXS violated *section 2* of the Sherman Act by willfully acquiring and possessing monopoly power in the EDI industry and using its monopoly power to exclude competition; (4) GXS violated Maryland ***Antitrust law***, *Md. Code Ann., Com. Law § 11-204*; (5) GXS is liable for tortious inference with Loren Data's business relationships; and (6) GXS breached its contracts with Loren Data. (ECF No. 1). On February 3, 2011, GXS filed a motion to dismiss the complaint for failure to state a claim and lack of subject matter jurisdiction. (ECF No. 9). Loren Data subsequently filed an amended complaint adding a supplemental statement of facts but otherwise simply incorporating the claims from its original complaint. (ECF No. 13.) The parties have stipulated that GXS' motion to dismiss and Loren Data's opposition may be deemed to apply to the first amended complaint. (ECF Nos. 16, 17).

II. Standard of Review

The purpose of a motion to **[*8]** dismiss pursuant to *Fed.R.Civ.P. 12(b)(6)* is to test the sufficiency of the plaintiff's complaint. *See* *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of *Rule 8(a)*, *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed.R.Civ.P. 8(a)(2)*. Nevertheless, "*Rule 8(a)(2)* still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*(internal citations omitted).

In its determination, the court must consider all well-pled allegations in a complaint as true, *Albright v. Oliver, 510 U.S. 266, 268, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)*, and must construe all factual allegations in the light most favorable to the plaintiff. *See* *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783 (4th Cir. 1999)*(citing **[*9]** *Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993))*. The court need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989)*, legal conclusions couched as factual allegations, *Iqbal, 129 S.Ct. at 1950*, or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979)*. *See also Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not 'show[n] . . . that the pleader is entitled to relief.'" *Iqbal, 129 S.Ct. at 1950* (quoting *Fed.R.Civ.P. 8(a)(2)*). Thus, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

III. Analysis

A. Sherman Act Claims

1. Section 1 of the Sherman Act

Count I of Loren Data's complaint alleges a violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. *Section 1* prohibits "[e]very contract, combination in the form of trust **[*10]** or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *Id.* GXS contends that Loren Data has failed to state a claim under *section 1* because neither the alleged facts nor any reasonable inference therefrom shows a contract or agreement to conspire between GXS and other EDI providers. In response, Loren Data argues that GXS' refusal to deal with Loren Data while simultaneously combining to allow all other VANS to interconnect constitutes a group boycott and is a *per se* violation of section 1 of the Sherman Act. (ECF No. 14, at 2).

"Section one of the Sherman Act applies only to concerted action; unilateral conduct is excluded from its purview." *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991)* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*, *cert. denied*, *502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992)*. As the United States Court of Appeals for the Fourth Circuit emphasized in *Virginia Vermiculite, Ltd v. Historic Green Springs, Inc, 307 F.3d 277, 282 (4th Cir. 2002)*, *cert. denied*, *538 U.S. 998, 123 S. Ct. 1900, 155 L. Ed. 2d 824 (2003)*, "concerted activity susceptible to sanction by *section 1* is activity in which multiple parties join their resources, **[*11]** rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)."

The pleading requirements to state a claim for violation of *section 1* are quite clear. *Section 1* "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 550 U.S. at 556*. A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two. *West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99-100 (3d Cir. 2010)*. The Supreme Court in *Twombly* further held "[a]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *550 U.S. at 556-57*. In dicta, the *Twombly* court indicated that a section 1 claim should include information as to the specific time and place of the illicit agreement and the names of the parties to the agreement. *Id. at n.10*. Subsequent decisions from the courts of appeal have **[*12]** dismissed claims under *section 1* for failure to provide these specific details about the agreement. *See, e.g., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 (6th Cir. 2008)*.

In addition to pleading the existence of an agreement, the plaintiff must prove that the conspiracy or combination to which the defendant was a party imposed an unreasonable restraint on trade. Courts generally evaluate whether a restraint is unreasonable under one of three approaches: "(1) *per se* analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those with some procompetitive justification, and (3) the full "rule of reason," for restraints whose net impact on competition is particularly difficult to determine." *Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508-09 (4th Cir. 2002)*. Under the *per se* approach, courts are permitted to make "categorical judgments that certain practices, including price fixing, horizontal output restraints, and market-allocation agreements, are illegal *per se.*" *Id.* (citing *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985))*. "Practices suitable **[*13]** for *per se* analysis have been found over the years to 'be ones that would always or almost always tend to restrict competition and decrease output,' and that are not 'designed to increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* (quoting *Broad. Music, Inc. v. CBS, 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979))*. When a practice qualifies for *per se* analysis there is a "conclusive presumption that the restraint is unreasonable." *See* *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343-45, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. Under the rule of reason approach, by contrast, a factfinder must "decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Id. at 343*. Rule of reason analysis requires a detailed analysis of "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Continental Airlines, Inc., 277 F.3d at 509* (quoting *Nat'l Soc'y of Prof'l Engr's v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978))*. The intermediary level of analysis, quick-look, is appropriate for practices that have an obvious anticompetitive impact upon a quick look, but also obvious procompetitive justifications. **[*14]** *Id.*

Loren Data has not alleged adequate facts to establish that GXS contracted, combined, or conspired with other VANs to boycott Loren Data. The complaint contains only the conclusory allegations that "Defendant GXS, Inc. has entered into contracts, combinations, and/or conspiracies in restraint of trade and/or commerce" and that it "combined with other EDI providers to provide peer non-settlement interconnects to the exclusion of Loren Data." (ECF No. 1 ¶ 28). The complaint does not identify the parties with whom GXS agreed to restrain trade, the time or place at which such an agreement was reached, or the specific contours of such agreement. Inserting the word "combine" into its allegation is not enough to state a claim under *section 1*.

Elsewhere Loren Data alleges that GXS provided peer interconnects to other VANS, (*see* ECF No. 1 ¶ 20 (alleging that GXS provided interconnects to Sterling, Inovis, Easylink, NuBridges, Advanced Communications Systems, I-Connect, and York Worldwide)), but Loren Data does not allege that these VANs failed to provide peer interconnects to Loren Data, that they were ever forced to deny interconnects by GXS, or that they agreed to deny interconnects to **[*15]** Loren Data. To the contrary, Loren Data alleges that "it has been granted Interconnects with every other VAN." (*Id.* ¶ 6). Agreements between other VANs to establish peer connects with GXS do not constitute an agreement to boycott Loren Data. To the extent Loren Data intended to allege that other VANs agreed that GXS would boycott Loren Data, this is an agreement lacking any substance as GXS does not need the permission or consent of third parties to decide whether it will do business with Loren Data. *See* *Monsanto Co. v. Spray- Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. . . . And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.").

Loren Data's argument that horizontal group boycotts constitute *per se* violations of *section 1* is irrelevant because Loren Data has not alleged any facts to suggest the existence of a horizontal group boycott. At most Loren Data has alleged GXS was boycotting Loren Data and other VANs did not try to stop GXS from doing so. [2] Single party boycotts **[*16]** are not *per se* violations of the Sherman Act.

2. *Section 2* of the Sherman Act

[2] In its first amended complaint Loren Data alleges that GXS has "let it be known that it will not permit any other VAN that interconnects with GXS to enter into an agreement with Loren Data that is similar to Loren Data's current agreement with Inovis." (ECF No. 13 ¶ k). No further details are alleged to indicate how, when, or to whom this intention was conveyed or how GXS intends to carry out its intent. This allegation is far from adequate to allege an illegal boycott or any other form of conspiracy to restrain trade.

Counts II and III of Loren Data's complaint allege violations of *section 2* of the Sherman Act, *15 U.S.C. § 2*. *Section 2* makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations[.]" *15 U.S.C. § 2*. The elements of claims alleging monopolization and attempted monopolization are quite similar. To state a monopolization claim, a plaintiff must show possession of monopoly power in a relevant market, willful acquisition, or maintenance of that power **[*17]** in an exclusionary manner as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident, and causal antitrust injury. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 147 (4th Cir. 1990)*. To state a claim for attempted monopolization, a plaintiff must demonstrate: (1) a specific intent to monopolize the relevant market; (2) predatory or anticompetitive acts in furtherance of the intent; and (3) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *In re Microsoft Corp. Antitrust Litig., 333 F.3d 517 (4th Cir. 2003)*.

a. Maintaining a Monopoly

GXS argues that Loren Data has failed to state a claim for monopolization in count III because it has not alleged facts to show that GXS lacked a legitimate business justification for the challenged actions or even that GXS failed to deal with Loren Data in an anti-competitive fashion. GXS also argues that Loren Data has failed to allege a relevant product or geographic market for the supposed monopoly, or that GXS possessed a monopoly. (ECF No. 9-1, at 21-38).

1) [*18] Possession of Monopoly Power in Relevant Market

Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. "Proof of a relevant market is the threshold for a Sherman Act *§ 2* claim. The plaintiff must establish the geographic and product market that was monopolized." *Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 493 (4th Cir. 1986)* (citing cases), *cert. denied*, *481 U.S. 1050, 107 S. Ct. 2182, 95 L. Ed. 2d 838 (1987)*. The requirements for the relevant geographic market were explained by the Fourth Circuit in *Consul*:

> [T]he geographic market should consist of an area in which the defendants operate and which the plaintiff can reasonably turn to for supplies." [*RCM Supply Co. v. Hunter Douglas, Inc.*,] 686 F.2d [1074] at 1077 [4th Cir. 1982] (emphasis in original). *See* *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-34, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. The penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market. The geographic demarcation should not be too tightly **[*19]** drawn, unless clear evidence exists that potential competitors outside the region are hindered from entering. A market drawn too tightly, either in geographic terms that exclude potential suppliers or in product terms that exclude potential substitutes, creates the illusion of market power where none may exist.

Id. at 494-95 (internal footnote omitted). "In sum, 'a relevant market, then is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.'" *Int'l Wood Processors v. Power Dry, Inc., 792 F.2d 416, 430 (4th Cir. 1986)* (quoting L. Sullivan, Handbook of the Law of Antitrust § 12, at 41 (1977)).

At the pleading stage, Loren Data need only identify a geographic market that could meet this criteria. Loren Data seems determined, however, to comply with this straightforward pleading requirement in the most circuitous fashion. As GXS notes, neither the original complaint nor the supplemental statement of facts in the amended complaint contain a clear statement of the relevant geographic market. Instead, the amended complaint contains allegations such as "Loren **[*20]** Data's market is primarily (more than 95%) with trading partners in North America," (ECF No. ¶ 6), and that "50% of [GXS'] customers were based in the United States." Loren Data also alleges, however, that a "smaller portion of Loren Data's business was in the United Kingdom" (*id.*) and references GXS' VAN in the UK. (*Id.* ¶ 8). From these allegations it is not entirely clear whether Loren Data maintains that the relevant geographic market is North America or that the relevant market is North America and the United Kingdom. Additionally, while the original complaint included a section entitled "Relevant Market" (ECF No. 1, at 2-4), this section did not delineate the geographic limits of the relevant market; it merely discussed the EDI industry in generic terms. It is only in Loren Data's opposition to the motion to dismiss that it unequivocally states "Loren Data competes with GXS in the EDI market in North America." (ECF No. 24). Ordinarily a plaintiff cannot rely on allegations not made in the actual complaint to survive a motion to dismiss. In this case, one could discern that North America is the relevant market from the allegations in the complaint, but it is not the only conclusion **[*21]** that could be drawn. But because Loren Data's claim has other failings, it need not be determined whether the inconclusive statements as to geographic market are adequate to state a claim.

With respect to the product market, competing products are in the same market if they are readily substitutable for one another. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Well-defined submarkets may also exist within a broader market, "which, in themselves, constitute product markets for antitrust purposes." *Id.* (citing *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957))*. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

Here, Loren Data identifies the Electronic Data Interchange **[*22]** industry as the relevant product market in which GXS allegedly possesses monopoly power by controlling at least 50% of the market. (ECF No. 1 ¶¶ 5, 35, and B). The complaint further explains details regarding the Electronic Data Interchange industry and its contours. Whether this industry constitutes a submarket for antitrust purposes is a factual allegation that ultimately should be determined by the factfinder, but at this stage it cannot be said that Loren Data has failed to plead a relevant product market in terms sufficient to state a claim.

GXS also argues that control of only fifty percent of the market is inadequate as a matter of law to constitute a monopoly. (*See* ECF No. 9-1, at 37 (citing *United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*, *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989)*, *Spirit Airlines, v. Nw. Airlines, 431 F.3d 917, 935-36 (6th Cir. 2005))*. It is true that some courts have held that 50% or 60% of market share, absent other relevant factors, is not enough to demonstrate the existence of monopoly power. *See, e.g.,* *PepsiCo, Inc. v. Coca-Cola, Co., 315 F.3d 101, 109 (2d Cir. 2002)* ("absent **[*23]** additional evidence, such as an ability to control prices or exclude competition, a 64 percent market share is insufficient to infer monopoly power."); *In re Se. Milk Antitrust Litig., 730 F.Supp.2d 804, 822 (E.D.Tenn. 2010)* ("As a general rule, however, monopoly power requires proof of more than 60% market power."). Monopoly power is a factual determination, however, and courts consider many factors beyond percentage of market share including: "the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods on services from outside the market, and consumer demand factors." *Weiss v. York Hosp., 745 F.2d 786, n.72 (3d Cir. 1984)* (citing. L. Sullivan, *Handbook of the Law of Antitrust* §§ 22-32 (1977)), *cert. denied*, *470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)*. Loren Data's complaint included allegations relating to many of these factors, and, thus, the claim cannot be dismissed based on Loren Data's failure to allege a market share greater than 60%. *See also* *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 443 (4th Cir. 2011)* ("Because market definition is a deeply fact-intensive inquiry, **[*24]** courts hesitate to grant motions to dismiss for failure to plead a relevant product market.") (citing cases).

2) Willful Exclusionary Conduct

The possession of monopoly power does not violate *section 2* of the Sherman Act unless it is accompanied by an element of willful anticompetitive conduct. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Where the alleged anticompetitive conduct is conduct that would constitute a *per se* violation of section 1 of the Sherman Act, willfulness is presumed. For other alleged violations, a plaintiff must demonstrate that the defendant did not have legitimate business reasons for its conduct or that the defendant engaged in exclusionary conduct manifesting "a willingness to forsake short-term profits to achieve an anticompetitive end" and "a distinctly anticompetitive bent." *Id. at 409*. Loren Data alleges that GXS denied Loren Data reasonable access to the GXS network of clients and intentionally used its position as an essential facility to control EDI market prices and to harm and eliminate horizontal competition. (ECF No. 1 ¶ 36). In its motion to dismiss, GXS argues that the alleged facts demonstrate that GXS **[*25]** did not refuse to deal with Loren Data because GXS had legitimate business reasons for its actions and because the GXS VAN is not an essential facility. (ECF No. 9-1, at 21-27).

First, as to the allegation that GXS denied Loren Data reasonable access to the GXS network of clients, "as a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *See* *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. The Supreme Court has "held that a firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a sufficient level of service." *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 129 S.Ct. 1109, 1115, 172 L. Ed. 2d 836 (2009)* (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. The Court further held that a firm "certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." The rationale behind this rule was set forth in *Trinko*:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such **[*26]** firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.

540 U.S. at 407.

Nevertheless, "[t]here are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability." *Pacific Bell Tel. Co., 129 S.Ct. at 1119* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. In *Aspen Skiing*, the Court found that a rival's refusal to deal with its competitor violated *section 2* because the defendant's conduct revealed a distinctly anticompetitive bent. *472 U.S. at 608-611*. In other words, *Aspen Skiing* recognized an affirmative duty to deal where refusal to do so would result in an important change in a competitive market with negative consequences **[*27]** for consumers. In *Aspen Skiing*, the defendant owned three out of the four mountain ski areas in the Aspen region. For many years the defendant had cooperated with the owner of the fourth ski area to offer a combined multi-day, all area ski ticket with proceeds split in accordance with purchasers' use of lifts at the four areas. Over time the defendant demanded a greater percentage of the profits and ultimately cancelled the joint ticket and refused even to sell lift tickets at retail price to the owner of the fourth area. In upholding the jury finding that defendant's conduct violated *section 2*, the Court reasoned that "the jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id. at 608*.

A claim of refusal to deal is only cognizable if it harms competition generally and not solely the competitor challenging the monopolist's action. *See* *Rural Tel. Serv. v. Feist Publ'ns, 957 F.2d 765, 768 (10th Cir.)*, *cert. denied*, *506 U.S. 984, 113 S. Ct. 490, 121 L. Ed. 2d 429 (1992)*; *U.S. v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* ("[alleged anticompetitive conduct] must **[*28]** harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."). In addition, the duty to deal is more likely to be recognized where the defendant is ending a long-standing relationship with a competitor, *see, e.g.,* *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 991 (9th Cir. 1993)*, or where the monopolist's aid is essential. *See, e.g.,* *Olympia Equip. Leasing Co. v. Western Union Tel., 802 F.2d 217, 219 (7th*

Cir. 1986) ("A monopolist is not required to subsidize its competitors by doing their selling for them."), *cert. denied*, *480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987)*.

As its primary argument for dismissal, GXS argues that it has not refused to deal with Loren Data. GXS notes that the complaint identifies three current connections between the Loren Data VAN and the GXS VAN, (ECF No. 9-1, at 23 (citing ECF No. 1 ¶ 10)), and that Loren Data has not alleged that GXS will discontinue all connections in the future, only that GXS wants to renegotiate the terms and may charge more for access to its VAN. (*Id.* at 24). In response, Loren Data contends that GXS has refused to deal on certain occasions by refusing Loren Data's requests for interconnects **[*29]** and by countering the $3500 per month offer of InovisWorks to connect to GXS through its VAN with an offer to use GXS' mailbox for $13,000 per month. (ECF No. 14, at 13).

As a general matter, GXS is correct that a refusal to deal at the terms and conditions desired by a plaintiff does not violate the Sherman Act. *See* *Abcor Corp. v. AM Int'l Inc., 916 F.2d 924, 929-30 (4th Cir. 1990)* (holding that defendant had not engaged in anti-competitive behavior when it enacted policy that shifted costs of maintaining inventory to a competitor who had previously gotten a "free ride"); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544-45 (4th Cir.)*, *cert. denied*, *502 U.S. 814, 112 S. Ct. 64, 116 L. Ed. 2d 39 (1991)*; *Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1296 (11th Cir. 2004)* ("*Section 2* of the Sherman Act does not require [defendant] to give its product freely to its competitors."). There need not be an outright refusal to deal, however, if a defendant offers only unreasonable terms for access to an essential facility under its control. *Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 179-80 (2d Cir. 1990)*. Thus, while Loren Data's complaint has not stated facts to support the allegation **[*30]** that GXS has refused entirely to deal, if Loren Data has pleaded facts to establish that GSX' VAN is an essential facility and that the terms offered by GSX were unreasonable, its claim for monopolization may survive.

The essential facilities doctrine has never been expressly rejected or adopted by the Supreme Court, *Trinko, 540 U.S. at 410*, but has been cited and relied upon by the courts of appeal. *See, e.g., MCI Commc'ns v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.)*, *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*; *Laurel Sand & Gravel, Inc., 924 F.2d at 544*; *Delaware & Hudson Ry. Co., 902 F.2d at 179-80*. In order to establish a violation of *section 2* using this doctrine, four elements must be proven: (1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility. *Laurel Sand & Gravel, 924 F.2d at 544*. To be essential, "a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a **[*31]** severe handicap on potential market entrants." *Fishman v. Estate of Wirtz, 807 F.2d 520, 539 (7th Cir. 1986)*. Other courts have explained that the facility must not be "merely helpful, but vital to the claimant's competitive viability," *Am. Online, Inc. v. GreatDeals.Net, 49 F.Supp.2d 851, 862 (E.D.Va. 1999)*, and that a plaintiff must show "more than inconvenience or even some economic loss" stemming from the lack of access to the facility to establish that it is essential. *Advance Health-Care Servs. v. Giles Mem'l Hosp., 846 F.Supp. 488, 498 (W.D.Va. 1994)*. Moreover, the owner of an essential facility is not obligated to make it available under whatever terms the competitor wishes; the owner need only offer access under reasonable terms. *See* *Laurel Sand & Gravel, Inc., 924 F.2d at 544*. Terms are not unreasonable simply because they will reduce a competitor's profits. *Id.* Indeed as the Seventh Circuit has explained, "the most economical route is not an essential facility when other routes are available." *Midwest Gas Servs., Inc. v. Indiana Gas Co., Inc., 317 F.3d 703, 714 (7th Cir. 2003)* (citing *Endsley v. City of Chicago, 230 F.3d 276, 283 (7th Cir. 2000))* (holding that defendant's **[*32]** refusal to allow plaintiff to interconnect to its gas pipeline network where other routes were available to transport the gas to its end destination did not constitute denial of access to an essential facility).

Here, Loren Data has not alleged facts to establish that GXS is liable pursuant to the essential facilities doctrine. Although Loren Data tries to argue that without an interconnect to the GSX VAN it cannot continue its business operations, the alleged facts do not demonstrate that the GXS VAN is essential or that Loren Data has not been offered reasonable means of access. First, Loren Data acknowledges that there are at least 36 VANs aside from GXS, as well as other means of transferring EDI from one trading partner to another. In addition, the complaint alleges that Loren Data has successfully worked around GXS' refusal to provide an interconnect for the past ten years, by using a metered mailbox and by interconnecting with other VANs that can interconnect with GXS' customers. There are also no alleged facts from which one can conclude that the terms offered by GXS for Loren Data to connect via a commercial mailbox are unreasonable.

b. Attempted Monopoly

In contrast to claims **[*33]** of actual monopolization, to establish attempted monopoly under *section 2* a plaintiff must demonstrate that the defendant had specific intent to monopolize and a dangerous probability of success at achieving monopoly power. *In re Microsoft Antitrust Litig., 333 F.3d 517, 534 (4th Cir. 2003)*. Specific intent may be inferred from the defendant's anticompetitive practices. *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166 (4th Cir. 1992)* (citing *Abcor, 916 F.2d at 927*; *Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 802 (8th Cir. 1987))*. But where there are legitimate business reasons motivating a refusal to deal, the requisite intent for an attempt to monopolize claim is not met. *See* *J.H. Westerbeke Corp. v Onan Corp., 580 F.Supp. 1173 (D.Mass. 1984)*.

GXS contends that Loren Data has failed to state a claim for attempted monopolization because it has not alleged facts to show specific intent or a dangerous probability of success. As discussed above, the conduct that Loren Data alleges does not demonstrate that GSX had an intent to monopolize. GSX does business with other VAN providers, large and small, including offering them interconnects. Loren **[*34]** Data has also not alleged facts to establish a dangerous probability that GXS will succeed in establishing a monopoly. The requirements for establishing a dangerous probability of success were set forth in *M & M Medical Supplies and Service, Inc.*. There the Fourth Circuit explained:

> The third element of attempted monopolization, a dangerous probability of success, must be shown to be substantial and real. Market share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown. Conversely, weak evidence of the other two elements requires a showing of significant market share. A rising share may show more probability of success than a falling share. Other factors must be considered, such as ease of entry, which heralds slight chance of success, or exclusionary conduct without the justification of efficiency, which enhances the likelihood of success.

981 F.2d at 168 (citing generally 3 Philip Areeda & Donald F. Turner, ***Antitrust Law*** ¶ 835, at 346-48 (1978)).

Loren Data alleges that GXS has conducted "an aggressive campaign" **[*35]** in the last decade to control and monopolize the EDI communications market and identifies two examples in support: (1) GXS' acquisition of a division of IBM in 2005; and (2) its merger with Inovis in 2010. (ECF No. 1 ¶ 7). Putting aside Loren Data's characterizations, two acquisitions in a ten year period with no allegation of plans for future mergers or acquisitions do not suggest that GXS is on the path to market domination. Loren Data further attempts to characterize GXS' refusal to grant Loren Data an interconnect as the latest iteration of GXS' monopolization goals. The problem with this argument is that Loren Data simultaneously alleges that GXS has granted interconnects to every other VAN, large or small, and that GXS has refused to grant an interconnect to Loren Data for the past ten years. (*Id.* ¶ 6). GXS is not likely to gain monopoly control over the industry if it refuses to deal with only one of 36 available VAN networks. Moreover the fact that GXS has granted interconnects to so many other VANs makes it unlikely that GXS' denial of an interconnect to Loren Data will have a negative impact on competition in the relevant market.

For all these reasons, Loren Data has not stated **[*36]** a claim for monopolization or attempted monopolization under *section 2* of the Sherman Act.

B. Maryland State Law Claims

GXS argues that if the federal claims are dismissed, the state law claims must also be dismissed for lack of subject matter jurisdiction. GXS argues, first, that Loren Data did not allege supplemental jurisdiction over the state law claims and, second, that once the federal antitrust claims are dismissed there is no reason for the court to exercise jurisdiction over the state law claims. (ECF No. 9-1, at 43-44). Loren Data did not respond to these arguments in its opposition.

Counts IV, V, and VI of Loren Data's complaint arise under Maryland state law. Title *28 U.S.C. § 1367* grants federal courts supplemental jurisdiction over state law claims that are related to claims for which the court has original jurisdiction. GXS argues that Loren Data's failure to invoke this statute in its complaint is fatal and precludes the court from exercising jurisdiction over the state law claims. Ordinarily a party should provide "a short plain statement of the grounds upon which the court's jurisdiction depends." *Pinkley Inc. v. City of Frederick, 191 F.3d 394, 399 (4th Cir. 1999)* (citing **[*37]** *Fed.R.Civ.P. 8(a)(1)*), *cert. denied*, *528 U.S. 1155, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000)*. The Fourth Circuit went on to note in *Pinkley*:

> there is some authority that in the absence of an affirmative pleading of a jurisdictional basis a federal court may find that it has jurisdiction if the facts supporting jurisdiction have been clearly pleaded. 'The pleading can either refer to the appropriate jurisdictional statute or contain factual assertions that, if proved, establish jurisdiction.'

Id. (quoting 2 *Moore's Federal Practice § 8.03[3]* (3d ed. 1997)). Consequently, Loren Data's failure to invoke *28 U.S.C. § 1367* does not mandate dismissal of its state law claims. Furthermore, although diversity jurisdiction is not referenced in the body of its complaint, Loren Data's civil cover sheet indicates its intent to invoke diversity jurisdiction, identifies the parties as having diverse citizenship, and states a total amount in controversy in excess of $75,000. (*See* ECF No. 1-1). The complaint also alleges facts to support diversity jurisdiction for some claims. For this reason, the merits of Loren Data's state law claims should be considered.

1. Maryland ***Antitrust Law*** Claim

Count IV alleges a violation of Maryland's ***antitrust*** **[*38]** ***law***, Md. Code Ann. § Com. Law §§ 11-204(a)(1)-(3). *Sections 11-204(a)(1)* and *11-204(a)(2)* mirror sections 1 and 2 of the Sherman Act and are interpreted concordantly with the Sherman Act. [3] *havePOWER, LLC v. Gen. Elec. Co., 183 F. Supp. 2d 779, 785 n.4 (D.Md. 2002)* (recognizing that *Md. Code Ann., Com. Law § 11-202(a)(2)* expressly states the General Assembly's intent that when construing the antitrust subtitle, courts should "be guided by the interpretation given by the federal courts to the various federal statues dealing with the same or similar matters, including . . . *15 U.S.C. §§ 1 though 7*."); *Natural Design, Inc. v. Rouse Co., 302 Md. 47, 53 and 67, 485 A.2d 663 (1984)* ("*Section 11-204(a)(1)* of the Maryland Act is essentially the same as § 1 of the Sherman Antitrust Act" and "*Section 11-204(a)(2)* is analogous to *§ 2* of the Sherman Act"). When an antitrust claim fails under federal law, that claim will also fail under the analogous Maryland state ***antitrust law***. *Hinkleman v. Shell Oil Co., 962 F.2d 372, 379 (4th Cir. 1992)*. Accordingly, Loren Data's claims that GXS has violated *§§ 11-204(a)(1)* and (2) must be dismissed.

Loren Data has not alleged a violation of federal law that directly parallels *Md. Code Ann., Com. Law § 11-204(a)(3)*. This subsection provides that one may not:

> Directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may:
> (i) Substantially lessen competition;
> (ii) Tend to create a monopoly in any line of trade or commerce; or
> (iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them[.]

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[3] Md. Code Ann. § Com. Law *§ 11-204(a)(1)* provides that a person may not "[b]y **[*39]** contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce." *§ 11-204(a)(2)* provides that a person may not "[m]onopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the State, for the purpose of excluding competition or of controlling, fixing, or maintaining prices in trade or commerce."

This subsection mirrors section 13(a) of the Robinson Patman Act, *15 U.S.C. § 13(a)*. *See* *Soth v. Baltimore Sun Co., 4 F. Supp. 2d 417, 420 (D.Md. 1996)*; *Berlyn, Inc. v. Gazette Newspapers, 223 F.Supp.2d 718, 741-42 (D.Md. 2002)*. **[*40]** To state a claim for price discrimination under the Robinson Patman Act, a plaintiff must allege that (1) the commodity or service was sold in interstate commerce; (2) the services or goods sold to plaintiff were of the same grade or quality as those sold to others; (3) the defendant discriminated in price between plaintiff and others; and (4) the discrimination had a prohibited effect on competition. *Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*; *Mikeron, Inc. v. Exxon Co., 264 F.Supp.2d 268, 275 (D.Md. 2003)*. The same requirements apply to claims stating a violation of *§ 11-204(a)(3)* of Maryland's ***antitrust law***, absent the requirement of an interstate nexus.

Here, Loren Data has failed to state a claim under *§ 11-204(a)(3)* because it has not alleged a prohibited effect on competition. With respect to this count, Loren Data's allegation is nothing more than a recitation of the statutory language with no additional facts to distinguish this claim from any of the other antitrust violations alleged. And as discussed above, Loren Data has not alleged facts that show that GXS has or is attempting to obtain monopoly power, or that GXS' actions have had or will have a negative effect **[*41]** on competition. For all these reasons, count IV will be dismissed.

2. Tortious Interference

Count V alleges that GXS tortiously interfered with Loren Data's business relationships. A tortious interference claim under Maryland law requires proof of intentional acts "done with the unlawful purpose to cause . . . damage and loss to the plaintiffs in their lawful business, without right or justifiable cause on the part of the defendants which constitutes malice[.]" *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc., 336 Md. 635, 655, 650 A.2d 260 (1994)* (internal quotations omitted). "Wrongful or unlawful acts include common law torts and violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith." *K & K Mgmt. v. Lee, 316 Md. 137, 166, 557 A.2d 965 (1989)* (internal quotations omitted). The tort does not lie simply because the defendant's breach of contract "would foreseeably impinge upon a contracting party's economic relations with others." *Alexander & Alexander Inc., 336 Md. at 656*.

The complaint does not identify the specific wrongful acts upon which Loren Data is relying **[*42]** for its claim. GXS contends that the only potential wrongful acts alleged are the antitrust violations and because these claims are being dismissed the tortious interference claim also fails. (ECF No. 9-1, at 46-47). Loren Data concedes that its antitrust allegations were one basis for its wrongful interference claim but argues that the complaint contains other allegations of conduct that could constitute wrongful interference. (ECF No. 14, at 28). Specifically, Loren Data lists: (1) GXS' general denial of the industry standard settlement interconnect; (2) GXS' breach of Loren Data's contract with Inovis by discontinuing Loren Data's interconnect with Tradanet in the United Kingdom; (3) GXS' failure to service IBM's contract with the Department of Defense under which Loren Data was a subcontractor; (4) GXS' interference with Loren Data's client relations; (5) and GXS persistent refusal to grant an appropriately configured interconnect after settlement in the Covisint matter. (*Id.*). None of these allegations identify conduct that has been recognized as wrongful or unlawful for the purpose of stating a claim for tortious interference. Loren Data's failure to allege a wrongful act is **[*43]** fatal to its tortious interference claim.

3. Breach of Contract

Finally, count VI alleges that GXS is liable for breach of contract. The original complaint alleged only that GXS "is in breach of its contracts with the Plaintiff both in its long-term relationship and in its current contract with Inovis, Inc." (ECF No. 1 ¶ 45). The supplemental statement of facts in the amended complaint elaborates on this claim and identifies two specific contracts that GXS allegedly breached. (ECF No. 13 ¶ 11). For the first identified contract, Loren Data alleges damages of $24,832.49; no amount of damages is alleged for breach of the second contract.

Assuming that Loren Data has alleged adequate facts to state a claim for breach of contract, it has not alleged adequate damages for the court to exercise independent diversity jurisdiction over this count. *28 U.S.C. § 1332(a)* gives federal district courts diversity jurisdiction only for civil actions where the amount in controversy "exceeds the sum or value of $75,000." Count VI alleges an amount of damages significantly below the statutory threshold. Typically claims can be aggregated to satisfy the minimum threshold, but because the remainder of Loren **[*44]** Data's counts will be dismissed for failure to state a claim, and count VI does not satisfy the minimum threshold on its own, the court merely possesses potential supplemental jurisdiction over this count. *Shanaghan v. Cahill, 58 F.3d 106, 109-10 (4th Cir. 1995)*. As noted therein, *28 U.S.C. § 1367(c)(3)* provides that "the district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." Dismissal is favored in cases turning primarily on questions of state law, because "[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Particularly in a case, such as this one, before trial or even discovery, has begun, "the balance of factors . . . point[s] toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*; *see also* *Taylor v. Giant Food, Inc., 438 F.Supp.2d 576, 580 (D.Md. 2006)*.

Thus, **[*45]** the breach of contract count will be dismissed without prejudice for lack of subject matter jurisdiction. Loren Data will be free to pursue this claim upon filing suit in an appropriate state court.

IV. Conclusion

For the foregoing reasons, the motion to dismiss filed by Defendant GXS, Inc. will be granted. A separate order will follow.

/s/ DEBORAH K. CHASANOW

United States District Judge

Black v. JP Morgan Chase & Co.

United States District Court for the Western District of Pennsylvania

August 10, 2011, Decided; August 10, 2011, Filed

Civil Action No. 10-848

Reporter

2011 U.S. Dist. LEXIS 103727 *; 2011 WL 4102802

KARIN J. BLACK, individually and on behalf of the Classes, Plaintiff, v. JP MORGAN CHASE & CO., et al., Defendants.

Subsequent History: Magistrate's recommendation at *Black v. JP Morgan Chase & Co., 2011 U.S. Dist. LEXIS 99428 (W.D. Pa., Aug. 25, 2011)*

Adopted by, Motion granted by, Claim dismissed by, Request denied by *Black v. JP Morgan Chase & Co., 2011 U.S. Dist. LEXIS 103621 (W.D. Pa., Sept. 14, 2011)*

Core Terms

VantageScore, scores, lenders, Bureau, pricing, allegations, consumer, conspiracy, motion to dismiss, terms, customers, personal jurisdiction, Defendants', credit bureau, submits, competitors, recommended, factual allegations, price fixing, letters, credit information, antitrust, consumer credit, anti trust law, website, subsidiary, lending, sharing, argues, credit history

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN1[] **Sherman Act, Claims**

See *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN2[] **Sherman Act, Claims**

See *15 U.S.C.S. § 22*.

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

HN3[] Motions to Dismiss, Failure to State Claim

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* tests the legal sufficiency of a complaint. The complaint must be dismissed for failure to state a claim if it does not allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when a plaintiff pleads factual content that allows a court to draw the reasonable inference that a defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that the defendant has acted unlawfully. Where the complaint pleads facts that are merely consistent with the defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

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

HN4[] Motions to Dismiss, Failure to State Claim

Conclusory or bare-bones allegations will not survive a motion to dismiss for failure to state a claim: threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. To prevent dismissal, all civil complaints must set out sufficient factual matter to show that the claim is facially plausible. This then allows a court to draw the reasonable inference that a defendant is liable for the misconduct alleged. A plaintiff must show that the allegations of his or her complaints are plausible.

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

HN5[] Motions to Dismiss, Failure to State Claim

A two-prong test is applied by a district court in deciding a motion to dismiss for failure to state a claim. First, the district court must accept all well-pleaded facts as true and discard any legal conclusions contained in the complaint. Next, the court must consider whether the facts alleged in the complaint sufficiently demonstrate that the plaintiff has a plausible claim for relief. To survive a motion to dismiss, the complaint must show an entitlement to relief through its facts.

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

HN6[] Motions to Dismiss, Failure to State Claim

Courts generally consider only the allegations of a complaint, its attached exhibits, and matters of public record in deciding motions to dismiss for failure to state a claim. Factual allegations within documents described or identified in the complaint may also be weighed if the plaintiff's claims are based upon those documents. A district court may consult those documents without converting a motion to dismiss into a motion for summary judgment.

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

HN7[] Motions to Dismiss, Failure to State Claim

For purposes of a motion to dismiss a complaint for failure to state a claim, a court assumes all factual allegations to be true.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN8[] Sherman Act, Claims

Section 1 of the Sherman Act makes illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 1. Moreover, § 1 prohibits only unreasonable restraints of trade. Thus, because § 1 of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.

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

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

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

HN9[] Price Fixing & Restraints of Trade, Vertical Restraints

In determining whether a practice restrains trade in violation of 15 U.S.C.S. § 1, a court will apply one of two standards, depending on the nature of the alleged violation: (1) a per se rule or (2) the rule of reason. The accepted standard for determining whether a business practice restrains trade in violation of § 1 is the rule of reason. Under this standard, the court must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. Another significant consideration is whether the businesses involved have market power. By way of example, the rule of reason standard has been applied to vertical agreements, i.e., allegations of agreements between entities at different market levels that restrain trade.

Antitrust & Trade Law > Sherman Act > Claims

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

HN10[] Sherman Act, Claims

In applying the rule of reason analysis, there are four elements that an antitrust plaintiff asserting a 15 U.S.C.S. § 1 claim must prove: (1) that defendants contracted, combined, or conspired with each other; (2) that the combination or conspiracy produced adverse anticompetitive effects within the relevant product and geographic markets; (3) that the objects of and conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

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

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

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

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

HN11[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The per se rule applies to a narrow category of restraints of trade that have such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit that they are deemed unlawful per se. For example, horizontal restraints, i.e., agreements between competitors at the same level of market structure, such as price fixing agreements and group boycotts, are deemed to be unlawful per se.

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

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

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

HN12[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Resort to per se rules is confined to restraints of trade that would always or almost always tend to restrict competition and decrease output. To justify a per se prohibition a restraint must have manifestly anticompetitive effects, and lack any redeeming virtue. As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue and only if the courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. Courts express reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. A departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

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

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

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

HN13[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In the situation where the evidence consists of mere exchanges of information, the presumption that price fixing agreements are per se unlawful disappears. Exchanges of information are not considered a per se violation because such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. Consequently, courts evaluate such exchanges of information under a rule of reason analysis.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] Sherman Act, Claims

The very essence of a *15 U.S.C.S. § 1* antitrust claim is the existence of an agreement, because *§ 1* liability is predicated upon some form of concerted action. Unilateral activity by a defendant, no matter the motivation, cannot give rise to a *§ 1* violation. This is because a business may deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Antitrust & Trade Law > Sherman Act > Claims

HN15[] Sherman Act, Claims

To allege an agreement in restraint of trade between two or more persons or entities, a plaintiff must allege facts plausibly suggesting a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

HN16[] Sherman Act, Claims

A plaintiff may prove the existence of concerted action in restraint of trade among defendants and other parties by relying on either direct or circumstantial evidence. Direct evidence is explicit and requires no inferences to establish the proposition or conclusion being asserted. However, because direct evidence is often not available, the plaintiff may rely solely on circumstantial evidence, and any reasonable inferences that may be drawn from such evidence, to prove a conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

HN17[] Sherman Act, Claims

One type of circumstantial evidence from which a fact finder may infer an agreement in restraint of trade is parallel conduct or conscious parallelism. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions, is not in itself unlawful.

Antitrust & Trade Law > Sherman Act > Claims

HN18[] Sherman Act, Claims

An allegation of parallel conduct and a bare assertion of conspiracy in restraint of trade does not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a *15 U.S.C.S. § 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a *§ 1* claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a *§ 1* complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.

Antitrust & Trade Law > Sherman Act > Claims

HN19[] **Sherman Act, Claims**

Where an antitrust plaintiff intends to prove her *15 U.S.C.S. § 1* claim based on circumstantial evidence of parallel conduct, she must also plead plus factors. Because parallel conduct is just as likely to be in line with a wide array of rational and competitive business judgments unilaterally prompted by common market perceptions, the courts require the antitrust plaintiff to plead facts suggesting that defendants were not acting independently. Thus, the plaintiff relying on parallel conduct must allege facts that, if true, would establish at least one plus factor, since plus factors are, by definition, facts that tend to ensure that courts punish concerted action--an actual agreement--instead of the unilateral, independent conduct of competitors.

Antitrust & Trade Law > Sherman Act > Claims

HN20[] **Sherman Act, Claims**

Although not a finite list, three plus factors may nudge the allegations of parallel conduct across the line from a conceivable to a plausible *15 U.S.C.S. § 1* antitrust claim: (1) evidence that a defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy. In evaluating the first two factors, the evidence must go beyond indicating that market behavior is interdependent and characterized by conscious parallelism. With regard to the third plus factor, evidence implying a traditional conspiracy consists of noneconomic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

Antitrust & Trade Law > Sherman Act > Claims

HN21[] **Sherman Act, Claims**

Examples of parallel conduct allegations that would be sufficient to state a *15 U.S.C.S. § 1* antitrust claim include parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties, or conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement. In addition, complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN22[] **Sherman Act, Claims**

Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud. But a court cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned.

Antitrust & Trade Law > Sherman Act > Claims

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

HN23[] **Sherman Act, Claims**

The public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influences free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell.

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

HN24[] **Sherman Act, Scope**

It is not the antitrust purpose or the intent of the Sherman Act to inhibit the intelligent conduct of business operations, nor is its purpose to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated.

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

HN25[] **Sherman Act, Scope**

Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Act neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate commerce. They would not be any the more so merely because they became stockholders in a corporation or joint owners of a trade journal, engaged in the business of compiling and publishing such reports.

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

HN26[] **Sherman Act, Scope**

Trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption as did these defendants and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

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

HN27[] **Sherman Act, Scope**

The exchange of information between business firms concerning the creditworthiness of customers does not violate the Sherman Act. Unlike exchanges regarding prices, which usually serve no purpose other than to suppress competition and hence fall within the ban of the Sherman Act, the dissemination to competitors of information concerning the creditworthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers. Given the legitimate function of such data, it is not a violation of *15 U.S.C.S. § 1* to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement.

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

HN28[] **Sherman Act, Scope**

Exchanges of credit information do not constitute an antitrust violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, so long as the information exchanged does not include any recommendations or agreement as to how the exchanged information should be used.

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

HN29[] **Sherman Act, Scope**

In cases involving the exchange of information, price stabilization may result from factors that do not constitute an antitrust violation, such as obtaining a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Act neither repeals economic laws or nor prohibits the gathering and dissemination of information. Thus, the presence of price stabilization alone cannot prove concerted action on the part of the alleged conspirators.

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

HN30[] **Sherman Act, Scope**

Under the federal antitrust laws, decisions involving credit have always required and produced totally different analyses from those involving prices. This is why decisions regarding agreements pertaining to prices and exchanges of price information are consistently held to violate the Sherman Act, while at the same time the exchange of information between competitors regarding the creditworthiness of customers does not violate any provision of the federal antitrust laws. Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud, so it cannot be declared to be an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned. As long as the exchange of credit information is not accompanied by any agreements relating to the extension of credit, such as an agreement to deny credit to one or more of the competitors' customers, no violation of the antitrust laws has occurred.

Banking Law > Consumer Protection > Fair Credit Reporting > Consumer Reports

HN31[] **Fair Credit Reporting, Consumer Reports**

See *15 U.S.C.S. § 1681b(a)(3)(A)*, *(B)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN32[] **Amendment of Pleadings, Leave of Court**

Fed. R. Civ. P. 15(a) provides that leave to amend a pleading shall be freely given when justice so requires. Grounds that would justify denying leave to amend include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment. The grant or denial of leave to amend is within the sound discretion of the district court; however, failure to provide a reason for denying leave to amend is considered an abuse of that discretion.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN33[] **Pleadings, Amendment of Pleadings**

See *Fed. R. Civ. P. 15(a)(1)(A)*, *(B)*

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN34[] Amendment of Pleadings, Leave of Court

After the expiration of the time set forth in *Fed. R. Civ. P. 15(a)(1)*, a party may amend its pleading prior to trial only with the opposing party's written consent or with leave of court. *Rule 15(a)(2)*. *Rule 15(a)(2)* further provides that leave to amend should be freely given when justice requires.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN35[] Amendment of Pleadings, Leave of Court

Where leave of court is required to amend a complaint, the plaintiff must request leave to amend and attach the proposed amended complaint to the request. Failure to attach the proposed amendment is fatal to the request.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN36[] Motions to Dismiss, Failure to State Claim

It is hardly error for a district court to enter final judgment after granting a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim when the plaintiff has not properly requested leave to amend its complaint.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

HN37[] Existence, Distinct & Separate Legal Entity

A parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Thus, the exercise of the control which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary. That control includes the election of directors, the making of by-laws and the doing of all other acts incident to the legal status of stockholders.

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

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

HN38[] Sherman Act, Scope

In order to state a *15 U.S.C.S. § 1* antitrust claim against parent corporations, a plaintiff must set forth facts establishing the parent corporations' direct and independent participation in an alleged conspiracy. However, assertions that the parent corporations participated in the antitrust conspiracy by giving their assent and approval to a subsidiary's conduct, and through their ownership and control of their subsidiary, amount to nothing more than conduct typical of any parent and subsidiary, and thus are insufficient to state a *§ 1* claim against the parent corporations.

Business & Corporate Law > Limited Liability Companies > General Overview

HN39[] **Business & Corporate Law, Limited Liability Companies**

A limited liability company formed under Delaware law is treated for liability purposes like a corporation.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

HN40[] **Piercing the Corporate Veil, Alter Ego**

Activities that constitute standard parent-subsidiary interactions, such as the parent corporation appointing the subsidiary's officers and directors, influencing executive compensation, approving budgets, gathering information about corporate performance, and receiving distributions of subsidiary profits do not reflect daily, operational control that is the sine qua non of an alter ego relationship.

Business & Corporate Law > Limited Liability Companies > Member Duties & Liabilities

HN41[] **Limited Liability Companies, Member Duties & Liabilities**

Allegations of ownership or knowledge alone do not confer liability on the individual members/owners of a limited liability corporation.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN42[] **In Personam Actions, Challenges**

In ruling on a motion to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2)*, a court is required to accept as true all allegations contained in the complaint and view all factual disputes in the plaintiff's favor. However, the scope of the court's review on a *Rule 12(b)(2)* motion is not limited to the face of the complaint, but may include affidavits or other competent evidence submitted by the parties.

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

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > Preponderance of Evidence

HN43[] **In Personam Actions, Challenges**

A plaintiff bears the burden of proving, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction over a defendant. If an evidentiary hearing is not held on the *Fed. R. Civ. P. 12(b)(2)* motion, then the plaintiff need only demonstrate a prima facie case of personal jurisdiction at the preliminary stages of litigation. Once a defendant submits contradictory evidence through an affidavit, the plaintiff may not rest on the allegations in the complaint, but must come forward with affidavits or other competent evidence to show that personal jurisdiction is proper. To satisfy this burden, the plaintiff may not rely on bare pleadings, but must produce competent evidence to establish with reasonable particularity the nature and extent of the defendant's contacts with the forum state. Once the plaintiff has sustained this burden, the *Rule 12(b)(2)* motion will be denied despite any controverting presentation by the defendant.

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

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN44[] **In Personam Actions, Challenges**

In cases where a plaintiff's claim is predicated on a federal statute which authorizes nationwide service of process, courts apply a *Fifth Amendment* due process analysis to personal jurisdiction challenges.

Antitrust & Trade Law > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN45[] **Antitrust & Trade Law**

See *15 U.S.C.S. § 22*.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

HN46[] **In Rem & Personal Jurisdiction, Constitutional Limits**

Under the requirements of the due process component of the *Fifth Amendment*, a court must consider whether the maintenance of a suit (i.e., the exercise of personal jurisdiction over a defendant to the suit) offends traditional notions of fair play and substantial justice. In assessing whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice, the inquiry in the federal court context takes less account of federalism concerns and focuses more on the national interest in furthering the policies of the law(s) under which the plaintiff is suing. Thus, specific personal jurisdiction may be exercised only when the defendant has constitutionally sufficient minimum contacts with the forum, and where subjecting the defendant to the court's jurisdiction comports with 'traditional notions of fair play and substantial justice.

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

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

HN47[] In Personam Actions, Long Arm Jurisdiction

Under Pennsylvania's long-arm statute, codified at *42 Pa. Cons. Stat. § 5322* (2004), Pennsylvania courts are authorized to exercise personal jurisdiction over a person who, directly or through an agent, as to a cause of action arising from such person, engages in certain forum related activities. *§ 5322(a)*. Personal jurisdiction predicated on *§ 5322(a)* falls within the category of personal jurisdiction known as specific jurisdiction, which arises when a defendant has both purposefully directed its activities at residents of the forum state and the action arises from, or is directly related to, the defendant's actions within the forum state.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

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

HN48[] In Rem & Personal Jurisdiction, Constitutional Limits

The Pennsylvania long-arm statute authorizes the exercise of personal jurisdiction to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with Pennsylvania allowed under the Constitution of the United States. *42 Pa. Cons. Stat. § 5322(b)*. Thus, to satisfy due process, the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The minimum-contacts requirement serves the purpose of protecting the defendant against the burdens of litigating in a distant and inconvenient forum by requiring that the defendant's conduct and connection with the forum state be such that the defendant should reasonably anticipate being haled into court there. This framework enables potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. Moreover, a plaintiff cannot unilaterally create the necessary contacts between the defendant and the forum; rather, minimum contacts can arise only by some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

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

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

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

HN49[] In Personam Actions, Consent

A category of personal jurisdiction under which a plaintiff may establish a court's jurisdiction over a defendant is general jurisdiction. The court's general jurisdiction may be invoked where the nonresident defendant's contacts with the forum are continuous and substantial but are not related to a plaintiff's cause of action. To establish personal jurisdiction over a corporation under Pennsylvania's general jurisdiction statute, the plaintiff must demonstrate that the corporate defendant either: (1) is incorporated under or qualifies as a foreign corporation under Pennsylvania law; (2) consents to jurisdiction; or (3) carries on a continuous and systematic part of its general business within Pennsylvania. *42 Pa. Cons. Stat. § 5301(a)(2)*.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

HN50[] In Rem & Personal Jurisdiction, Constitutional Limits

A plaintiff must prove significantly more than mere minimum contacts to invoke a court's general jurisdiction over a defendant. Thus, to satisfy due process, the contacts of a nonresident defendant with the form must be continuous and substantial.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Trademark Law > General Overview

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

HN51[] In Rem & Personal Jurisdiction, Constitutional Limits

Mere ownership of a registered U.S. trademark does not subject a domestic company to personal jurisdiction in every state throughout the United States. To so hold would run afoul of the mandate of the Due Process Clause or the limits on judicial authority that the Clause ensures. Thus, an approach which does not conduct a forum-by-forum analysis, but relies merely on ownership of a registered U.S. trademark as evidence of interstate commerce, violates the Due Process Clause.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

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

HN52[] In Rem & Personal Jurisdiction, Constitutional Limits

Foreseeability alone is not a sufficient benchmark for personal jurisdiction under the Due Process Clause. The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that a defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

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

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

HN53[] In Personam Actions, Doing Business

Merely entering into a licensing agreement with a company that delivers products into the stream of commerce is insufficient to support the exercise of personal jurisdiction.

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

HN54[] **Preliminary Considerations, Jurisdiction**

A plaintiff's request for jurisdictional discovery should be granted if the plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between the party and the forum state. The plaintiff may not, however, undertake a fishing expedition based only upon bare allegations, under the guise of jurisdictional discovery.

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Judges: LISA PUPO LENIHAN, Chief U.S. Magistrate Judge. Judge David Stewart Cercone.

Opinion by: LISA PUPO LENIHAN

Opinion

ECF Nos. 32, 36, 39 & 42

REPORT AND RECOMMENDATION

I.RECOMMENDATION

It is respectfully recommended that the Motion of Defendants JP Morgan Chase & Co. and Bank of America Corporation to Dismiss the Complaint (ECF No. 32) be granted with prejudice. It is further recommended that the

Motion of Defendant Fair Isaac Corporation to Dismiss the Complaint (ECF No. 36) be granted with prejudice. It is further recommended that the Motion of Defendant VantageScore Solutions LLC to Dismiss the Complaint (ECF No. 39) be granted with prejudice. **[*3]** It is further recommended that the Motion of Defendants Trans Union, Experian and Equifax to Dismiss the Complaint (ECF No. 42) be granted with prejudice.[1]

In addition, although not separately filed, Plaintiff requested leave to file an amended complaint in her opposition briefs to each of the above motions. It is respectfully recommended that those requests be denied. It is further recommended that Plaintiff's request for jurisdictional discovery, lodged in her opposition brief to VantageScore Solutions LLC's motion to dismiss, also be denied.

II.<u>REPORT</u>

A.<u>Background and Procedural History</u>

Plaintiff, Karin Black, has filed a purported class action complaint, alleging that the Defendants violated the Sherman Act, *15 U.S.C. §1*. Generally, Black alleges that the Defendants—consumer lenders ("Lenders"), credit reporting agencies ("Credit Bureaus") and credit scoring companies ("Scoring Cos.")—conspired to restrain the availability of consumer loans and inflate or fix **[*4]** the price of that credit by sharing credit history information. Plaintiff also alleges a national boycott of consumers who are unable or unwilling to pay monopolistic prices. (Compl. ¶ 67.)

The Defendant Lenders in this case consist of JP Morgan Chase & Co. ("JP Morgan"), Bank of America Corporation ("BOA"), and Discover Financial Services, Inc. ("Discover"). The Defendant Credit Bureaus consist of Experian Information Solutions, Inc. ("Experian"), Trans Union, LLC ("Trans Union"), and Equifax Credit Information Services, Inc., ("Equifax"). The Scoring Cos. named as Defendants consist of FICO, LLC ("FICO") and VantageScore Solutions, LLC ("VantageScore").

Black commenced this action on behalf of herself and three purported classes of individuals: (1) the "Injunctive Relief Class" - all U.S. persons or entities that obtained consumer loans sold by Defendants; (2) "End Purchaser Loan Damages Class" - all U.S. persons or entities that obtained loans sold by Defendants from January 1951 through the conclusion of the trial in this matter ("Class Period"); and (3) "End Purchaser Credit Reporting Class" - all U.S. persons or entities that had their loan information shared among Defendants during **[*5]** the Class Period (collectively, the "Classes"). She seeks an order declaring that this action be maintained as a class action and declaring Plaintiff as representative of the Classes and her counsel as counsel for the Classes; an order enjoining the Defendants' anti-competitive conduct; and an award of damages for herself and the Classes.

Black invokes this Court's subject matter jurisdiction pursuant to *15 U.S.C. §§ 15* and *26*, and *28 U.S.C. §§1331* and *1337*. She maintains that venue lays in this district under *15 U.S.C. §§15*,[2] *22*,[3] and *26*,[4] and *28 U.S.C. § 1391*,

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[1] The Motion to Compel Arbitration or, in the alternative, Motion to Dismiss the Complaint filed by Discover Financial Services, Inc. (ECF No. 28), will be considered and ruled on in a separately filed Report and Recommendation.

[2] *15 U.S.C. §15(a)* provides in relevant part: ***HN1***[] ". . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the **[*6]** United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, ..."

[3] *Section 22* provides: ***HN2***[] "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." *15 U.S.C. §22*.

[4] *Section 26* does not confer venue in this district, but rather, provides that a "person . . . shall be entitled to sue for and have injunctive relief, *in any court of the United States having jurisdiction over the parties, . . .* ." *15 U.S.C. §26*.

because Defendants transact business within this district, thousands of members of the Class reside in this district, a substantial part of the interstate trade and commerce involved and affected by the alleged violations of the antitrust laws was and is carried on in part within this district, and the acts complained of have had, and will have, substantial anti-competitive effects within this district. (Compl. ¶16.)

In response to the Complaint, Defendants have filed several motions to dismiss under Fed.R.Civ.P. 12(b)(6), arguing that under *Twombly* and its progeny, Plaintiff has failed to allege sufficient facts to show that her antitrust claims against Defendants are plausible. In addition, Defendant VantageScore seeks dismissal of the complaint against it on the basis that this Court lacks personal jurisdiction over it. The motions **[*7]** have been fully briefed and responded to. On February 10, 2011, the Court held oral argument on all of the pending motions. Thus, the motions are ripe for disposition.

B.Legal Standard – Motion to Dismiss Under Fed.R.Civ.P. 12(b)(6)

HN3[] A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint must be dismissed for failure to state a claim if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (rejecting the traditional 12(b)(6) standard set forth in Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)); Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1960, 173 L. Ed. 2d 868 (May 18, 2009) (citing *Twombly*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal at 1949 (citing Twombly at 556). The Supreme Court further explained:

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has **[*8]** acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (citing Twombly at 556-57). The court of appeals has expounded on this standard in light of its decision in Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008) (construing *Twombly* in a civil rights context), and the Supreme Court's recent decision in *Iqbal:*

> **HN4**[] After *Iqbal,* it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 129 S.Ct. at 1949. To prevent dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See* Id. at 1949-50; *see also* Twombly, 505 U.S. at 555, & n. 3.

Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). **[*9]** In light of *Iqbal,* the *Fowler* court then set forth **HN5**[] a two-prong test to be applied by the district courts in deciding motions to dismiss for failure to state a claim. First, the district court must accept all well-pleaded facts as true and discard any legal conclusions contained in the complaint. Fowler, 578 F.3d at 210-11. Next, the court must consider whether the facts alleged in the Complaint sufficiently demonstrate that the plaintiff has a "plausible claim for relief." Id. at 211. To survive a motion to dismiss, a complaint must show an entitlement to relief through its facts. *Id.* (citing Phillips at 234-35).

HN6[] Courts generally consider only the allegations of the complaint, its attached exhibits, and matters of public record in deciding motions to dismiss. Pension Benefit Guar. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). Factual allegations within documents described or identified in the complaint may also be weighed if the plaintiff's claims are based upon those documents. *Id.* (citations omitted). A district court may consult those documents without converting a motion to dismiss into a motion for summary judgment. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

C.The [*10] Complaint

HN7[] For purposes of the motion to dismiss, the Court assumes all factual allegations to be true. Many of the allegations in Plaintiff's Complaint, however, are conclusory, and therefore, will not be considered here.[5]

It appears that the focus of Plaintiff's Complaint is on consumer credit card lending, as Black alleges that she holds credit cards issued by JP Morgan, BOA, and Discover.[6] (Compl., ¶3.) Plaintiff asserts **[*11]** that Defendants JP Morgan, BOA and Discover are among the top ten consumer credit lenders in the United States, and together the top ten lenders control 87.55% of consumer loans.[7] (¶19.) Plaintiff further alleges that Defendants Trans Union, Experian and Equifax constitute the top three credit bureaus that control and store consumer lending information. (Compl. ¶ 20.) Plaintiff contends that together, these Credit Bureaus store and control the credit data of over 85% of all debtors. (*Id.*) According to Plaintiff, Defendants FICO and VantageScore are credit scoring companies that provide a "score" to lenders which is used to price consumer loans, and together they provide over 85% of the credit scores to lenders in the United States. (Compl., ¶21.)

Plaintiff alleges that there has been no or only marginal growth of consumer lending in the last five years. (Compl., ¶23.) According to Plaintiff, since 2007, market share has not shifted more than two percent among competitors. (Compl., ¶ 24.) However, Plaintiff contends interest rates have actually increased in the economic downturn. (Compl., ¶25.)

Plaintiff also alleges that Defendants loan money to consumers throughout the United States and/or share data on such loans. (Compl. ¶ 22.) In addition, Plaintiff alleges that Defendants share their customer data among themselves to set higher prices by reporting and utilizing credit bureaus to distribute information, and derive large profits from submitting the data to competitors. (Compl., ¶¶ 27, 29.) Customer data, such as consumer credit histories, includes information such as balances owed, credit lines offered, interest rates offered, extent of credit debt, product purchasing history, and payment history for each of the lender's customers. (Compl., ¶27.)

According to Plaintiff, although some of the data collected by credit bureaus is publicly available, the majority **[*13]** of the data is collected from lenders' private records. (Compl., ¶ 30.) Plaintiff contends that once a single competitor reports a negative event or a high balance, all lenders are immediately notified, so that all lenders can raise rates and adjust credit in unison. (Compl., ¶ 31.) Credit reporting agencies use private and sensitive data among marketplace competitors and they actively promote and derive profit from assisting all of the competitors in the industry. (Compl., ¶ 32.) Credit bureaus act as information clearing houses holding proprietary data on over 1 billion debtors internationally. (Compl., ¶ 33.) Consumers who choose default over paying higher interest rates are excluded from the credit market for at least seven years. (Compl., ¶ 34.) Credit bureaus also assist in the setting of higher prices by sharing database information in real-time. (Compl., ¶ 35.)

Credit scoring companies use the reported information from credit bureaus to create a derivative score which incorporates all of the consumer's credit data as well as the consumer's profitability. (Compl., ¶ 36.) This score is

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[5] In addition, the Court notes that throughout the complaint, Black continuously refers to "Defendants" without differentiating between which of the Defendants or categories of Defendants allegedly engaged in the specific conduct. It cannot be assumed that all of the Defendants engaged in all of the alleged conduct given that there are distinct differences in their businesses. The Court further notes that many of Plaintiff's allegations do not describe conduct engaged in specifically by the named Defendants in this action, but rather, are stated in more theoretical terms, describing generally conduct engaged in by all consumer lenders, credit bureaus and credit scoring companies. With these caveats in mind, the Court turns to the factual allegations in the Complaint.

[6] Plaintiff does not allege that she holds or held any other type of consumer loan with the Lenders, such as a home mortgage loan or home equity loan or line of credit, and she distinguishes interest rates for consumer lending from interest rates on "lending in other markets including home and business loans." (Compl., ¶ 69.)

[7] According to Plaintiff, the other entities making the list of top ten consumer lenders are Citi, American Express, Capital **[*12]** One, Wells Fargo, HSBC, U.S. Bank, and USAA Savings. (Compl., ¶ 63.)

then distributed to all lenders, who use the scores to identify the most profitable customers **[*14]** and fix rates accordingly. (*Id.*) Customers are allocated into particular risk groups. The higher risk groups are charged more interest ostensibly because the lenders are taking more risk. The availability of insurance and predictability of default rate virtually eliminate this risk. (Compl., ¶38.) Credit scores are actually lowered when consumers pay off credit cards, even though credit risk is reduced by the pay off. (Compl., ¶40.)

All consumer lenders provide loans at a variable interest rate tied to the prime lending rate. (Compl., ¶ 43.) The prime lending rate is a pricing floor which no lender will ever price below, creating a pricing baseline. (*Id.*) The pricing floor baseline is elevated for customers based on the shared credit information. (*Id.*) Defendants rate creditworthiness and set prices for consumer debt for at least the prime rate and on average at 14%, which is twice the rate of lending in other markets including home and business loans, with higher consumer rates exceeding 30%. (Compl., ¶ 69.)

Defendants charge penalty fees for various consumer actions such as exceeding the card credit limit or late payments. (Compl., ¶ 44.) Because consumer data is shared among creditors, **[*15]** the assessment of penalty fees is used to notify the competition that the customer's rate prices can be increased to higher levels. (*Id.*) Defendants have further attempted to obtain supra-competitive prices by incorporating under the laws of states where there are no usury laws, *i.e.,* no upper limit on loan terms. (Compl., ¶ 45.)

On May 5, 2009, JP Morgan sent Plaintiff two letters regarding her two accounts. (Ex. A to Am. Compl., ECF No. 1-2.) In these letters, JP Morgan notified Plaintiff that it was reducing the credit limit on one of her business accounts, and decreasing the credit line on her other account. (*Id.*) JP Morgan further indicated in the letters that its reasons for the decision to decrease Plaintiff's credit limit/line were: "Balance owed on revolving accts too high" and "[c]urrent loan amount on all open accounts." *Id.* With regard to the decrease in her credit line, JP Morgan provided the additional explanation "[s]ufficient credit available with us." *Id.* The letters go on to explain: "This decision was based in whole or in part on information provided by the reporting agency noted below. Other than providing information, this agency played no part in our decision. **[*16]** . . ." *Id.* The reporting agency identified in the May 5, 2009 letters is Equifax. *Id.*

D.JP Morgan & BOA's Motion to Dismiss

Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, Defendants JP Morgan and BOA ("Lenders") move to dismiss the Complaint with prejudice, claiming that Black has failed to plead sufficient facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.[8] The crux of Black's complaint against the Lender Defendants is that they conspired in violation of *Section 1 of the Sherman Act* to restrain the availability of consumer credit and to inflate or fix the price of that credit by sharing credit history information.

HN8[] *Section 1 of the Sherman Act* makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. §1*. Moreover, the Supreme Court has repeatedly held that §1 prohibits only unreasonable restraints **[*17]** of trade. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (citing *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. Thus, "[b]ecause *§ 1 of the Sherman Act* 'does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy,' *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)*, '[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express,' *Theatre Enterprises, 346 U.S., at 540, 74 S.Ct. 257*." *Twombly, 550 U.S. at 553*.

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[8] Defendants Experian, Trans Union, Equifax, VantageScore and FICO join in the motion to dismiss and supporting brief filed by Defendants JPMorgan and BOA and incorporate their arguments by reference.

HN9[] In determining whether a practice restrains trade in violation of §1, a court will apply one of two standards, depending on the nature of the alleged violation: (1) A *per se* rule or (2) the rule of reason. *See* Leegin, 551 U.S. at 885-86. The accepted standard for determining whether a business practice restrains trade in violation of §1 is the rule of reason. Leegin, 551 U.S. at 885 (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)). Under this standard, a court must "decide whether the questioned practice imposes an unreasonable restraint on **[*18]** competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." Khan, 522 U.S. at 10; *see also* Leegin, 551 U.S. at 885 (citing Khan, supra). Another significant consideration is whether the businesses involved have market power. Leegin, 551 U.S. at 885-86 (citations omitted). By way of example, the rule of reason standard has been applied to vertical agreements, *i.e.,* "allegations of agreements between entities at different market levels that restrain trade[.]" Kasada, Inc. v. Access Capital, Inc., No. 01 Civ. 8893 (GBD), 2004 U.S. Dist. LEXIS 25257, 2004 WL 2903776, at *4 (S.D.N.Y. Dec. 14, 2004) (citing Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods. Inc., 129 F.3d 240, 243 (2d Cir. 1997) ("Absent price-fixing between a supplier and distributor, vertical restraints are generally subject to 'rule of reason' analysis.")).

HN10[] In applying the rule of reason analysis, the United States Court of Appeals for the Third Circuit has articulated four elements that an antitrust plaintiff asserting a §1 claim must prove: "(1) that the defendants contracted, combined **[*19]** or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy."[9] In re Baby Food Antitrust Litigation, 166 F.3d 112, 118 (3d Cir. 1999) (citing J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1541 (3d Cir. 1990)) (footnote omitted); *see also* Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010) (quoting Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir.2005)).

On the other hand, HN11[] the *per se* rule applies to a narrow category of restraints that "have such predictable and pernicious anticompetitive effect, and such limited potential for precompetitive benefit that they are deemed unlawful *per se."* Khan, 522 U.S. at 10. For example, horizontal restraints, *i.e.,* agreements between competitors at the same level of market structure, such as price fixing agreements and group boycotts, **[*20]** have been deemed to be unlawful *per se* by the Supreme Court. Kasada, 2004 U.S. Dist. LEXIS 25257, 2004 WL 2903776, at *4 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959) (finding group boycotts unreasonable *per se*); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (finding price fixing unreasonable *per se*); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976) (finding that group boycott is unreasonable *per se* due to its inherently anticompetitive nature, and therefore, always illegal)). Because of the *per se* rule's limited application, the Supreme Court has provided the following guidance on when to apply it:

> HN12[] Resort to *per se* rules is confined to restraints . . . "that would always or almost always tend to restrict competition and decrease output." Business Electronics, supra, at 723, 108 S.Ct. 1515 (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, GTE Sylvania, supra, at 50, 97 S.Ct. 2549, and "lack ... any redeeming virtue," Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (internal quotation **[*21]** marks omitted).
>
> As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason, see Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." Khan, supra, at 10, 118 S.Ct. 275

[9] For purposes of the pending motions to dismiss, only the first and third elements are at issue.

> (internal quotation marks omitted); see also *White Motor Co. v. United States, 372 U.S. 253, 263, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963)* (refusing to adopt a *per se* rule for a vertical nonprice restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply *a per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based **[*22]** upon demonstrable economic effect rather than ... upon formalistic line drawing." *GTE Sylvania, supra, at 58-59, 97 S.Ct. 2549*.

Leegin, 551 U.S. at 886-87.

HN13[] In the situation where the evidence consists of mere exchanges of information, the presumption that price fixing agreements are *per se* unlawful disappears. *In re Baby Food Antitrust Litig., 166 F.3d at 118* (citing *United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n. 16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978))*. "Exchanges of information are not considered a *per se* violation because 'such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* (quoting *Gypsum, supra*). Consequently, courts will evaluate such exchanges of information under a rule of reason analysis. *Id.*

In the case at bar, Plaintiff appears to be proceeding under the *pro se* rule, as she alleges in her complaint that "[t]he agreement among competitors in the lenders' market to share pricing data in the form of credit reports, which are used to coordinate and fix prices as well as promote boycotts is a *per se* violation of the Sherman Antitrust Act, *15 U.S.C. §1*." (Compl. ¶75.) However, the alleged conspiracy between the Lenders, **[*23]** Credit Bureaus and Credit Scoring Companies involves a vertical non-price constraint, and therefore, it is questionable whether the demanding standards necessary to apply the *per se* rule can be met.

Regardless of whether Plaintiffs claim is evaluated under the *per se* rule or the rule of reason, an essential element of her antitrust claim is that there was an unlawful agreement, or conspiracy, among the Defendants. On this point, the court of appeals has opined:

> ***HN14***[] "[t]he very essence of a section 1 claim ... is the existence of an agreement," because "section 1 liability is predicated upon some form of concerted action." Unilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation. *Rossi, 156 F.3d at 465*. This is because a business may "deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)*.

InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003) (quoting *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994))*; *see also In re Baby Food Antitrust Litig., 166 F.3d at 117* ("The existence of **[*24]** an agreement is the hallmark of a Section 1 claim.") (citation omitted). ***HN15***[] "To allege such an agreement between two or more persons or entities, a plaintiff must allege facts plausibly suggesting 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Dentsply Int'l, 602 F.3d at 254* (quoting *Copperweld Corp., 467 U.S. at 771*) (other citation omitted).

The court of appeals further explained that ***HN16***[] a plaintiff may prove the existence of concerted action among the defendants and other parties by relying on either direct or circumstantial evidence. *InterVest, 340 F.3d at 159*. "Direct evidence 'is explicit and requires no inferences to establish the proposition or conclusion being asserted.'" *Id.* (quoting *In re Baby Food Antitrust Litig., 166 F.3d at 118*). However, because direct evidence is often not available, plaintiffs may rely solely on circumstantial evidence, and any reasonable inferences that may be drawn from such evidence, to prove a conspiracy. *Id.* (citing *Rossi, 156 F.3d at 465*).

HN17[] One type of circumstantial evidence from which the fact finder may infer agreement is parallel conduct or "conscious parallelism." In *Twombly,* the Supreme **[*25]** Court determined the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct in order to survive a motion to dismiss:

> While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense." [*Theatre Enterprises, 346 U.S.] at 540-541, 74 S.Ct. 257, 98 L. Ed. 273*. Even "conscious

> parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)*; see 6 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 1433a, p. 236 (2d ed.2003) (hereinafter Areeda & Hovenkamp) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by *Sherman Act § 1*"); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L.Rev. 655, 672 (1962) **[*26]** ("[M]ere interdependence of basic price decisions is not conspiracy").

550 U.S. at 553-54. The Supreme Court went on to explain:

> ***HN18***[] [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.
>
> . . .
>
> A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility **[*27]** of "entitle[ment] to relief." Cf. *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 56 (C.A.1 1999)* ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation-for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint").

Id. at 554, 556-57 (footnote omitted).

In applying these precepts to the facts before it, the *Twombly* court concluded that the facts adduced did not support an antitrust conspiracy, and therefore, the complaint failed to state a valid §1 claim. *Id. at 569*. In *Twombly,* plaintiffs, who represented a putative class of subscribers to local telephone and/or high speed internet service, alleged that the incumbent local exchange carriers (ILECs) or "Baby Bells"[10] unlawfully agreed to prevent market entry by upstart regional telephone companies, referred to as competitive local exchange carriers (CLECs), and to refrain from competing with each other. *Id. at 550-51*. In examining the factual allegations in the complaint in support of these two theories, the **[*28]** Supreme Court found that the complaint left no doubt that plaintiffs' §1 claim was predicated on allegations of parallel conduct, and not on any independent allegation of actual agreement among the defendants.[11] *Id. at 564*. Turning to the allegations of parallel conduct, the Supreme Court observed that "the complaint first takes account of the alleged 'absence of any meaningful competition between [the ILECs] in one another's markets,' 'the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs,' 'and the other facts and market circumstances alleged [earlier]'; 'in light of' these, the complaint concludes 'that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another.'" *Id. at 564-65* (quoting complaint, ¶51). The Supreme Court concluded that these allegations failed to allege a plausible suggestion of conspiracy as "nothing in the complaint

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[10] "Baby Bells" refers to the regional telephone monopolies created in the wake of the 1984 divestiture of the American Telephone & Telegraph Company. *Id. at 548*.

[11] The Court disregarded the few stray statements that spoke directly of an agreement, finding that they constituted legal conclusions. *Id. at 564*.

intimate[d] that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance." *Id. at 566*. Moreover, the Supreme Court **[*29]** noted an obvious alternative explanation existed for the ILECs' parallel conduct—"the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing." *Id. at 567-68*. Thus, because the complaint "failed *in toto* to render plaintiffs' entitlement to relief plausible[,]" the Supreme Court upheld dismissal of the complaint. *Id. at 569 & n. 14*.

Turning to the case at bar, Plaintiff argues that she has adequately pled a §1 claim either through: (1) allegations of a specific agreement among Defendants, or (2) allegations of parallel conduct. The Court addresses each of these arguments in turn.

1. Allegations of a Specific Agreement

Initially, Plaintiff submits that she has properly pled a specific agreement in her Complaint. In support, she argues that all she is required to plead, under Third Circuit precedent, is "some form of concerted action," **[*30]** or a "unity of purpose or a common design and understanding or a meeting of minds" or "a conscious commitment to a common scheme." Pl.'s Mem. in Opp'n to JP Morgan/BOA Mot. to Dismiss ("Pl.'s Mem. in Opp'n") at 18,[12] ECF No. 63 (quoting *In re Baby Food Antitrust Litig., 166 F.3d at 117*; *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)* (citation omitted)). Pointing to the allegations in paragraph 36 of the Complaint, Plaintiff submits she has properly alleged an agreement "because all lenders have adopted the same consistent pricing system." She further argues that by adopting a consistent and uniform system, lenders consequently operate with a unity of purpose and common design which necessarily meets the judicial standard of an "agreement." *Id.* at 18-19. With regard to Defendants' argument that the "Complaint cites no factual allegations to support an inference that defendants have agreed on how to perform [the] evaluation or determine [the] interest rate", Plaintiff submits Defendants' argument is wrong because the complaint clearly alleges that the terms of the price agreement are found in the credit score, which has been adopted as a uniform interpretation of **[*31]** how to price loans. *Id.* at 19 (citing Compl., ¶36).

The Court does not find any merit to Plaintiff's argument. First, Plaintiff has misstated the pleading standard for a §1 conspiracy. Contrary to Plaintiff's argument, the court of appeals in *Flat Glass* did not hold that all a plaintiff is required to plead to survive a motion to dismiss a §1 claim is "some form of concerted action" or a "'unity of purpose or a common design and understanding or meeting of minds.'" Rather, the court of appeals was reiterating the Supreme Court's interpretation of the terms "contract," "combination," or "conspiracy," and did not even address the required showing to establish such concerted action or meeting of minds at the motion to dismiss stage, because *Flat Glass* involved an appeal regarding the adequacy of plaintiffs' showing at the summary judgment stage. Black's reliance on *Baby Food* fails for the same reason.

Second, Plaintiff fails to point to any *factual* allegations in the **[*32]** Complaint that show or suggest a specific agreement. In support of her position that she has properly pled a specific agreement, Plaintiff relies primarily on the allegations set forth in paragraph 36 of the Complaint:

> Furthering the conspiracy, credit scoring companies use the reported information from credit bureaus to create a derivative score which incorporates all of the consumer's credit data as well as the consumer's profitability. This score is then distributed to all lenders. The lending industry has identified that the most profitable customers are the ones having the lower credit scores. Consequently, by examining credit scores lenders can rapidly identify the most profitable customers and fix rates accordingly. Thus, credit scoring companies assist lenders in effecting a parallel pricing scheme for credit by creating a derivative metric which is an effective proxy for setting uniform price points among competitors.

Clearly, however, paragraph 36 does not contain any factual allegations suggesting a specific agreement to fix prices. In actuality, in paragraph 36, Plaintiff pleads, in general and conclusive terms, parallel conduct allegedly engaged in by the lending industry.[13]

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[12] The page references to Plaintiff's memoranda in opposition to the Defendants' motions to dismiss are to the ECF page number on the top of the documents, as Plaintiff has failed to number the individual pages of her briefs.

Moreover, a review of the remaining allegations in the Complaint yields a similar conclusion. For example, in paragraph 43, Plaintiff alleges that "Defendants have also schemed to restrain trade by creating pricing floors." In paragraph 44, Plaintiff alleges "Defendants have additionally colluded to charge monopolistic punitive fees . . .." In paragraph 52, Plaintiff asserts "The lenders have acted collectively to increase the interest rates and fees . . .." In paragraph 67, Plaintiff alleges:

> Beginning at least in 1951, the exact date being unknown, Defendants and their co-conspirators have engaged in a continuing combination, conspiracy and common course of conduct in unreasonable restraint of **[*34]** interstate trade and commerce in violation of the Sherman Act, *15 U.S.C. §1*. As more fully described herein, the combination, conspiracy and common course of conduct including sharing of proprietary consumer information engaged in by the Defendants consisted of a continuing agreement, understanding and concert of action among the Defendants and their co-conspirators, the substantial terms of which were to restrain the availability of consumer loans and then fix and maintain at artificially high and non-competitive levels the prices at which they made loans, as well as nationally boycott consumers unable to unwilling to pay monopolistic prices.

In paragraph 68, Plaintiff alleges "Pursuant to their combination, conspiracy, and concerted actions, Defendants have adopted and adhered to virtually identical and parallel methods of pricing . . .." In paragraph 70, Plaintiff alleges "each Defendant took actions to restrain the availability of consumer credit and fix the prices for consumer lending. Pursuant to the combination, conspiracy, and concerted action, Defendants have consistently adopted and adhered to coordinated parallel-pricing schemes and boycotts." In paragraph 72, Plaintiff asserts **[*35]** ". . . the letter sent to Plaintiff [by JP Morgan] indicat[es] that the change in position on her credit line was not due to independent market factors, but rather cooperation, understanding, and agreement among competitors." And, in paragraph 75, Plaintiff alleges "The agreement among competitors in the lenders' market to share pricing data in the form of credit reports . . .." Like the complaint in *Twombly*, here the above statements in Black's Complaint that refer to an "agreement" or some sort of concerted action constitute conclusory allegations or legal conclusions. These allegations must be disregarded in evaluating the sufficiency of the Complaint under *Rule 12(b)(6)*. When the Court examines the remaining factual allegation in the Complaint, it finds nothing suggesting an actual agreement between Defendants to fix the price of loans or to boycott certain consumers.

Next, Plaintiff argues that to the extent Defendants submit that an actual meeting and formal agreement must be alleged, Defendants misconstrue the case law. Plaintiff submits that a conspiracy can be found where there is "'a conscious commitment to a common scheme,'" citing *Flat Glass, 385 F.3d at 357* (quoting *Monsanto, 465 U.S. at 764*). **[*36]** According to Plaintiff, competitors rarely structure an agreement which is collusive on its face, but rather, use sophisticated systems to hide the nature of the understanding among them. Thus, Plaintiff maintains that the Complaint should not be dismissed simply because Defendants have successfully hidden the pricing terms. This argument likewise lacks merit. First, Defendants are not arguing that an actual meeting and formal agreement are required. Second, as noted above, even under the proper standard, Plaintiff's factual allegations fall short of the mark.[14]

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[13] With **[*33]** regard to Plaintiff's allegations of parallel conduct, even if the Court assumes, for purposes of the motion to dismiss, that all lenders have adopted the same consistent pricing system, that fact alone does not nudge the Complaint across the line from possibility to plausibility of entitlement to relief. As explained below, Plaintiff must allege some further circumstance pointing toward a meeting of the minds to fix the price of loans in order to cross that line. *Twombly, 550 U.S. at 556-57*.

[14] Plaintiff also advances the argument that to the extent Defendants are contending that the Complaint is insufficient for not using the magic language of "agreement," but instead pleads "conspiracy," Defendants ignore the plain meaning of the word conspiracy and, in any event, there is no requirement in the case law that the term "agreement" be used to properly plead an antitrust violation. The Court does not construe Defendants' argument to be making any such distinction. Indeed, Defendants clear up any confusion on this point in their Reply Memorandum. (Reply Mem. of Law in Supp. of Mot. to Dismiss ("Lenders' Reply Mem.") **[*37]** at 2 n. 2, ECF No. 66.)

Plaintiff's final argument on this point responds to the position advanced by Defendant Lenders—that other than alleging that they conspired to restrict the availability of consumer credit and to fix the price of that credit, "[b]eginning at least in 1951, the exact date being unknown," (Compl. ¶67), Black fails to plead any facts to suggest a specific time, place, or the person(s) involved in the alleged conspiracy, or to provide them with some idea as to which of them (much less which of their employees) supposedly agreed, or when or where the illicit agreement occurred. Defendants contend the "sole factual allegations contained in the complaint assert that, for some period of time, [D]efendants have shared consumer credit history information for purposes of evaluating consumer creditworthiness and pricing consumer credit." Mem. of Law in Supp. of Mot. of Defs. JP Morgan & BOA to Dismiss ("Lenders' Mem.") at 10, ECF No. 34. In support, Defendants rely on dictum from *Twombly,* in which the Supreme Court noted that had the complaint not explained that the claim of agreement rested on allegations of parallel conduct, the mere reference to an agreement among the **[*38]** defendants would have been insufficient to provide the notice required by *Federal Rule of Civil Procedure 8*, as alleging merely that the Section 1 violations occurred over a seven-year period, without alleging any "specific time, place or person involved in the alleged conspiracies . . . furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." *550 U.S. at 565 n. 10*.

In response to this argument, Plaintiff disagrees with Defendants that she is required to state the specific time, place and persons involved in the conspiracy. Plaintiff argues that because her claim of conspiracy, like *Twombly,* rests on parallel conduct described in the Complaint, she is not required to mention a specific time, place or person involved in each conspiracy allegation. Pl.'s Mem. in Opp'n at 21, ECF No. 63. In support, Plaintiff cites *Starr v. Sony BMG Music Entertainment, 592 F.3d 314, 325 (2d Cir. 2010)*, *cert. denied, 131 S. Ct. 901, 178 L. Ed. 2d 803 (2011)* (citing *Twombly, 550 U.S. at 565 n. 10*), in which the court of appeals ruled that *Twombly* did not require plaintiffs to state a specific time, place or person involved in **[*39]** each conspiracy allegation. Thus, Plaintiff maintains that notice pleading is the proper standard under *Twombly,* and under that standard, she has "properly alleged in the complaint how the agreement and understanding operates?adoption of a uniform pricing model in the form of a derivative credit score. (Compl. ¶36)." Pl.'s Mem. in Opp'n at 21, ECF No. 63. Because Defendants are on notice as to what actions constitute the basis for her Complaint, Black contends that factual details as to time, place and persons involved are the proper subjects of discovery.

While Plaintiff is correct that the court of appeals in *Starr* rejected defendants' argument that *Twombly* requires an antitrust plaintiff to identify the specific time, place and persons related to each conspiracy allegation, the *Starr* court explained that it was doing so because, as in *Twombly,* the conspiracy claim rested on allegations of parallel conduct. *Starr, 592 F.3d at 325*. **[*40]** However, in the case at bar, Plaintiff has advanced alternative theories of proof of an antitrust conspiracy. In addition to allegations of parallel conduct, Plaintiff contends she has pled a specific agreement through direct evidence in the JP Morgan letters.

Plaintiff contends that two letters dated May 5, 2009 addressed to her and sent by JP Morgan[15] (the "JP Morgan letters") provide "direct evidence of a conspiracy, which operates independently of an alleged 'bare allegation of parallel conduct' that *Twombly* addressed." Pl.'s Mem. in Opp'n to Mot. to Dismiss at 7, ECF No. 63. Specifically, Plaintiff argues that the JP Morgan letters show that "competing lenders are taking coordinated action against their customers based on sharing information about those individuals among themselves." *Id.* Plaintiff further submits that unlike independent market parallelism, these letters show that action was taken based on communication between the competitors and not independent action, which clearly infers the existence of an agreement or understanding among competitors. *Id.* In addition, Plaintiff takes issue with Defendants' failure to mention these letters, stating that their "silence on the **[*41]** issue is deafening." *Id.* According to Plaintiff, because Defendants' have failed to contest this point, the letters provide evidence of a conspiracy, and the case should be allowed to proceed as proper notice has been given as to the nature, scope, and factual basis for the allegations.

In response, Defendants submit that the two letters from JP Morgan do not contain any direct evidence showing any such agreement. *See* Lenders' Reply Mem. at 3, ECF No. 66. According to Defendants, the letters indicate that JP Morgan is reducing Plaintiff's credit limit but make no mention at all of Plaintiff's credit score. On this latter point,

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[15] The letters from JP Morgan are attached to Plaintiff's Complaint as Exhibit A.

Defendants argue, the letters are entirely inconsistent with Plaintiff's theory that lenders rely solely on credit scores and do not independently evaluate other "neutral" credit history information. *Id.* In addition, Defendants submit that the letters do not contain any facts or information showing that JP Morgan made the decision to reduce Plaintiff's credit limits as part of an agreement with competing lenders, or remotely suggesting that JP Morgan's credit decisions were not the **[*42]** result of its unilateral exercise of its independent judgment about Plaintiff's creditworthiness and the credit terms it was prepared to offer Plaintiff. *Id.* Finally, Defendants maintain that Plaintiff has not alleged any facts that would constitute direct evidence of an unlawful agreement. *Id.*

The Court agrees with Defendants that the letters from JP Morgan do not constitute direct evidence of an agreement or conspiracy. In the letters, JP Morgan stated that its reasons for the decision to decrease Plaintiff's credit limit/line were: "Balance owed on revolving accts too high" and "[c]urrent loan amount on all open accounts." Ex. A to Compl., ECF No. 1-2. With regard to the decrease in her credit line, JP Morgan provided the additional explanation "[s]ufficient credit available with us." *Id.* The letters go on to explain: "This decision was based in whole or in part on information provided by [Equifax]. Other than providing information, [Equifax] played no part in our decision. . . ." *Id.* Contrary to Plaintiff's argument, the Court finds that the content of the letters does not show, or even suggest, that JP Morgan made the decision to reduce Plaintiff's credit limits as part of an *agreement* **[*43]** with competing lenders. Rather, the letters expressly state that JP Morgan made its decision to reduce Plaintiff's credit limit based on information supplied by Equifax. At best, this suggests a one-way communication, which falls short of the required "meeting of the minds" to infer an agreement. In addition, the letters clearly state that Equifax played no part in JP Morgan's decision to reduce Plaintiff's credit limit. Again, it is unreasonable to infer "agreement" from this statement. Moreover, the letters clearly state independent bases for JP Morgan's decision to decrease Plaintiff's credit limit—too high balance owed on revolving accounts, the current loan amount on all open accounts, and sufficient credit available with JP Morgan. Thus, nothing contained in either letter provides direct evidence of a preceding agreement between competing lenders or between JP Morgan and Equifax to fix loan prices.[16]

Moreover, other than wholly conclusory allegations of an agreement among Defendants, which provide no indication (or inference) as to which of the Defendants or their employees supposedly agreed to fix loan prices, or when and where said agreement took place, the Complaint is devoid of factual allegations of an actual agreement, and therefore, is insufficient to provide the notice required by *Rule 8*. Nonetheless, because Black is not relying exclusively on independent allegations of an actual agreement to prove her claim, her failure to plead sufficient facts of an actual agreement is not fatal to her §1 claim.

2. Allegations of Parallel Conduct

HN19[] Where, as here, an antitrust plaintiff intends to prove her §1 claim based on circumstantial evidence of parallel conduct, she must also plead plus factors. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323-24 (3d Cir. 2010)*. Because the courts have found parallel conduct is just as likely to be in line with a wide array of rational and competitive business judgments unilaterally prompted by common market perceptions, **[*45]** the courts have required an antitrust plaintiff to plead facts suggesting that defendants were not acting independently. *Id. at 321*. Thus, "plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one 'plus factor,' since plus factors are, by definition, facts that 'tend[ ] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors.'" *Id. at 323* (quoting *Flat Glass, 385 F.3d at 360*) (other citations omitted). ***HN20***[] Although not a finite list, the court of appeals has delineated three plus factors that may nudge the allegations of parallel conduct across the line from a conceivable to a plausible §1 claim: "'(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the

[16] Plaintiff's argument misses the mark for another reason. Direct evidence is evidence which requires no inferences to establish the asserted proposition, but is explicit on its face. *InterVest, 340 F.3d at 159* (citation omitted). By asking the Court to *infer* an agreement from the **[*44]** text of the letters, Plaintiff appears to be conceding that the letters do not constitute direct evidence of an agreement.

defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.''" *Id. at 322* (quoting *Flat Glass, 385 F.3d at 360* (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1244 (3d Cir.1993))*). In evaluating the first two factors, the court of appeals has cautioned that the evidence must go beyond indicating that market **[*46]** behavior is interdependent and characterized by conscious parallelism. *Id.* (citations omitted). With regard to the third plus factor, the court of appeals explained that "'evidence implying a traditional conspiracy,' consists of 'non-economic evidence 'that there was an actual, manifest agreement not to compete," which may include "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.''" *Id.* (quoting *Flat Glass, 385 F.3d at 361* (quoting *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir.2002))*) (other citations omitted).

In the case at bar, Plaintiff submits that the "conspirators are acting in parallel based on their communications with each other regarding their customers[.]" Pl.'s Mem. in Opp'n at 8, ECF No. 63. To nudge her §1 claim across the line from conceivable to plausible, Plaintiff proffers evidence which she contends provides the requisite plus factors. This evidence includes the two letters from JP Morgan, information posted on the website of VantageScore, and a statement allegedly contained in FICO's trademark registration **[*47]** document. Plaintiff contends these documents provide circumstantial evidence from which an agreement can be inferred.

Turning first to the two JP Morgan letters, Plaintiff submits that this evidence shows that "Defendants changed position based on communication with a competitor." Pl.'s Mem. in Opp'n at 8, ECF No. 63. Plaintiff further submits that this "negative event impacted [her] credit score[,]" and, as alleged in paragraph 36 of her Complaint, "the 'Credit Score' provides the instructions for the uniform system for pricing loans." *Id.* According to Plaintiff, this shows that she is a victim of the price fixing conspiracy. *Id.*

For the reasons stated above, the Court finds that the JP Morgan letters do not show that JP Morgan (or any other named Defendant for that matter) changed positions based on communications with an unidentified competitor. Rather, the letters show that JP Morgan decided to reduce Plaintiff's credit limit based on several factors, one of which was information provided by Defendant Equifax. The Court cannot glean from that statement, or any other statement in the JP Morgan letters, any suggestion of a preceding agreement between competing lenders, or between **[*48]** JP Morgan and Equifax, to fix the terms of Plaintiff's credit. Moreover, Plaintiff's argument is undermined by the fact that the only communication suggested in the JP Morgan letters is between non-competitors. With regard to Plaintiff's argument in her brief that the reduction in her credit limit impacted her credit score, there is simply no factual support for this statement in the Complaint. The Court concludes, therefore, that the JP Morgan letters do not provide circumstantial evidence of an agreement.

Plaintiff also argues that her case is factually distinguishable from *Twombly* because in that case, the plaintiff only alleged parallel conduct with nothing more. By contrast here, Black submits it is unarguable that the parallel conduct is due to communications among competitors, with a plausible inference that such communication is based on an understanding among competitors. In fact, Plaintiff contends that such communication and understanding is more than plausible—it is literally true as entered into the evidentiary record and ignored in the Defendants' brief. *Id.* at 9. Thus, this case should not be dismissed, Plaintiff maintains, because the nature and scope of the communications **[*49]** and the understanding among competitors regarding such communications are obviously the cause of the parallel conduct. *Id.*

The Court finds that like *Twombly,* Plaintiff's factual allegations fall short of showing a preceding agreement. Under *Twombly,* "allegations of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement[.]" *550 U.S. at 557*.[17] In the case at bar, the relevant context is the consumer lending industry, and in

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[17] The Supreme Court in *Twombly* noted that several commentators provided ***HN21***[] examples of parallel conduct allegations that would be sufficient to state a §1 claim under its newly enunciated plausibility standard, which included "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties," or "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement". *550 U.S. at 556 n. 4* (citations omitted). In addition, the

particular, the sharing of customers' credit history information to set credit terms and limits on consumer credit cards. In determining whether Plaintiff has alleged facts suggesting a preceding agreement among the eight named Defendants to fix credit terms of consumer credit cards, the Court examines the Complaint, and any documents incorporated by reference, for factual assertions referencing or suggesting some cooperation, understanding or agreement between Defendants regarding fixing credit terms, such as discussions, meetings, or other communication between the Defendants.[18] When the Court does so, the only reference to or suggestion of communication between any of the Defendants is contained in paragraph 72 of the **[*50]** Complaint, which references the JP Morgan letters.[19] As previously discussed, however, a close examination of these letters does not reveal any direct or circumstantial evidence that JP Morgan changed Plaintiff's credit terms based on cooperation, understanding or an agreement among competitors, or between JP Morgan and Equifax. Because the JP Morgan letters do not constitute a "tacit invitation . . . to join a coordinated credit policy" directed towards Plaintiff, *Michelman, 534 F.2d at 1048-49*,[20] no foundation exists for a plausible §1 claim.

Likewise, Plaintiff's conclusory assertion that JP Morgan used competitively sensitive information obtained from unidentified competitors to set prices, foreclose credit lines, and/or accelerate default, in and of itself, does not suggest a plausible §1 claim. The sharing of consumers' credit history information does not constitute a violation of the Sherman Act without some factual allegations suggesting that the lenders have come to some understanding or agreement among themselves on the credit eligibility of consumers with a particular credit score, or the credit limits or interest rates to be offered to such consumers. Here the Complaint is completely devoid of any factual allegations showing or suggesting that JP Morgan, BOA, Discover, and/or any unnamed competitors came to an understanding or agreement to fix eligibility criteria, credit limits, or interest rates to be applied to Plaintiff or any of the putative class members. In addition, there is a legitimate, independent basis for the sharing of consumer credit history information. **[*53]** Historically, lenders have used credit history information provided by credit bureaus and credit scoring companies to assess risk levels for setting credit terms and interest rates. The practice of sharing consumer credit history information has been lawful under the antitrust laws since at least 1925. *Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588, 45 S. Ct. 586, 69 L. Ed. 1104 (1925)*. Thus, without the necessary suggestion of a preceding agreement to fix credit terms/rates, the Court cannot say that JP Morgan's decision to reduce Plaintiff's credit limit was due to anything other than independent market factors.

Additional plus factors proffered by Plaintiff consist of certain statements appearing on the websites maintained by the Credit Scoring Company Defendants, VantageScore and FICO. Specifically, Plaintiff submits that a conspiracy can be inferred from the following statement appearing on VantageScore's website: "Banks, credit card companies, and other lenders use credit scores to assess a borrower's loan eligibility and set loan/credit terms." Ex. B to Pl.'s Mem. in Opp'n, ECF No. 63-2. In addition, Plaintiff directs the Court to FICO's trademark registration, which allegedly contains the statement **[*54]** "lenders use their scoring model to set prices." Pl.'s Mem. in Opp'n 10, ECF No. 63. However, no such document is attached to her memorandum in opposition (ECF No. 63), nor was it attached to any of Plaintiff's other papers and/or memorandums filed in opposition to the motions to dismiss of the other Defendants. Rather, Plaintiff has attached an excerpt from FICO's website relating to FICO® Score Delivery.

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parties in *Twombly,* "agree[d] **[*51]** that 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason' would support a plausible inference of conspiracy." *Id.* In the case at bar, the allegations of parallelism do not describe conduct that falls within any of these examples. Indeed, as noted below, the parallelism asserted here at best resulted from mere interdependence unaided by an advance understanding among the parties.

[18] The Court's focus on communications between Defendants is appropriate given Plaintiff's argument in her brief to the effect that the parallel conduct of Defendants is based on their communications with each other regarding their customers. Pl.'s Mem. in Opp'n at 8, ECF No. 63.

[19] In paragraph 72 of her Complaint, Plaintiff is asserting essentially that the letters she received from JP Morgan indicate JP Morgan changed its position on her credit line due to cooperation, understanding, and agreement among competitors, rather than independent market factors, and thus prove that JP Morgan used competitively sensitive information obtained from other yet to be identified lenders to set prices, foreclose credit **[*52]** lines, and accelerate default. Compl., ¶ 72.

[20] The court of appeals decision in *Michelman* is discussed in more detail in Part 3, *infra,* at 37-38.

See Ex. C to Pl.'s Mem. in Opp'n, ECF No. 63-3.[21] Plaintiff posits that these statements by the Credit Scoring Company Defendants constitute an admission and recommendation that lenders set their lending terms according to the scoring model, not independent analysis of credit histories and, as such, provide direct evidence of a conspiracy and an overwhelming plus factor required for pleading parallel conduct under *Twombly.* (Pl.'s Mem. in Opp'n at 10, ECF No. 63.)

The Court finds no support for Plaintiff's position in the information reported on the websites of VantageScore and FICO. First, the Complaint does not contain any factual allegations regarding the information on the websites or in FICO's trademark registration. Rather, the only place this information appears is in Plaintiff's brief. However, even if these allegations were contained in the Complaint, they fall short of raising the suggestion of a preceding agreement between Defendants to fix the price of loans/credit. The statements appearing on the websites are not directed to any particular persons or entities, and thus, cannot be used to show concerted action or a "meeting of the minds" between Defendants. In addition, there is no indication of when these statements first appeared, and therefore, Plaintiff has not established that they preceded the decision to reduce her credit limit. At best, the information provided on the websites constitutes a one-way communication from the Credit Scoring Company Defendants to potential clients—banks, credit card companies, and **[*56]** other lenders—recommending certain uses of their credit scores. The Credit Scoring Companies' websites do not instruct potential clients to use their credit scores exclusively to set loan prices. Absent such instruction, it is irrational to infer from the websites that the credit scoring companies have admitted and recommended that lenders refrain from engaging in independent analysis of credit histories in setting their lending terms. It is simply irrational to suggest that the referenced website statements provide direct or circumstantial evidence that the banks, credit card companies, and other lenders entered into an agreement to use the credit scores to fix credit at a certain price.

Finally, Plaintiff contends that further factual evidence exists in the Complaint, which Defendants have ignored. In particular, Plaintiff submits that in paragraphs 41 through 43, the "Complaint properly alleges that anticompetitive pricing terms are present in the scoring model adopted by the lenders, in the form of punishment and pricing floors." Pl.'s Mem. in Opp'n at 9, ECF No. 63. When the Court discards the conclusory allegations in paragraphs 41 through 43 of the Complaint, the factual allegations **[*57]** contained in those paragraphs assert that all consumer lenders provide loans at a variable interest rate tied to the prime lending rate, which is a pricing floor that no lender will ever go below. (Compl., ¶43.) The price floor baseline is elevated for customers based on the shared credit information. *Id.* However, these factual allegations simply do not support Plaintiff's argument that the Complaint properly alleges that anticompetitive pricing terms are present in the scoring model adopted by the lenders. Indeed, the practice of tying the interest rate to the prime lending rate is not unlawful and has been followed historically in the consumer lending industry. Moreover, elevating the pricing floor or baseline to take into account a particular customer's credit information/risk is also entirely appropriate.

In further support of her argument, Plaintiff cites *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)*, for the proposition that "credit terms must be characterized as an inseparable part of the price." Pl.'s Mem. in Opp'n at 9, ECF No. 63. However, Plaintiff fails to explain how *Catalano* is relevant to her case. *Catalano* involved a secret agreement among wholesalers **[*58]** to terminate the practice of extending short-term interest free credit on beer purchases to plaintiffs, a conditionally certified class of beer retailers. The Supreme Court held that the agreement to fix credit terms was tantamount to an agreement to eliminate discounts which was done to fix the price of beer sales, and thus, was unlawful *per se. Id. at 648*. In other words, because credit terms are increasingly viewed as an element of price, interference with credit terms necessarily involves interference with price, which is regarded as illegal *per se* under the Sherman Act. *Id. at 648 n. 11* (citations omitted). It is important to note that the Supreme Court in *Catalano* was not faced with the question of whether an agreement existed in the first instance—that fact had already been determined. Rather, the Supreme Court was faced with the question of whether an agreement to fix credit terms was tantamount to price fixing which is unlawful *per se* under the Sherman

[21] The excerpt from FICO's website attached as Exhibit C to ECF No. 63 states that the FICO scores give lenders "insight into [their] own customers' risk and revenue potential, and . . . updated scores . . . [can be] us[ed] to make more profitable decisions for credit line management, cross-selling, balance building, pricing, **[*55]** customer retention, activation, collections resource allocation and point-of-sale authorizations." *See* ECF No. 63-3.

Act. While the Supreme Court's decision in *Catalano* certainly supports the principle that an agreement can be unlawful *per se* where the terms agreed to are something other than price itself, such as credit terms, here, unlike **[*59]** *Catalano,* Plaintiff has failed to come forward with facts to show or infer an agreement in the first instance.

Plaintiff further argues that:

> One form of coordinated action dictated by a credit score is the lowering of the credit score where a person pays off a credit card. (Compl. ¶40-41). In other words, all the lenders use the uniformly lowered credit score to act in parallel to increase the price even though such actions by the consumer actually increase creditworthiness and decrease risk to all of the lenders. Further, as the complaint properly alleges, the credit scores are manipulated for loan re-pricing, even though the customer has been previously been deemed creditworthy and the lender is no longer subject to risk, having underwritten the underlying debt in the form of insurance and credit swap derivatives, which results in monopolistic and uniform pricing. (Compl. ¶ 36, 38).

Pl.'s Mem. in Opp'n at 9-10, ECF No. 63. Plaintiff submits that "these factual allegations alone are sufficiently specific and plausible to plead a claim on which relief may be granted." *Id.* at 10. The Court disagrees. First, many of the statements in paragraphs 36, 38, 40 through 43 are conclusory as opposed **[*60]** to factual in nature, and thus, must be disregarded for purposes of the motion to dismiss. Second, when the factual allegations in these paragraphs are isolated,[22] the Court finds that none of them provide evidence of any plus factors, as they do not evince a motive to enter into a price fixing conspiracy or show Defendants were acting against their own self-interests. The factual allegations in those paragraphs do not go beyond suggesting interdependent market behavior and conscious parallelism which, under *Twombly,* is insufficient to state a §1 claim.

3. Sharing Customers' Credit Information

Next Defendants submit the "sole factual allegations contained in the complaint assert that, for some period of time, [D]efendants have shared consumer credit history information for purposes of evaluating consumer creditworthiness and pricing consumer **[*61]** credit." Lenders' Mem. at 10, ECF No. 34. However, sharing customer credit history information, even if it were conducted pursuant to an agreement to exchange such information, according to Defendants, is entirely lawful under the antitrust laws. *Id.* Indeed, Defendants maintain that this practice has been lawful under the antitrust laws since at least 1925, and cite in support *Cement Manufacturers, supra.* Moreover, Defendants submit the use of consumer credit scoring is wide spread and encouraged by federal bank regulators as a means to expand access to credit, promote competition and improve market efficiency. Lenders' Reply Mem. at 5, ECF No. 66 (citing Bd. of Governors of the Fed. Res. Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit,* at 1 (Aug. 2007), *http://www.federalreserve.gov/boarddocs/RptCongress/creditscore/creditscore.pdf* ("Bd. of Governors").

In *Cement Manufacturers,* members of the association dispensed monthly reports of all customer accounts which were past due by two months or more, which included the name and address of the delinquent debtors, the amount overdue, any explanation for the delinquency (such **[*62]** as the debtor claimed an offset or otherwise disputed the debt), and indicated whether the account had been turned over to attorneys for collection. *Id. at 599*. The Supreme Court reversed the decision of the district court in favor of the government and held that the exchange of credit history information among cement manufacturers relating to the creditworthiness of their customers did not violate the antitrust laws. *Id. at 606*. In arriving at this conclusion, the Supreme Court reasoned:

> The government neither charged nor proved that there was any agreement with respect to the use of this information or with respect to the persons to whom or conditions under which credit should be extended. The evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers, or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of

[22] The factual allegations in those paragraphs can be distilled essentially as follows: Credit scores are lowered when a consumer pays off a credit card. Lenders use the lowered credit score to increase the interest rate (and thus the price), even though such payoffs actually increase a consumers' creditworthiness and decrease risk to all of the lenders.

> manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer.

Id. at 599-600. **[*63]** The Court noted that in *Swift & Co. v. United States, 196 U.S. 375, 393, 25 S. Ct. 276, 49 L. Ed. 518 (1905)*, it "approved a decree which provided that defendants should not be restrained 'from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers.'" *Cement Mfrs., 268 U.S. at 604*. The Court then went on to explain:

> ***HN22***[] Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud. But for reasons stated more at length in our opinion in *United States v. Maple Flooring Association, supra*, we cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned.

Id.

Similarly in *Maple Flooring Manufacturers' Ass'n v. United States, 268 U.S. 563, 565-67, 45 S. Ct. 578, 69 L. Ed. 1093 (1925)*,[23] **[*64]** the Supreme Court reversed a judgment in favor of the government where the alleged antitrust conspiracy was an agreement to exchange historical cost and sales information among members of an association who were competitors in the business of selling and shipping wood flooring in interstate commerce. The Court pointed out that the government had neither alleged nor proved that any agreement existed among the association's members affecting production, fixing prices, or for price maintenance. *Id. at 567*. Rather, the government had alleged only that the exchange of information had resulted in the maintenance of practical uniformity in net delivered prices. *Id.* In rejecting the government's argument, the Supreme Court in *Maple Flooring* explained:

> It is the consensus of opinion of economists and of many of the most important agencies of government that ***HN23***[] the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to **[*65]** avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. 'Free competition' means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influences free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell.

Id. at 585 (footnote omitted). The Supreme Court went on to explain:

> ***HN24***[] It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct **[*66]** of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. ***HN25***[] Persons who unite in

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[23] The Supreme Court issued its decision in *Maple Flooring* the same day it decided *Cement Manufacturers.*

> gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate **[*67]** commerce. They would not be any the more so merely because they became stockholders in a corporation or joint owners of a trade journal, engaged in the business of compiling and publishing such reports.

Id. at 583-84. The Court in *Maple Flooring* thus held:

> We decide only that ***HN26***[] trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption as did these defendants and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

Id. at 586.

The Court's analysis in *Maple Flooring* has been applied by numerous federal courts since its publication eighty-six years ago. In **[*68]** *Michelman v. Clark-Schwebel Fiber Glass Corp.,* the court of appeals relied on *Cement Manufacturers* in holding:

> ***HN27***[] The exchange of information between business firms concerning the credit-worthiness of customers has long been held not to violate the Sherman Act. *See* *Cement Manufacturers Protective Association v. United States, 268 U.S. 588, 604, 45 S. Ct. 586, 591, 69 L. Ed. 1104, 1111 (1925)*. Unlike exchanges regarding prices, which usually serve no purpose other than to suppress competition and hence fall within the ban of the Sherman Act, *see* *United States v. Container Corp. of America, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969)*, the dissemination to competitors of information concerning the credit-worthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers. *See* *id. at 335, 89 S.Ct. at 511, 21 L.Ed.2d at 528*. *Cement Manufacturers Protective Assn. v. United States, supra, 268 U.S. at 604, 45 S.Ct. at 591, 69 L.Ed. at 1111*. Given the legitimate function of such data, it is not a violation of *§ 1* to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent **[*69]** judgment, and not of agreement.

534 F.2d at 1048. Several other courts have held likewise. *See e.g.,* *Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 885-86 (9th Cir. 1982)* (rejecting argument that all exchanges of credit information are *per se* violations of *§1 of the Sherman Act*, and holding that the exchange of information regarding individual retailers' credit histories and total indebtedness, for the individual use by members of a credit managers' association in determining whether to offer credit, did not constitute a violation of *§1* where there was no indication of an agreement to fix credit terms); *Burtch v. Milberg Factors, Inc., Civ. No. 07-556, 2009 U.S. Dist. LEXIS 26872, 2009 WL 840589, at *10 (D.Del. Mar. 30, 2009)* (the alleged sharing of customer credit information among competitors was not the type of information-sharing that has been held to violate federal antitrust laws); *Kasada, 2004 U.S. Dist. LEXIS 25257, 2004 WL 2903776, at *6* (quoting *Michelman, 534 F.2d at 1048*) (rejecting garment manufacturers' price fixing and group boycott claims against various credit institutions, predicated on the exchange of credit information, noting that the "'exchange of information between business firms concerning the credit-worthiness of customers **[*70]** has long been held not to violate the Sherman Act.'"); *Metro Video Dist., Inc. v. Vestron Video, Inc., CIV No. 89-0640 PG, 1990 U.S. Dist. LEXIS 18739, 1990 WL 58463, at *10 (D. P.R. Feb. 8, 1990)* (where no agreements regarding price fixing were ever reached, video software manufacturers credit association's exchange of dealers' historical credit information, which contained no price information, did not violate federal antitrust laws).

In opposing the motion to dismiss, Plaintiff attempts to distinguish *Cement Manufacturers* from the case at bar. Plaintiff argues that the Supreme Court did not subsequently ratify price fixing arrangements that are tied to such data exchanges. Plaintiff submits that a dispositive fact not present in *Cement Manufacturers* (or any of the other cases cited by Defendants) is that the defendants did not also adopt a uniform credit score/pricing system based on the customer information exchanged, as in the instant matter. (Pl.'s Mem. in Opp'n at 16-17, ECF No. 63.) Plaintiff's argument equates the credit score to a pricing model,[24] and posits that by using and promoting a uniform credit score, in addition to raw data, lenders, credit scoring companies, and credit bureaus ignored the guidance **[*71]** of the Supreme Court in *Cement Manufacturers.* Consequently, Plaintiff contends the uniformly adopted industry credit score determines and/or provides a guideline for setting the price of loans, and therefore precludes the exercise of individual judgment of the competitors as required by the Supreme Court in *Cement Manufacturers.* Thus, by linking a pricing model (credit score) to the credit reporting system, Plaintiff concludes that Defendants have coordinated and stabilized pricing, which is clearly outside the scope of the lawful purposes of sharing the credit data.[25]

The Court finds no merit to Plaintiff's argument. The Supreme Court has determined that ***HN28***[] exchanges of credit information similar to those alleged here[26] do not constitute a violation of *§1 of the Sherman Act*, so long as the information exchanged does not include any recommendations or agreement as to how the exchanged information should be used. *Cement Manufacturers, 268 U.S. at 599-600, 606*; **[*73]** *Maple Flooring, 268 U.S. at 586*. Indeed, the Antitrust Division of the Department of Justice (the "Department") has consistently approved the exchange of credit information through a third party where the exchange does not involve the terms on which the firms conduct their business or make any recommendations regarding the information exchanged.[27] *See, e.g., Experience Info. Bureau, Inc., DOJ Business Review Letter, B.R.L. 92-1, 1990 DOJBRL LEXIS 3, 1992 WL 71827 (D.O.J. Jan. 14, 1992)* (approving information clearinghouse for underwriters of credit life and disability insurance); *Nat'l Ass'n of Credit Mgmt., DOJ Business Review Letter, B.R.L. 94-3, 1994 DOJBRL LEXIS 12, 1994 WL 70278 (D.O.J. Feb. 16, 1994)* (approving association's creation of new department to offer credit information services to businesses in leasing industry); *Nat'l Telecomm. Data Exch., Inc., DOJ Business Review Letter, B.R.L. 94-6, 1994 DOJBRL LEXIS 3, 1994 WL 70279 (D.O.J. Mar. 8, 1994)* (approving credit information clearinghouse for telecommunications carriers); *Mortg. Indus. Data Exch., DOJ Business Review Letter, B.R.L. 94-18, 1994 DOJBRL LEXIS 20, 1994 WL 532704 (D.O.J. Sept. 22, 1994)* (approving information clearinghouse for mortgage industry); *Telecomm. Data Exch., DOJ Business Review Letter, 1997 WL 543106, 1997 DOJBRL LEXIS 18 (D.O.J. Sept. 3, 1997)* **[*74]** (approving consumer credit information clearinghouse for telecommunications carriers).

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[24] Plaintiff submits that the "term 'credit score' is simply a euphemism for pricing point", Pl.'s Mem. in Opp'n at 12, ECF No. 63, but fails to cite any authority for this proposition, most likely because none exists.

[25] Plaintiff also attempts to distinguish the Supreme Court's decision in *Maple Flooring* on the basis that the data exchanged in that case was aggregate statistical data, which did not identify individual customers, much less a pricing score. However, Plaintiff's attempt falls short as no pricing information was exchanged here and the identities of the customers was not dispositive. Plaintiff also cites *Container* ***[*72]*** *Corp.* in support of her argument that *Cement Manufacturers* and *Maple Flooring* are not applicable where "'each defendant on receiving . . . [a price request] usually furnished the data with the expectation that is would be furnished reciprocal information when it wanted it. That concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of *§ 1 of the Sherman Act*.'" Pl.'s Mem. in Opp'n at 17 n. 3, ECF No. 63 (quoting *Container Corp., 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969))*. Plaintiff's reliance on *Container Corp.* is misplaced. Unlike the exchange in that case, here there was no exchange of pricing information, a critical fact, nor do the factual allegations here show or suggest an understanding or expectation of a reciprocal exchange of pricing information.

[26] Essentially, the business practice challenged by Plaintiff as violating federal antitrust laws can be summarized as follows. Lenders report negative events (such as late payments, exceeding credit limits/too high balances, default, arrearages, and foreclosures), as they occur in their customers' accounts, to credit bureaus which compile credit histories and provide that information to credit scoring companies, who in turn use that information, along with algorithms, to convert this information into a credit score. The recalculated credit scores are then distributed via the credit bureaus to the lenders, which use the recalculated credit scores to adjust their customers' credit terms/limits.

[27] Upon request, the Antitrust Division will issue a business review letter pursuant to *28 C.F.R. §50.6* stating the Department's antitrust enforcement intentions with regard to the requesting organization's proposed business operation.

Plaintiff concedes, as she must, that the sharing of customer information regarding creditworthiness is lawful under the antitrust laws. Pl.'s Mem. in Opp'n at 11, 16-17, ECF No. **[*75]** 63. Plaintiff further concedes that the use of credit scores to assess a borrower's loan eligibility, *i.e.,* creditworthiness, is a potentially lawful use of the data. *Id.* at 10. What is not lawful, Plaintiff contends, is the linking of a pricing model (credit score) to the credit reporting system. However, in order for Plaintiff's argument to have any merit, the factual allegations would have to show or suggest that the information exchanged, in particular, the credit scores, included a recommendation or agreement to link loan prices and/or credit terms to certain credit scores, and no such inference can be drawn from the factual assertions in Plaintiff's complaint. At most, those factual assertions show or suggest that lenders unilaterally use credit scores to evaluate and make decisions regarding customers' credit, a perfectly lawful use. In addition, the exchange of credit information and credit scores serves a perfectly legitimate business function—to reduce losses by providing information that aids the unilateral decision-making of the lenders. To this end, it has been reported that said reductions will result in a "pro-competitive effect; it . . . enhance[s] efficiency and lower[s] **[*76]** operating costs, thereby increasing output." *Mortg. Indus. Data Exch., 1994 DOJBRL LEXIS 20, 1994 WL 532704*. Therefore, the Court finds that an exchange of such information does not violate *§1* where, as here, any action taken in reliance upon it is the result of each Defendant's independent judgment, and not of agreement. *Michelman, 534 F.2d at 1048*.

Perhaps realizing this infirmity, Plaintiff attempts to prove that concerted action exists by arguing that the effect of the exchange of customers' credit information and use of a uniform credit score is price stabilization, which could only result if Defendants agreed to fix the price of loans based on credit scores. In *Maple Flooring,* the Supreme Court rejected a similar argument made by the government which maintained that the exchange of information resulted in maintenance of practical uniformity in net delivered prices. *268 U.S. at 567*. The Supreme Court opined that "[p]ersons who unite in gathering and disseminating information . . . and statistics . . . as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade *merely because the ultimate result of their* ***[*77]*** *efforts may be to stabilize prices* or limit production through a better understanding of economic laws and a more general ability to conform to them." *Id. at 584* (emphasis added). The Supreme Court found determinative the fact that the government had neither alleged nor proved that any agreement existed among the association's members affecting production, fixing prices, or for price maintenance. *Id. at 567*.

Moreover, ***HN29***[] in cases involving the exchange of information, price stabilization may result from factors that do not constitute an antitrust violation, such as obtaining "a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman [Act] neither repeals economic laws or nor prohibits the gathering and dissemination of information." *Maple Flooring, 268 U.S. at 585*. Thus, the presence of price stabilization alone cannot prove concerted action on the part of the alleged conspirators. Having failed to aver facts to show or suggest an agreement among the Defendants to use credit scores for an improper purpose under the Sherman Act, Plaintiff's Complaint does not state a plausible §1 claim.

Another flaw in Plaintiff's argument **[*78]** is that the factual allegations in her Complaint do not show or suggest that the information exchanged involved credit terms or pricing used by the lenders in their consumer loan/credit card businesses. Plaintiff admits that "[w]hile actual prices may not be traded in the instant case, a price proxy in the form of a 'credit score' is created. (Compl. ¶ 36)." Pl.'s Mem. in Opp'n at 17 n. 3, ECF No. 63. In other words, Plaintiff is attempting to equate the term "credit score" to a "pricing model." This argument is equally unavailing, as there is simply no support in the law or facts for Plaintiff's position. It is clear that credit scores do not contain any pricing elements, such as interest rates or credit terms.[28] As the Federal Reserve Board reported to Congress in 2007, "[c]redit scoring[, which] is a statistical technology that quantifies the credit risk posed by a prospective or current borrower[,] . . . is widely used to evaluate applications for credit, identify prospective borrowers, and manage existing accounts." Bd. of Governors at 1. The Supreme Court's decision in *Catalano* illustrates this point. In that

[28] Nor does the credit information provided by the lenders to the credit bureaus constitute "pricing information" or "credit terms." The information provided by lenders consist of events that relate to a customer's creditworthiness—i.e., untimely repayment, high outstanding loan balances, loan default, arrearages, foreclosures, etc. This creditworthiness information is not a pricing point or model.

case, the elimination of discounts was considered a quantitative element **[*79]** of the price, because the price charged to the beer distributors was increased as a direct result of the elimination of discounts. Consequently, the wholesalers' agreement to eliminate the discounts was found to be an unlawful price fixing agreement. *Catalano, 446 U.S. at 648*. By contrast here, the same cannot be said of the credit information and credit scores exchanged between the Lenders, Credit Bureaus, and Credit Scoring Cos., as neither the credit information nor scores constitutes a quantitative element of the price of consumer credit. Another important distinction between *Catalano* and the case at bar is that an agreement to eliminate the discounts had been established in *Catalano;* no such agreement has been established, or can be inferred, from the facts as pled in this case.

Significantly, **[*80]** the distinction between credit information and price was aptly noted by the district court in *Metro Video:*

> ***HN30***[] [U]nder the federal antitrust laws decisions involving credit have always required and produced totally different analyses from those involving prices. This is why decisions regarding agreements pertaining to prices and exchanges of price information have consistently been held to violate the Sherman Act, while at the same time it has long been held that the exchange of information between competitors regarding the credit worthiness of customers does not violate any provision of the federal antitrust laws. In *Cement Manufacturers,* the Supreme Court specifically stated that "[d]istribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud," so it cannot be declared to be an unlawful restraint of trade "even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned." As long as the exchange of credit information is not accompanied by any agreements relating to the extension of credit, such **[*81]** as an agreement to deny credit to one or more of the competitors' customers, no violation of the antitrust laws has occurred.

*1990 U.S. Dist. LEXIS 18739, 1990 WL 58463, at *9* (internal citations omitted). Thus, for these and the reasons stated above, the Court finds no basis exists for equating "credit scores" to "pricing."

Finally, it bears mentioning that a key factor in the Supreme Court's decision in *Cement Manufacturers* was the reason for the exchange of customer credit history information—to prevent procurement of fraudulent contracts. *268 U.S. at 604*. Similarly here, credit history information, including credit scores, have been exchanged to provide critical information regarding a customer's creditworthiness, to assist lenders in gathering information necessary to protect themselves against fraudulent or insolvent customers or potential customers. Therefore, inasmuch as the exchange of information here does not include any pricing terms or pricing model, the Court finds that *Cement Manufacturers* controls the outcome here.

In further support of their argument that the exchange of credit information here was entirely lawful, Defendants submit that the lawfulness of exchanges of credit history information is **[*82]** so fully accepted as a matter of law that the reporting of consumer credit histories to credit reporting agencies and the dissemination of credit reports for the purpose of determining whether to extend credit to individual consumers is permitted, and indeed encouraged, by the federal Fair Credit Reporting Act, *15 U.S.C. §1681 et seq.* ("FCRA"). Lenders' Mem. at 13, ECF No. 34. Defendants further submit that in light of federal banking regulations, specifically *12 C.F.R. §7.4008*, authorizing the exchange of credit reports containing consumer credit history information, it would be inappropriate to apply the antitrust laws to prohibit lenders, credit reporting bureaus, and credit scoring agencies from sharing consumer credit history information, or to allow a factfinder to infer an unlawful conspiracy from allegations of the lawful sharing of consumer credit history information. Lenders' Mem. at 14, ECF No. 34. According to Defendants, allowing Plaintiff to predicate her antitrust conspiracy claim on factual allegations that Defendants did precisely what Congress has authorized them to do would be plainly repugnant to the language and purpose of the FCRA and federal banking regulations. **[*83]** *Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 267-68, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007)* (where there is a "plain repugnancy" between the antitrust laws and another federal statutory scheme, the other statutory scheme implicitly precludes the application of the antitrust laws to the alleged conduct). Lenders' Mem. at 14-15, ECF No. 34.

In enacting the FCRA, Congress recognized the need for fair and accurate credit reporting in the banking system, respect for consumers' rights to privacy, and the vital role consumer reporting agencies have assumed in collecting and evaluating consumer credit and other information on consumers. *15 U.S.C. §1681(a)(1)*, *(3)*, & *(4)*. Congress also acknowledged the existence of an elaborate mechanism for "investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers." *15 U.S.C. § 1681(a)(2)* (footnote omitted). With these purposes in mind, Congress delineated a finite list of circumstances under which consumer credit information may be disseminated. Of particular relevance to this case are the circumstances set forth in *§1681b(a)(3)*:

> ***HN31***[] [A]ny consumer reporting agency may furnish a consumer report . . . [t]o a person **[*84]** which it has reason to believe—
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> (B) intends to use the information for employment purposes[.]
>
> . . .

15 U.S.C. §1681b(a)(3)(A) & *(B)*. In addition, federal banking regulations governing consumer lending provide that a "national bank shall not make a consumer loan . . . without regard to the borrower's ability to repay the loan. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors." *12 C.F.R. § 7.4008(b)*.

Plaintiff responds that by adding a pricing score to the otherwise neutral credit information in credit reports, the Defendants have engaged in a price fixing scheme that clearly is not a legitimate business use of credit information under the FCRA. According to Plaintiff, price fixing, price **[*85]** stabilization, or any other form of price manipulation do not fall within one of the five limited and specific circumstances delineated by Congress, pursuant to *15 U.S.C. §1681b(a)*, in which credit information may be provided. Pl.'s Mem. in Opp'n at 13, ECF No. 63. Plaintiff's argument is unavailing, as it presumes that credit scores are the equivalent of "pricing," which this Court has already determined to be completely unfounded. In addition, although the Court agrees that price fixing is not one of the circumstances enumerated in *§1681b(a)*, as explained above, the factual allegations in the Complaint do not support the suggestion that credit information and credit scores were disseminated for the improper purpose of fixing prices.

Next, Plaintiff contends that the cited language from *§7.4008(b)* of the federal banking regulations presumes that each competing bank will make their own independent analysis of the facts, and not adopt a uniform model among competitors for pricing customers. According to Plaintiff, Defendants ignore this limitation because after the determination of creditworthiness is made, lenders then engage in loan re-repricing based on the uniform credit score which **[*86]** has nothing to do with creditworthiness, since there is no lender risk once the loans are underwritten by insurance such as credit-swap derivatives. Pl.'s Mem. in Opp'n at 15, ECF No. 63.

Again, Plaintiff's argument misses the mark. Black has failed to allege any facts showing or suggesting that Defendants adopted a uniform *pricing* model. Furthermore, there is nothing improper about lenders adjusting credit terms and rates upon receipt of an updated credit score, so long as the adjustment is based on unilateral decision-making by each lender, and nothing in Plaintiff's Complaint suggests otherwise. In addition, the website sources cited by Plaintiff show that the credit score and creditworthiness are related.[29] Indeed, VantageScore's website,

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[29] At **[*87]** its very essence, the credit score is a predictor of a borrower's risk of default. It is touted by VantageScore as a "highly predictive, generic consumer credit risk model . . . [that p]redicts the likelihood of future serious delinquencies (90 days late or greater) on any type of account." VantageScore, *http://www.vantagescore.com/about/vantagescore_methodology/* (last visited 8/09/11). According to VantageScore's website, credit scores are used by lenders to determine whether to extend credit and the terms of such credit. *Id., http://www.vantagescore.com/benefits/consumers/* (last visited 8/09/11). A consumer's VantageScore is derived from a mathematical formula that evaluates a number of credit-related characteristics, including:

quoting Fitch Ratings with regard to the secondary market, states: "VantageScore provides highly predictive evaluations of consumer creditworthiness." VANTAGESCORE, *http://www.vantagescore.com/about/marketadoption/* (last visited 8/09/11). Finally, Plaintiff's contention that there is no lender risk once the loans are underwritten by insurance (such as credit-swap derivatives) is wholly conclusory and not supported by the factual allegations.

Next, Plaintiff submits that despite the statute's directive to analyze the facts independently, credit bureaus and credit scoring agencies have collaborated to create a uniform industry pricing model. Plaintiff further submits that "[s]uch industry-wide uniformity for making lending decisions is even touted as an advantage in Credit Score Defendants' product literature: 'VantageScore is the generic credit scoring created by America's three major credit reporting companies [named defendants, Experian, Trans Union, and Equifax]. Our highly predictive model uses an innovative, patent-pending scoring methodology *to provide lenders with a consistent interpretation of consumer credit files* (emphasis added).'" Pl.'s Mem. in Opp'n at 15, ECF No. 63 (quoting Barrett Burns, President & CEO, VantageScore Solutions LLC, VantageScore Newsletter, Oct. 20, 2010). Plaintiff maintains that this consistent interpretation is intended to, and does, lead to consistent pricing in which lenders lose any competitive advantage in their ability to analyze data, but because the credit score consistently fixes the terms of the loans, lenders can make up **[*89]** for the loss of competition by adopting the same recommended credit pricing model, which yields monopolistic profits. *Id.* at 15-16. Thus, Plaintiff submits that Defendants are acting outside the scope of the FCRA, which is the reason the instant Complaint was filed. *Id.* at 16.

The Court finds no merit to any of these arguments. First, the alleged collaboration between the Credit Bureaus and Credit Scoring Companies to create a uniform industry pricing model is based on the erroneous assumption that the credit score or scoring model is the equivalent of a *pricing* model. However, as explained above, the credit score and/or scoring models generated by VantageScore and FICO are not pricing models. This is evident from a perusal of the excerpts from VantageScore's and FICO's websites as provided by Plaintiff.[30] Moreover, the Court does not find any "directive" in the FCRA that *credit reporting agencies* are to independently analyze the facts. Rather, the FCRA requires that the credit reporting agencies accurately and fairly report, collect and evaluate consumer credit information. And it appears from VantageScore's website that its patent-pending scoring model does just that, as it allegedly **[*90]** reduces the variance between the credit scores of the three credit reporting agencies, and thus, produces a more accurate and consistent score. There is nothing unlawful about the exchange of customers' credit history information between the Credit Bureaus and Credit Scoring Companies so that the latter can generate a *scoring* model, as opposed to a *pricing* model, as the former clearly falls within the purview of *§1681b(a)(3)*. Likewise, the Court cannot glean any improper motive from VantageScore's representation on its website that its scoring methodology provides lenders with consistent interpretations of consumer credit files. A review of the website excerpts provided by Plaintiff reveals that the purpose behind VantageScore's scoring model is developing a statistically sound, and therefore reliable and accurate, prediction of a consumer's credit risk or creditworthiness. VantageScore represents that its scoring model is more accurate and reduces the variance in credit scores between credit reporting agencies. It is clear that VantageScore's scoring model is purely a risk assessment. Moreover, it is in complete accord with the purpose of the FCRA—to ensure accuracy and fairness in **[*91]** credit reporting. *15 U.S.C. §1681*. The fact that VantageScore's scoring model may have a stabilizing effect on price does not give rise to a Sherman Act violation without some evidence of an agreement between lenders to offer the same credit terms and interest rates for certain credit scores without any independent evaluation of a consumer's facts and credit history. *Maple Flooring, 268 U.S. at 585*. And as this Court found above, no such agreement can be inferred from the facts alleged in Plaintiff's Complaint. Accordingly, the Court finds no merit to Plaintiff's argument that Defendants are acting outside the scope of the FCRA.

Payment history, credit utilization, depth of credit, balances, recent credit, and available credit. *Id., http://www.vantagescore.com/faqs/consumer/* (last visited 8/09/11). Along with the credit score, lenders also consider a number of other factors including whether a borrower is likely to improve, deteriorate, or remain stable in terms of their credit score by closely examining credit reports, specifically, the amount of credit utilization. *The Score,* VANTAGESCORE at 5 (Apr. 26, 2011), **[*88]** *http://www.vantagescore.com/docs/newsblast_pdfAPR28.pdf*.

[30] *See, e.g.,* Pl.'s Exs. B & C, ECF Nos. 63-2 & 63-3; Pl.'s Exs. D, E, F, & G, ECF Nos. 64-4 - 64-7.

Therefore, because Plaintiff has failed to allege facts that show or suggest that the exchange of credit information and credit scores was accompanied by an agreement to use that information improperly, *i.e.,* to fix the price of credit, the Court finds that the Complaint fails to state a plausible §1 violation under the Sherman Act.

4. Leave to Amend the Complaint

In the alternative, Plaintiff has summarily requested leave to amend her Complaint. For the reasons **[*92]** set forth below, the Court recommends that Plaintiff's request for leave to amend her complaint be denied.

HN32[] *Rule 15(a) of the Federal Rules of Civil Procedure* provides that leave to amend a pleading "shall be freely given when justice so requires." In *Foman v. Davis,* the Supreme Court delineated the grounds that would justify denying leave to amend: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment". *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. The grant or denial of leave to amend is within the sound discretion of the district court; however, failure to provide a reason for denying leave to amend is considered an abuse of that discretion. *Id.; see also In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1434* (citing *Foman, supra*).

The proper procedure for amending a complaint, in non-civil rights cases, is set forth in *Fed.R.Civ.P. 15(a)(1)*: ***HN33***[] "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive **[*93]** pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under *Rule 12(b)*, *(e)*, or *(f)*, whichever is earlier." *Fed.R.Civ.P. 15(a)(1)(A)* & *(B)* (effective Dec. 1, 2009). However, ***HN34***[] after the expiration of the time set forth in *Rule 15(a)(1)*, a party may amend its pleading prior to trial only with the opposing party's written consent or with leave of court. *Fed.R.Civ.P. 15(a)(2)*. *Rule 15(a)(2)* further provides that leave to amend should be freely given when justice requires.

HN35[] Where leave of court is required to amend the complaint, the plaintiff must request leave to amend and attach the proposed amended complaint to the request. *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 252 (3d Cir. 2007)* (citing *Kelly v. Del. River Joint Comm'n, 187 F.2d 93, 95 (3d Cir. 1951))*.[31] Failure to attach the proposed amendment is fatal to the request. *Id. at 252-53*; *see also Ranke v. Sanofi-Synthelabo Inc., 436 F.3d 197, 206 (3d Cir. 2006)* (citing *Ramsgate Court Townhome Ass'n v. West Chester Borough, 313 F.3d 157, 161 (3d Cir. 2002))*.

The Court finds that Plaintiff has not properly requested leave to amend her Complaint. Plaintiff did not file an amended complaint as a matter of course within 21 days after service of Defendants' motions to dismiss under *Rule 12(b)(6)*. Therefore, Plaintiff is required to follow the procedure set forth under *Rule 15(a)(2)*, as further delineated in *Fletcher-Harlee.* This she did not do. On November 18, 2010, Plaintiff summarily requested, in the alternative, leave to amend her Complaint in her responsive brief to Defendants' motion to dismiss. *See* Pl.'s Mem. in Opp'n at 24, ECF No. 63. However, she has failed to indicate in her responsive brief what additional facts she would allege in her **[*95]** amended complaint to adequately plead a §1 antitrust claim, nor did she indicate at oral argument on Defendants' motions to dismiss what additional facts she would allege in support of her antitrust claim. Most importantly, she has failed to provide the Court with a proposed amended complaint. This is fatal to her request for leave to amend the complaint. *Fletcher-Harlee, 482 F.3d at 252*; *see also Burtch v. Milberg Factors, Inc., Civ. A. No. 07-556-JJF-LPS, 2009 U.S. Dist. LEXIS 48431, 2009 WL 1529861, *3 (D. Del. May 31, 2009)* (declining to

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[31] In *Fletcher-Harlee,* the version of *Rule 15* in effect at the time of the court of appeals' decision **[*94]** was the pre-2009 amendment version, which allowed a plaintiff to amend a complaint once as a matter of right up to the point at which the district court grants the motion to dismiss and enters final judgment, since a motion to dismiss is not a responsive pleading and the time limit applied only to responsive pleadings. After the motion to dismiss is granted and final judgment is entered, a plaintiff may seek to amend the complaint only through *Fed.R.Civ.P. 59(e)* or *60(b)*. *Id.* (citing *Kelly, supra*).

grant leave to amend the complaint in an antitrust action for failing to present a proper request for leave to amend) (citing *Fletcher-Harlee, 482 F.3d at 252*). As the court of appeals opined in *Fletcher-Harlee,* "we hold that in ordinary civil litigation ***HN36***[] it is hardly error for a district court to enter final judgment after granting a *Rule 12(b)(6)* motion to dismiss when the plaintiff has not properly requested leave to amend its complaint."

In addition, and perhaps more importantly, the Court finds that it would be futile to allow Plaintiff to amend her Complaint. Plaintiff has failed to proffer to this Court any additional facts to show a plausible antitrust claim, in particular, **[*96]** that there was an agreement among the Defendants to engage in unlawful conduct under *§1 of the Sherman Act*. Moreover, it is clear from Plaintiff's responsive brief and sur-reply that in order to prove the alleged antitrust violation here, she is relying on this Court agreeing with her that "credit scores" are the equivalent of "pricing." Having found against Plaintiff on this legal issue, the Court cannot envision any facts that would show or suggest a plausible §1 antitrust claim.

Therefore, for the reasons set forth above, the Court recommends that Plaintiff's request for leave to amend her complaint be denied.

D.Credit Bureaus' Motion to Dismiss

Defendants Experian Information Solutions, Inc., Trans Union LLC, and Equifax Credit Information Services, Inc. (collectively, the "Bureau Defendants"), have also moved to dismiss the Complaint in its entirety for failure to state a claim pursuant to *Rule 12(b)(6)*. In support of their motion, the Bureau Defendants submit that the Complaint fails to adequately allege an unlawful agreement and plausible conspiracy as required under *Twombly.* The Bureau Defendants further contend that their actions are lawful and authorized by the FCRA, and that **[*97]** the FCRA impliedly precludes enforcement of the antitrust laws as sought by Plaintiff. The Court will address each of these arguments below.

1. The Sufficiency of Plaintiff's Allegations As to Bureau Defendants

In her Complaint, Plaintiff sets forth several averments directed specifically to the Bureau Defendants. In this regard, Plaintiff alleges that credit bureaus "act as market associations within the context of ***antitrust law***" because they "use private and sensitive data among marketplace competitors" and "actively promote and derive profit from assisting all of the competitors in the industry." (Compl., ¶32.) Plaintiff posits that "[m]arket associations can be effective tools for monopolizing industries by acting as an information clearing house for coordinating pricing information and boycotts. Credit bureaus act as information clearing houses holding proprietary data on over 1 billion debtors internationally." (Compl., ¶33.)

According to Plaintiff, the credit bureaus "further the price fixing scheme among lenders because they assist and promote parallel action among competitors. Specifically, where one company reports a negative event, the credit bureau(s) alert all of the lenders **[*98]** to either boycott the debtor by foreclosing access to any further loans or increase interest rates. Thus, consumers are forced to either submit to higher monopolistic prices or default and thereby be excluded from the credit market for at least seven years." (Compl. ¶34.) In addition, Plaintiff alleges that "Credit bureaus also assist in providing instantaneous real-time monopolistic pricing. Because the database information is shared in real time, the lenders can increase prices or institute boycotts with unparalleled efficiency." (Compl., ¶35.)[32]

[32] The Court finds that as to the allegations contained in paragraphs 32-35 of the Complaint, "because they are no more than conclusions, [they] are not entitled to the assumption of truth." *Iqbal, 129 S.Ct. at 1950*. In some instances, Plaintiff combines a conclusion with a hypothesis or theory not directed to any named defendant. *See* Compl. ¶33 ("Market associations *can be* effective tools for monopolizing industries by acting as an information clearing house for coordinating pricing information and boycotts."); *see also* Compl. ¶35 ("Because the database information is shared in real time, the lenders *can* increase prices or institute boycotts **[*99]** with unparalleled efficiency."). Moreover, other than the reference to Equifax in the JP Morgan letters,

The Bureau Defendants submit that Plaintiff's allegations fail to satisfy the pleading requirements of *Twombly,* and join in and incorporate by reference the Lender Defendants' motion to dismiss and memorandum of law in support thereof. The Bureau Defendants also advance two arguments of their own. First, the Bureau Defendants contend that Plaintiff has utterly failed to allege a conspiracy theory **[*100]** that is plausible as to them. In support, the Bureau Defendants argue that when the proper standard is applied to Plaintiff's Complaint, even a cursory review of the allegations exposes them as inadequate. Second, the Bureau Defendants submit that Plaintiff has failed to allege virtually any facts at all regarding the alleged conspiracy, let alone facts plausibly suggesting that they reached any agreement to take actions they do not even perform, *i.e.,* setting interest rates and other credit terms.

With regard to their argument that Plaintiff has failed to allege a conspiracy theory that is plausible as to them, the Bureau Defendants argue mainly that there are no allegations indicating or suggesting what benefit they would receive from participating in a conspiracy to restrict the supply of loans. The Bureau Defendants submit that if anything, they would have nothing to gain and much to lose from a scheme to shrink their downstream credit-reporting revenue by limiting the availability of credit. The conspiracy as alleged by Plaintiff would decrease the number of loans and thereby decrease the number of credit reports used and sold. Thus, agreeing to restrict loan output, or supporting **[*101]** such agreement, makes no sense for a credit bureau. Moreover, the Bureau Defendants maintain that Plaintiff fails to provide a credible explanation or even allege why they would agree to participate in a conspiracy to fix the terms of products they do not sell, when clearly they do not receive revenue from interest rates. Because the banking system is dependent upon fair and accurate credit reporting, the Bureau Defendants maintain lenders would purchase credit data from them regardless. By participating in a conspiracy, the Bureau Defendants would needlessly risk antitrust penalties for revenue they would receive anyway. Thus, because Plaintiff has failed to allege a plausible motive for the Bureau Defendants to participate in a conspiracy, the Complaint against them should be dismissed.

In response to the Bureau Defendants' implausibility argument, Plaintiff submits that their argument is factually untrue. Pl.'s Mem. in Opp'n to Bureau Defs.' Motion to Dismiss at 7, ECF No. 60 ("Pl.'s Mem. in Opp'n to Bureau Defs."). According to Plaintiff, the Bureau Defendants solely own VantageScore, thus making it their agent, and VantageScore sells credit scores which are used by lenders to set **[*102]** lending terms. Plaintiff further theorizes that VantageScore's revenues accrue solely to the Bureau Defendants, and therefore, the profitability of the Bureau Defendants rests, at least in part, on lenders adopting the VantageScore "pricing model." Consequently, Plaintiff submits, the Bureau Defendants through their agent, VantageScore, will more than make up for "the lost revenues due to decreased lending by deriving revenues from the lenders who adopt the proprietary, consistent, and uniform pricing system [known as] VantageScore®." *Id.*

The Court finds that Plaintiff's argument in response is flawed in several respects. Plaintiff does not explain what facts are untrue. Indeed, Plaintiff does not appear to be disputing that a credit bureau would be harmed by a conspiracy to limit the availability of credit, which would reduce the use of credit reports, thereby lowering the credit bureaus' revenue. Rather, Plaintiff argues that the Bureau Defendants "compensate" for these lost revenues "by deriving revenues from lenders who adopt . . . VantageScore scores." This argument ignores the fact (previously admitted) that if lending decreases, there will be less demand for the VantageScore **[*103]** scores, and therefore, revenue from the sales of VantageScore scores will also decrease. The Court agrees with the Bureau Defendants that it is highly unlikely they would enter into a conspiracy in which they would needlessly risk antitrust penalties and from which they would not benefit. Therefore, the Court finds Plaintiff's conspiracy theory, as it relates to the Bureau Defendants, implausible.

Plaintiff's argument is also flawed to the extent she attempts to establish antitrust liability as to the Bureau Defendants based solely on their ownership of VantageScore. As the Supreme Court recognized:

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there are no facts alleged in the Complaint suggesting communications between the Bureau Defendants and the other Defendants, that support the allegation in paragraph 34 that the "credit bureau(s) alert all of the lenders to either boycott the debtor by foreclosing access to any further loans or increase interest rates." In addition, the reference to Equifax in the JP Morgan letters does not give rise to the suggestion or inference that the Equifax alerted JP Morgan to boycott Plaintiff by foreclosing access to any further loans or increase interest rates. Rather, the JP Morgan letters indicate that Equifax merely provided credit information to JPMorgan. *See* discussion, *supra,* at 22-24.

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that **HN37**[] a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Thus, it is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders."

United States v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) **[*104]** (internal citations omitted); *see also* Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (3d Cir. 2001) (citing Bestfoods, 524 U.S. at 69; other citation omitted) (when the shareholder is another corporation, mere ownership of a subsidiary does not justify the imposition of liability on the parent).[33] This principle has been applied in the context of antitrust cases. In re Pa. Title Ins. Antitrust Litig., 648 F.Supp.2d 663, 687 (E.D.Pa. 2009) (citations omitted) (holding plaintiffs cannot rely merely on parent companies' ownership interest in their respective subsidiaries to maintain a §1 claim against parent defendants). **HN38**[] Therefore, in order to state a §1 claim against parent corporations, a plaintiff "must set forth facts establishing the parent corporations' direct and independent participation in the alleged conspiracy." Id. at 688 (citing McCray v. Fidelity Nat'l Title Ins. Co., 636 F.Supp.2d 322, 334 (D.Del. 2009); In re Pressure Sensitive Labelstock Antitrust Litig., 566 F.Supp. 2d 363, 375-77 (M.D.Pa. 2008); Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., ("NIPP"), 311 F.Supp. 2d 1048, 1068-69 (D. Colo. 2004)). However, assertions that the parent corporations **[*105]** participated in the antitrust conspiracy by giving their assent and approval to the subsidiary's conduct, and through their ownership and control of their subsidiary, amount to nothing more than conduct "typical of any parent and subsidiary," and thus, are insufficient to state a §1 claim against the parent corporations. Id. at 688-89 (citing Mitchael v. Intracorp, Inc., 179 F.3d 847, 857 & n. 12 (10th Cir. 1999)). **HN39**[] A limited liability company formed under Delaware law, such as VantageScore, "is treated for liability purposes like a corporation." Wellman v. Dow Chem. Co., Civ. No. 05-280, 2007 U.S. Dist. LEXIS 19527, 2007 WL 842084, at *2 (D.Del. Mar. 20, 2007) (citing 6 Del. C. §18-303).

In the case at bar, Plaintiff has not alleged any facts to suggest anything but "circumstances . . . typical of any parent and subsidiary." For example, in paragraph 11 of the Complaint, Plaintiff asserts that "VantageScore is co-owned by Trans Union, Equifax, and Experian."[34] In paragraph 12, Plaintiff alleges: "Defendants, directly or through a division, subsidiary or agent, have had actual knowledge or, have knowingly participated in, the conspiracy to fix loan prices, including the restraint of availability of consumer loans." (Compl., ¶12.) Disregarding for the moment the fact that paragraph 12 contains conclusory **[*107]** statements which are not considered on a motion to dismiss, Plaintiff alleges nothing more than the Bureau Defendants possessed knowledge of, and/or acquiesced in, the alleged conspiratorial conduct of their subsidiary, VantageScore. As the district court concluded in *In re Pennsylvania Title Insurance:*

> Because plaintiffs allege that parents merely acquiesced in their subsidiaries' conduct, the complaint lacks the "specific [allegations] of coordinated activity," [Mitchael, 179 F.3d] at 857, that shows that parents directed, controlled, or encouraged their subsidiaries' participation in the [price fixing] scheme, NIPP, 311 F.Supp.2d at 1070. Although plaintiffs need not present detailed allegations, plaintiffs here rely on general statements that

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[33] However, where it has been demonstrated that the corporate form has been abused, courts will allow the corporate veil to be pierced and liability imposed on the corporation's shareholders. Pearson, 247 F.3d at 484 (citing Publicker Indus., Inc. v. Roman Ceramics Corp., 603 F2d. 1065, 1069 (3d Cir. 1979)). In making this determination, the courts apply the "alter ego" test, which requires an inquiry into whether the subsidiary is little more than a legal fiction, and consideration of the following factors: "gross undercapitalization, **[*106]** failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder." Id. at 484-85 (citing Am. Bell Inc. v. Fed'n of Tel. Workers of Pa., 736 F.2d 879, 886 (3d Cir. 1984)). Plaintiff's Complaint does not contain any factual allegations even remotely suggesting any of the alter ego factors are present here.

[34] VantageScore is a Delaware limited liability company, and is owned by the three Bureau Defendants, two of which are corporations (Experian and Equifax), and the other (Trans Union) is a Delaware limited liability company. Compl., ¶¶ 7-9, 11.

> barely rise above mere labels and conclusions and thus hardly raise a right to relief above a speculative level. *Twombly, 550 U.S. at 555*.

648 F.Supp. 2d at 689; *see also* *In re Pressure Sensitive, 566 F.Supp. 2d at 376* (holding knowledge of the existence of an agreement between the subsidiary and other alleged co-conspirators does not support an inference that the parent company was a co-conspirator). Here too Plaintiff's Complaint lacks specific **[*108]** allegations of coordinated activity that shows the Bureau Defendants directed, controlled or encouraged VantageScore's participation in the alleged conspiracy.

Plaintiff's attempt to predicate the Bureau Defendants' liability on an alleged agency relationship with VantageScore is equally unavailing. Conclusory allegations of agency based merely on the parent corporation's ownership of a subsidiary without any facts suggesting an agency relationship are insufficient to establish the parent corporation's independent participation in the alleged conspiracy. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 513 F. Supp. 1100, 1297 (E.D.Pa. 1981)*, *rev'd in part on other grounds* *723 F.2d 238 (3d Cir. 1983)*, *rev'd* *475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In *Zenith Radio,* the plaintiff attempted to establish an antitrust conspiracy between eight principal corporations and their sales subsidiaries based merely on corporate affiliation. *Id. at 1297*. In rejecting this **[*109]** argument, the district court noted the principles relevant to deciding whether a subsidiary is the agent of its parent corporation: "'Whether an agency relationship exists between a parent corporation and its subsidiary is normally a question of fact. The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary.' . . . However, the mere fact that one corporation owns a controlling interest in another does not render the subsidiary the agent of the parent[.]" *Id.* (quoting *Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil Co., 456 F.Supp. 831, 840-41 (D.Del. 1978))*. The district court further explained: "'A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other....' Nor does the fact that a parent and a subsidiary have common officers and directors necessarily indicate an agency relationship." *Id.* (quoting *Japan Petroleum, 456 F.Supp. at 841* (quoting *Restatement (Second) of Agency §14* M)). Likewise, ***HN40***[] activities that constitute standard parent-subsidiary interactions, such as the parent corporation appointing the subsidiary's "officers and directors, influenc[ing] **[*110]** executive compensation, approv[ing] budgets, gather[ing] information about corporate performance, and receiv[ing] distributions of subsidiary profits[,] . . . do not reflect daily, operational control that is the sine qua non of an alter ego relationship." *In re Chocolate Confectionary Antitrust Litig., 674 F.Supp. 2d 580, 599-600 (M.D.Pa. 2009)* (citations and footnote omitted). In the case at bar, other than labeling VantageScore as the "agent" of the Bureau Defendants, Plaintiff has failed to assert any facts suggesting the operational control necessary to raise an inference of an agency relationship between them. Thus, to the extent Plaintiff's antitrust claim against the Bureau Defendants is predicated on an alleged agency relationship with VantageScore, the Complaint fails to raise a right to relief above the speculative level. *Twombly, 550 U.S. at 555*.

The Bureau Defendants further argue that Plaintiff fails to allege that they know the credit terms that lenders offer consumers or that they agreed to fix such terms. Other than repeatedly leveling conclusory allegations of "collusion," "agreement," and "conspiracy" against them, the Bureau Defendants submit that Plaintiff has failed **[*111]** to plead sufficient facts such as a "specific time, place, or person involved in the alleged conspiracies." Rather, the Bureau Defendants submit the closest Plaintiff comes to alleging that they participated in any agreement is to contend that they "further the price fixing scheme among lenders because they assist and promote parallel action among competitors [by] alerting all of the lenders to either boycott the debtor or increase interest rates." However, the Bureau Defendants contend these are merely legal conclusions masquerading as factual allegations, and, in any event, parallel conduct in and of itself is legal. According to the Bureau Defendants, Plaintiff's Complaint describes what a credit bureau does and has always done—collect and distribute credit data—which is expressly authorized by the FCRA, and thus, provides an obvious alternative explanation to participation in a conspiracy to fix loan prices.

In response to the Bureau Defendants' argument that the Complaint does not specifically allege that they themselves set prices, Plaintiff counters that they ignore the fact that the "Defendants together co-own and control VantageScore Solutions, LLC which licenses a credit pricing **[*112]** model for the lending industry." Pl.'s Mem. in Opp'n to Bureau Defs. at 5, ECF No. 60 (citing Compl., ¶¶11, 36). Plaintiff perceives that the Bureau Defendants "are arguing that because they participated in the conspiracy through an agent operating at their sole direction (VantageScore Solutions, LLC), the bureaus themselves should not be liable." *Id.* Plaintiff contends this perceived argument is misplaced as under antitrust laws, the inquiry is based on the substance of the scheme not the corporate structure used to obfuscate it. *Id.*

Plaintiff's argument lacks merit. Plaintiff is mistaken in her perception as the Bureau Defendants have not advanced any such argument. Indeed, Plaintiff's argument that the Court should look to the substance of the scheme is actually at odds with the position she is advancing against the Bureau Defendants vis a vis their ownership of VantageScore, which, in effect, asks this Court to elevate form over substance. In any event, as explained above, alleging merely ownership and control of a subsidiary is insufficient to establish a parent company's antitrust liability.

In her sur-reply, Plaintiff argues that the Complaint plainly states that VantageScore **[*113]** is owned exclusively by the Bureau Defendants, and that they "have direct knowledge [of] the conspiratorial acts." Pl.'s Sur-Reply to Bureau Defs. at 1, ECF No. 72. First of all, the Complaint asserts merely that "VantageScore is co-owned by Trans Union, Equifax and Experian." Compl., ¶11. ***HN41***[] Allegations of ownership or knowledge alone do not confer liability on the individual members/owners of a limited liability corporation. *In re Pa. Title Ins., 648 F.Supp. 2d at 688*; *In re Pressure Sensitive, 566 F.Supp. 2d at 376*. Perhaps realizing these infirmities, Plaintiff attempts to argue that the "Bureau Defendants admitted to cooperating closely together in creating the VantageScore Solutions credit pricing model." Pl.'s Sur-Reply at 1-2, ECF No. 72. Plaintiff gleans this so-called admission from an opinion filed in the United States District Court for the District of Minnesota, *Fair Isaac Corp. v. Equifax, Inc., Civil Action No. 06-4112, 2007 U.S. Dist. LEXIS 71187*, on a motion to compel production of VantageScore's credit scoring algorithm, and the software and process used in conjunction with the algorithm to produce a credit score. *Fair Isaac Corp. v. Equifax, Inc., Civ. A. 06-4112, 2007 U.S. Dist. LEXIS 71187, 2007 WL 2791168, *1 (D. Minn. Sept. 25, 2007)*. **[*114]** However, a review of the cited memorandum opinion in *Fair Isaac* does not reveal any discussion of such an admission.[35] Even if the defendants in *Fair Isaac* had admitted to cooperating in developing the algorithm, those facts are not alleged in Plaintiff's Complaint, and even if they were, they would not be sufficient to suggest the Bureau Defendants directly and independently participated in the alleged conspiracy. Moreover, nowhere in the *Fair Isaac* opinion does the court or any party refer to or describe VantageScore's credit scoring algorithm as a credit *pricing* model. Thus, Plaintiff's argument that the Bureau Defendants were 'substantively involved in developing the pricing system, having direct and intimate knowledge of the [sic] how it is designed and implemented" is contrary to both fact and law.[36]

The remainder of Plaintiff's response in opposition to the Bureau Defendants' motion to dismiss consists of a reiteration of the arguments she made in response to the Lender Defendants' motion to dismiss, namely, that Plaintiff has pled direct evidence of an agreement,[37] as well as plus factors, in addition to parallel conduct, and that the Bureau Defendants' agent, VantageScore, admits and even recommends that lenders set their terms according to VantageScore's scoring model and not independent analysis of consumer's credit history. *See* Pl.'s Mem. in

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[35] Moreover, *Fair Isaac* is not even relevant to the instant dispute as *Fair Isaac* did not involve an antitrust claim, but rather, claims of unfair competition, false advertising under Lanham Act, misappropriation of trade secrets, breach of contract, and interference with contract.

[36] Plaintiff also quotes from a document she describes as the Bureau Defendants' Response in Opposition **[*115]** to Plaintiff's Motion to Compel, but no such document is found in the record at Western District of Pennsylvania, Docket No. 2:10-cv-848. Nor does Plaintiff provide a citation for the quoted material. Without a proper cite identify the source of the quote, the Court declines to consider the quoted material.

[37] Plaintiff submits that she has presented actual evidence from which a conspiracy can be inferred with regard to Experian. Plaintiff points to the JP Morgan letters (attached as Exhibit A to the Complaint) which identify *Equifax,* not Experian, as the credit reporting agency who provided information upon which JP Morgan relied in making its decision to reduce the credit limit on Plaintiff's account. However, as discussed *supra* with regard to the Lender Defendants' motion to dismiss, the credit reporting agency's conduct was authorized by the FCRA, and therefore, entirely lawful. Therefore, the **[*117]** Court finds a conspiracy cannot be inferred from this "actual evidence" against any of the Bureau Defendants.

Opp'n to Bureau Defs. at 6-10, ECF No. 60. These arguments are unavailing for the same reasons stated in the Court's discussion of the Lender Defendants' motion to dismiss, namely, the Complaint lacks any factual allegations suggesting an agreement to unlawfully fix the price of consumer loans. *See* discussion *supra* at 16-33. In addition, **[*116]** Plaintiff argues that because the Bureau Defendants own VantageScore and VantageScore admits on its website that it "provide[s] lenders with a consistent interpretation of consumer credit files," the Bureau Defendants are implicated in the alleged price fixing conspiracy. Plaintiff's argument is completely unavailing as the Court has already found neither the Bureau Defendants' ownership of VantageScore, nor VantageScore's admission on its website, suggests unlawful conduct on the part of the Bureau Defendants. *See* discussion *supra* at 48-50; *see also* *In re Pa. Title Ins., 648 F.Supp. 2d at 687*.

Finally, Plaintiff submits that the relationship between the Bureau Defendants and VantageScore is yet another plus factor that further satisfies the *Twombly* pleading requirement. Pl.'s Mem. in Opp'n to Bureau Defs. at 9-10, ECF No. 60. This argument also fails because the Bureau Defendants' ownership of VantageScore, in and of itself, does not constitute a plus factor, as it does not provide evidence that the Bureau Defendants either had a motive to enter into the alleged conspiracy or acted contrary to their interests, nor does it provide evidence implying a traditional conspiracy. *In re Ins. Brokerage Antitrust Litig., 618 F.3d at 322*. Accordingly, the Bureau Defendants' ownership in VantageScore does not constitute a "plus factor."

2. Lawfulness of Bureau Defendants' Conduct

In further support of their motion to dismiss, the Bureau Defendants submit that Plaintiff has failed to adequately allege that their concerted actions were illegal. The Bureau Defendants point to the FCRA, which expressly authorizes the conduct allegedly engaged in by the Bureau Defendants, *i.e.,* sharing **[*118]** of consumer credit data between credit bureaus and lenders. Specifically, the Bureau Defendants point to *15 U.S.C. §1681b(a)(3)(A)* (also cited by the Lender Defendants), and *§1681s-2* ("Responsibilities of furnishers of information to consumer reporting agencies"). Indeed, the Credit Bureaus argue, the FCRA actually encourages credit bureaus to share credit data, citing Congress' findings and statement of purpose in enacting the FCRA. *See e.g., 15 U.S.C. §1681(a)(1)* & *(3)*, *§1681(b)*. Finally, the Bureau Defendants submit that the relevant case law, cited by the Lender Defendants in support of their motion to dismiss, puts to rest any lingering doubts about the legality of Defendants' conduct.

In response, Plaintiff acknowledges that sharing of credit history information is lawful under the FCRA, but submits that linking credit histories to pricing models termed "credit scores" is neither lawful nor authorized by the FCRA. Plaintiff further submits that the Bureau Defendants "ignore the fact they control the pricing model through VantageScore." Pl.'s Mem. in Opp'n to Bureau Defs. at 11, ECF No. 60. In support, Plaintiff incorporates her response to the Lender Defendants' motion to dismiss **[*119]** on this point.

The Court agrees with the Bureau Defendants that their alleged conduct is lawful and authorized by the FCRA. The Court rejects Plaintiff's argument that the Bureau Defendants also engaged in unlawful conduct by linking the credit histories to pricing models, which Defendants refer to as credit scores, for the same reason the Court rejected this argument in opposition to the Lender Defendants' motion to dismiss—Plaintiff's argument equates the term credit scores with pricing models, which this Court has determined to be completely unfounded. *See* discussion *supra* at 39-44. Accordingly, because Plaintiff has failed to allege facts to suggest the Bureau Defendants' alleged conduct is unlawful, the Complaint fails to state a §1 claim against the Bureau Defendants.

3. Implied Preclusion of Plaintiff's Antitrust Claim

For their third and final argument in support of dismissing the Complaint, the Bureau Defendants argue that the FCRA precludes Plaintiff's attempt to use the Sherman Act to dismantle the credit reporting system. The Bureau Defendants note that in her prayer for relief, Plaintiff requests the Court to enjoin Defendants "from sharing their customer data among themselves **[*120]** and their agencies." (Compl., Prayer for Relief, ¶ vii.) However, according to the Bureau Defendants, the relief Plaintiff seeks is inconsistent with the express authority under FCRA which governs such conduct. For example, the Bureau Defendants submit the FCRA provides when and with whom credit bureaus may share credit data, *15 U.S.C. §1681b*, and sets forth penalties for failing to comply with its provisions, *15 U.S.C. §1681s(b)*. The FCRA vests the Federal Trade Commission (FTC) with the authority to enforce the FCRA with respect to the collection and distribution of credit data by credit bureaus. *15 U.S.C. §1681s(a)*. In support of their argument, the Credit Bureaus cite *United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 719, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)*, and *Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 275-76, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007)*, for the proposition that conduct authorized by federal law is immune from antitrust liability when the statutory framework governing the conduct in question and the antitrust complaint are "clearly incompatible."

The Supreme Court in *Credit Suisse* was asked to decide whether the securities law governing the conduct at issue in that case impliedly **[*121]** precluded the application of the antitrust laws. To decide this issue, the Supreme Court found it necessary to determine whether sufficient incompatibility existed between the securities law and the antitrust complaint, to warrant an implication of preclusion, and identified several critical factors that should be considered, in light of the context and likely consequences: "(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." *551 U.S. at 275-76*. In addition, the Supreme Court noted a fourth factor—whether "the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate." *Id. at 276*. The Bureau Defendants urge this Court to apply the factors enunciated in *Credit Suisse* to the case at bar, and submit that when the Court does so, all four factors weigh in favor of preclusion. Accordingly, the Bureau **[*122]** Defendants ask this Court to hold that they may not be sued under the antitrust laws for their conduct at issue here and dismiss the Complaint against them.

In response, Plaintiff disputes that the FCRA impliedly precludes application of the antitrust laws. In support, she initially argues that no conflict exists between the FCRA and the antitrust laws, as they are definitely not repugnant to each other. Pl.'s Mem. in Opp'n to Lender Defs. at 22, ECF No. 63.[38] Plaintiff submits the FCRA and Sherman Act are not in conflict because they each promote different policy goals—the FCRA promotes fair use of credit information, while the Sherman Act promotes competition. Thus, Plaintiff maintains, there is simply no need to choose one meritorious policy over another where both policies promote unrelated and mutually beneficial goals. Second, Plaintiff argues that the remedies found in the FCRA and Sherman Act are different, as recovery of actual damages under the FCRA requires proof of fraud while the remedies under the Sherman Act for monopolistic pricing do not. Thus, Plaintiff submits it is entirely possible and probable a plaintiff could incur both forms of damages simultaneously but not **[*123]** be fully compensated if only a single statutory remedy is applied. Lastly, Plaintiff argues that the FCRA does not authorize or recommend, either expressly or impliedly, the sharing of pricing information. Congress was aware of the antitrust laws when it drafted the FCRA, and could have included a provision granting antitrust immunity, like it did for the exchange of loss information by insurance companies in the McCarren-Ferguson Act,[39] yet Congress failed to include such a provision in the FCRA. Therefore, Plaintiff maintains, "it would be a tortuous analysis . . . to presume that in passing the FCRA, Congress implicitly intended a sweeping antitrust exemption allowing price fixing, but somehow failed to mention it." Pl.'s Mem. in Opp'n to Lender Defs. at 23, ECF No. 63. Moreover, Plaintiff submits there is no real conflict here because sharing of pricing

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[38] Plaintiff incorporates her argument on this issue advanced in her brief in opposition to the Lender Defendants' motion to dismiss. **[*124]** The Court notes that the Lender Defendants merely cited *Credit Suisse* for the proposition that allowing Plaintiff to predicate her antitrust conspiracy claim on factual allegations that Defendants did precisely what Congress has authorized them to do would be plainly repugnant to the language and purpose of the FCRA, and thus, did not advance the argument that the FCRA impliedly precluded application of antitrust laws to this case. *See* discussion *supra* at 45 (citing Lender' Mem. at 14-15, ECF No. 34). Nonetheless, Plaintiff presented an argument opposing application of an implied antitrust exemption in her memorandum in opposition to the Lender Defendants' motion to dismiss at 21-23 (ECF No. 63), which she incorporates by reference in her memorandum in opposition to the Bureau Defendants' motion to dismiss.

[39] *15 U.S.C. §§1011-1015*.

information is governed by ***antitrust law***, while sharing of credit history information is governed by the FCRA. Plaintiff contends, therefore, it is unnecessary to undertake an implied preclusion analysis.

In reply, the Bureau Defendants counter that Plaintiff's arguments must fail because the proper inquiry is not whether the statutes promote different and conflicting policy goals generally, but rather, whether there is a clear repugnancy between applying antitrust laws *to the conduct alleged* and the FCRA. Bureau Defs.' Reply Mem. at 5, ECF No. 68. As stated **[*125]** in their opening memorandum, the Bureau Defendants argue the FCRA precludes antitrust liability for conduct by the Bureaus that is sanctioned by the Act.

The Court agrees with Plaintiff that it is unnecessary to undertake an implied preclusion analysis in this case, but for a different reason. Because this Court has already found that the Bureau Defendants' alleged conduct here is not unlawful under the antitrust laws, it does not need to, nor should it, reach this issue. *Credit Suisse, 551 U.S. at 287* (Stevens, J., concurring) (opining that he "would hold, as [the Supreme Court] did in *Parker v. Brown, 317 U.S. 341, 351-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, that the defendants' alleged conduct does not violate the antitrust laws, rather than holding that Congress has implicitly granted them immunity from those laws.").

4. Leave to Amend the Complaint

In the alternative, Plaintiff has summarily requested leave to amend her Complaint. Pl.'s Mem. in Opp'n to Bureau Defs. at 13, ECF No. 60. The Court recommends that Plaintiff's request for leave to amend her complaint be denied for the same reasons set forth with regard to the motion to dismiss filed by the Lender Defendants. *See* discussion *supra* at 51-53. In addition, **[*126]** leave to amend the Complaint against the Bureau Defendants would be futile because her conspiracy theory as to them is simply implausible, and she has failed to proffer to this Court, either in her written briefs or at oral argument, any additional facts to show that the Bureau Defendants engaged in unlawful conduct under *§1 of the Sherman Act*. Accordingly, the Court recommends that Plaintiff's Complaint against the Bureau Defendants be dismissed with prejudice.

E. FICO's Motion to Dismiss

Defendant Fair Isaac Corporation ("FICO") has also moved to dismiss the Complaint for failure to state a claim pursuant to *Rule 12(b)(6)* (ECF No. 36). In support of its motion to dismiss, FICO joins in, and incorporates by reference, the motion to dismiss and the memorandum of law in support thereof filed by the Lender Defendants, as well as Part I.A. of the memorandum of law in support of the Bureau Defendants' motion to dismiss. In addition, FICO submits that the Complaint is devoid of any factual allegations that would support the conclusion that FICO conspired in violation of *§1 of the Sherman Act*. Moreover, FICO maintains the Complaint is so vague and conclusory that it fails to state a claim against **[*127]** any Defendant, much less FICO. In this regard, FICO points out that significantly, the Complaint fails to allege that FICO either originates or services consumer loans, is a bank or lender, or that it sets interest rates or credit terms for loans. Mem. of Law in Supp. of FICO's Mot. to Dismiss ("FICO's Mem.") at 3, ECF No. 38. In addition, FICO notes that the Complaint does not contain any allegations that (1) FICO entered into any sort of agreement with any other Defendant other than to "share private data, or (2) that there were communications between FICO and any Defendant, except for allegedly sharing data and "providing a [credit] 'score' to lenders." *Id.* The most that can be gleaned from these allegations, according to FICO, is that FICO assists lenders by creating a credit score. *Id.* FICO further submits that the Complaint fails to set forth any facts suggesting that it engaged in anything other than lawful, independent conduct. Thus, FICO maintains, that Plaintiff cannot possibly state a plausible claim for relief under *§1 of the Sherman Act* against it, and asks that the Complaint against it be dismissed with prejudice.

In response, Plaintiff incorporates her previous arguments **[*128]** as set forth in opposition to the motions to dismiss of the Lender Defendants and Bureau Defendants. She also advances several arguments specific to FICO, none of which has any merit. Initially, perceiving FICO to be arguing that because it does not sell or service loans it is immune from antitrust allegations, Plaintiff argues that the courts have never recognized a defense to antitrust based on whether a conspirator sold the object of the price fixing scheme. Contrary to Plaintiff's perception, the Court does not perceive FICO to be advancing any such argument. Nor does the Court perceive that FICO is attempting to draw a distinction between companies or organizations that sell products or own facilities, and those that provide only services. FICO merely states in its supporting memorandum that Plaintiff "does not (and cannot) allege that FICO makes loans." (FICO Mem. at 2, ECF No. 38.) Also, Plaintiff relies on two Supreme Court cases[40] in support of her argument that any form of organization, even non-profits that sell nothing whatsoever, can violate the Sherman Act so long as there is cooperation in the price fixing scheme. Pl.'s Mem. in Opp'n to FICO at 5, ECF No. 62. However, **[*129]** Plaintiff's reliance on the cited Supreme Court cases is misplaced, as neither case addresses the proposition for which it is cited—whether an organization that neither sells nor owns products is liable for violation of *§1*. In any event, here the Complaint fails to allege any facts to suggest any cooperation or agreement between FICO and the other Defendants to fix interest rates or the terms of loans. Indeed, a review of the Complaint reveals few allegations specifically directed at FICO, which consist of the following:

> FICO and VantageScore are credit scoring companies that provide a "score" to lenders which is used to price consumer loans. Together, FICO and VantageScore provide over 85% of the credit scores to lenders in the United States. (Compl., ¶21.)
>
> The credit scoring industry is dominated by two companies, FICO and VantageScore. (Compl., ¶ 65.)
>
> In order to consolidate and distribute the vast amount of consumer data, an oligopoly of three credit bureaus and two credit scoring companies have emerged as the most efficient method for highly centralized, rapid distribution of competitively sensitive data among competitors. (Compl., ¶ 29.)
>
> Furthering the conspiracy, credit scoring **[*130]** companies use the reported information from credit bureaus to create a derivative score which incorporates all of the consumer's credit data as well as the consumer's profitability. The score is then distributed to all lenders. The lending industry has identified that the most profitable customers are the ones having the lower credit scores. Consequently, by examining credit scores, lenders can rapidly identify the most profitable customers and fix rates accordingly. Thus, credit scoring companies assist lenders in effecting a parallel pricing scheme for credit by creating a derivative metric which is an effective proxy for setting uniform price points among competitors. (Compl., ¶ 36.)
>
> Defendants also continue to use credit reporting agencies and credit scoring agencies to restrain and control the price of consumer loans. (Compl., ¶71.)

When the Court weeds out the conclusory allegations from the above paragraphs, the remaining allegations of fact suggest that FICO's involvement in the alleged conspiracy consists of (1) providing a "score" to lenders (¶21); (2) distributing competitively sensitive data among competitors (¶29); (3) using information from credit bureaus to create a derivative score (¶36); and assisting lenders by creating a derivative metric (¶36). The Court finds that this alleged involvement by FICO does not support an inference that FICO conspired, agreed or cooperated with any other Defendant to engage in any unlawful acts, or even communicated with the other Defendants to form the basis of an agreement.

The next argument advanced by Plaintiff goes to whether her allegation in the Complaint to the effect that a credit score is really a pricing model, is factual, not conclusory. Plaintiff maintains that it is factual and therefore must be accepted as true. Pl.'s Mem. in Opp'n to FICO at 5, ECF No. 62. The Court previously addressed this point, finding Plaintiff's statement to be a legal conclusion, **[*132]** and, in any event, not borne out by Plaintiff's own supporting documents. *See* discussion *supra* at 43-44. Also unavailing is Plaintiff's attempt to buttress this argument with FICO's "own admissions . . . in its trademark prosecution file wrapper," that "lenders can use 'it [the FICO® score] for credit line management, cross-selling, balance building, [and] pricing (emphasis added) .....'" Pl.'s Mem. in Opp'n to FICO at 5, ECF No. 62 (quoting Trademark Registration Ser. No. 76137347 File Wrapper, Specimen deposit, Aug. 28, 2008, attached as Ex. C). First of all, the referenced document is not found anywhere in the record.[41]

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[40] *Nat'l Coll. Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (finding NCAA's plan for televising college football games of its member institutions for 1981-85 seasons constituted horizontal price fixing in violation of *§1*); *United States v. Topco Assocs., Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)* (finding association's scheme of allocating territories **[*131]** to minimize competition at retail level was horizontal restraint constituting per se violation of *§1*).

Second, the quoted excerpt does not support Plaintiff's conclusion—that FICO's own literature confirms the truth of Plaintiff's allegation that FICO assists lenders in fixing prices. This point was raised in opposition to the Lender Defendants' motion to dismiss, and the Court rejects it for the same reasons it rejected it vis a vis the Lender Defendants. Moreover, in light of the Court's conclusion that the statements on FICO's website do not suggest that FICO assists lenders in fixing prices, Plaintiff's argument that the statements on FICO's website constitute **[*133]** direct evidence of a meeting of the minds, or operate as a "plus" factor, is likewise unavailing.

Finally, the Court finds that the factual allegations directed toward FICO do not suggest that its conduct was unlawful. There are no facts alleged to suggest FICO engaged in any acts other than providing credit scores to credit bureaus and lenders. Nor are there any facts alleged to suggest an agreement between Defendants to use the credit scores to fix interest rates or credit terms. Inasmuch as this Court has already found the credit scores are not pricing models, FICO's conduct is not unlawful.[42]

Thus, for these and the reasons set forth above with regard to the Lender Defendants' and Bureau Defendants' motions to dismiss, the Court finds Plaintiff has failed to state a plausible §1 claim against FICO. Therefore, the Court recommends that the Complaint as to FICO be dismissed **[*134]** with prejudice.[43]

F.VantageScore's Motion to Dismiss

VantageScore has filed a Motion to Dismiss the Complaint Pursuant to *Rules 12(b)(2)* and *12(b)(6) of the Federal Rules of Civil Procedure* (ECF No. 39). Essentially, VantageScore argues that this Court does not possess personal jurisdiction over it. VantageScore further argues that the Complaint should be dismissed for failure to plead a cognizable §1 claim against it. The Court will address each of these arguments in turn.

1. Motion to Dismiss for Lack of Personal Jurisdiction

As a preliminary matter, VantageScore has moved to dismiss Plaintiff's Complaint with prejudice on the basis that this Court lacks personal jurisdiction over it under *Rule 12(b)(2)*.

a. Standard of Review – *Rule 12(b)(2)* Motion

HN42[] In ruling on a motion to dismiss under *Rule 12(b)(2)*, the court is required, as with *Rule 12(b)(6)* motions, to accept as true all allegations contained **[*135]** in the complaint and view all factual disputes in plaintiff's favor. *D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 102 (3d Cir. 2009)* (citing *Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004))*. Unlike a *Rule 12(b)(6)* motion, however, the scope of the Court's review on a *Rule 12(b)(2)* motion is not limited to the face of the complaint, but may include affidavits or other competent evidence submitted by the parties. *Patterson v. FBI, 893 F.2d 595, 603-04 (3d Cir. 1990)* (citing *Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 n. 9 (3d Cir. 1984))*.

HN43[] Ultimately, the plaintiff bears the burden of proving, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction over the defendants. *Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330, 51 V.I. 1219 (3d Cir. 2009)* (citing *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002))*. If an evidentiary

[41] However, Plaintiff appears to be quoting from FICO's website. *See* Ex. C to Pl.'s Mem. in Opp'n to FICO, ECF No. 62-2.

[42] The remainder of Plaintiff's arguments in opposition to FICO's motion to dismiss dovetail those raised in opposition to the Lender Defendants' motion to dismiss, and fail for the reasons stated above.

[43] Plaintiff's request for leave to amend her complaint as to Defendant FICO (Pl's Mem. in Opp'n to FICO Mot. to Dismiss at 8, ECF No. 62), should be denied for the same reasons set forth with regard to the Lender Defendants' and Bureau Defendants' motions to dismiss. *See* discussion *supra at 51-53, 70*.

hearing is not held on the 12(b)(2) motion, then the plaintiff need only demonstrate a prima facie case of personal jurisdiction at the preliminary stages of litigation.[44] *Metcalfe, 566 F.3d at 330* (citing *O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 316 (3d Cir. 2007))*; *D'Jamoos, 566 F.3d at 102* **[*136]** (citing *Miller Yacht Sales, 384 F.3d at 97*). Once a defendant submits contradictory evidence through an affidavit, plaintiff may not rest on the allegations in the complaint, but must come forward with affidavits or other competent evidence to show that personal jurisdiction is proper. *In re Chocolate Confectionary Antitrust Litig., 602 F.Supp. 2d 538, 556 (M.D.Pa. 2009)* (citing *Patterson, 893 F.2d at 603-04*) (footnote & other citation omitted); *Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996)* (citations omitted); *Time Share Vacation Club, 735 F.2d at 66 n. 9* (citation omitted). To satisfy this burden, the plaintiff "may not rely on bare pleadings, but must produce competent evidence to establish 'with reasonable particularity' the nature and extent of the defendant's contacts with the forum state." *Burke v. Quartey, 969 F. Supp. 921, 924 (D.N.J. 1997)* (citing *Patterson, 893 F.2d at 603-04*); *see also* *Sprague Energy Corp. v. Union Drawn Steel II, Ltd., Civ. A. No. 07-962, 2008 U.S. Dist. LEXIS 20335, 2008 WL 696911, *2 (W.D.Pa. Mar. 12, 2008)* ("because a 12(b)(2) motion requires resolution of factual issues outside the pleadings, the plaintiff may not rely on the pleadings alone to carry its burden **[*137]** of establishing the jurisdictional facts."). Once the plaintiff has sustained this burden, the 12(b)(2) motion will be denied despite any controverting presentation by defendant. *Chocolate Confectionary, 602 F.Supp. 2d at 557* (citing *Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142 n. 1 (3d Cir. 1992))*; *Burke, 969 F.Supp. at 924*; *see also* *Metcalfe, 566 F.3d at 331*.

b. Sufficiency of Contacts with the Forum

HN44[] In cases where the plaintiff's claim is predicated on a federal statute which authorizes nationwide service of process, such as the Sherman Act, *see* *15 U.S.C. §22*,[45] courts apply a *Fifth Amendment* due process analysis to personal jurisdiction challenges. *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 299 (3d Cir. 2004)* (holding that "personal jurisdiction under *Section 12 of the Clayton Act* is as broad as the limits of due process under the *Fifth Amendment*") (citing *Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1415 (9th Cir. 1989))*; *Pinker, 292 F.3d at 368-69* **[*138]** (citation omitted) ("In federal court, the exercise of specific jurisdiction must satisfy the requirements of the *Due Process Clause of the Fifth Amendment*."); *Chocolate Confectionary, 602 F.Supp. 2d at 557* ("When a statute such as the Sherman Act permits nationwide service of process, the *Fifth Amendment Due Process Clause* guides the court's personal jurisdiction inquiry.") (citing *Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 295 (3d Cir. 1985))* (other citation and footnote omitted); 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §1068.1 at 594 (3d ed. 2002) ("it is now clear that the *Due Process Clause of the Fifth*, rather than the *Fourteenth, Amendment* applies to the assertion of personal jurisdiction in the federal question context.") (citing *Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987))*.

In *Go-Video,* the court of appeals explained ***HN46***[] the requirements of the due process component of the *Fifth Amendment*: "a court must consider whether the maintenance of the suit (i.e. the exercise of personal jurisdiction over the defendants to the suit) offends traditional notions of fair play and substantial justice." *885 F.2d at 1415* (citing *Omni Capital Int'l, 484 U.S. at 102-03*; *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945))*. In assessing whether the exercise of personal jurisdiction comports with "traditional notions of fair

[44] "However, the plaintiff's allegations must be grounded in 'specific facts.'" *Decon Labs., Inc. v. Decon Labs. Ltd., 703 F.Supp. 2d 481, 485 (E.D.Pa. 2009)* (citing *Marten v. Godwin, 499 F.3d 290, 298 (3d Cir. 2007))*.

[45] Section 12 of the Clayton Act, codified at *15 U.S.C. §22*, provides:

> ***HN45***[] Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; *and all process in such cases may be served in the district **[*139]** of which it is an inhabitant, or wherever it may be found.*

(Emphasis added.) The nationwide service of process provision in *Section 12* of the Clayton Act applies to cases brought pursuant to *Section 1 of the Sherman Act*. *See* *15 U.S.C. §12* and Historical & Stat. Notes thereto (defining antitrust laws to include *sections 1 through 7 of Title 15*, known as the Sherman Act).

play and substantial justice," the inquiry in the federal court context takes "less account of federalism concerns and focus[es] more on the national interest in furthering the policies of the law(s) under which the plaintiff is suing." *Pinker, 292 F.3d at 370* (internal citations omitted). **[*140]** Thus, "specific [personal] jurisdiction may be exercised only when the defendant has constitutionally sufficient 'minimum contacts' with the forum, *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (quoting *Int'l Shoe, 326 U.S. at 316*), and where subjecting the defendant to the court's jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Pinker, 292 F.3d at 369* (quoting *Int'l Shoe, 326 U.S. at 316*).

Moreover, when the parties challenging personal jurisdiction are alien corporations, the court of appeals for this circuit has held that the relevant forum for analyzing the extent of an alien corporation's contacts is the United States as a whole. *Pinker, 292 F.3d at 369*; *Auto. Refinishing, 358 F.3d at 298*. Thus, "a federal court's personal jurisdiction may be assessed on the basis of the [alien] defendant's national contacts when the plaintiff's claim rests on a federal statute authorizing nationwide service of process." *Pinker, 292 F.3d at 369* (citations omitted). However, the United States Court of Appeals for the Third Circuit has not had an opportunity to address the question of whether a national contacts test should be applied to domestic **[*141]** corporations in an antitrust case, and the other courts of appeals and district courts faced with this issue are in disagreement.[46] Because neither party has advanced any argument for applying a national contacts test here, this Court will refrain from doing so, and thus, will analyze the sufficiency of VantageScore's contacts with Pennsylvania under that state's long-arm statute, and the constitutional due process requirements of the *Fifth Amendment*.

HN47[🡅] Under Pennsylvania's long-arm statute, codified at *42 Pa.Cons. Stat. Ann. § 5322* (West 2004), Pennsylvania courts are authorized to exercise personal jurisdiction over a person who, directly or through an agent, as to **[*143]** a cause of action arising from such person, engages in certain forum related activities. *42 Pa. Cons. Stat. Ann. §5322(a)*. Personal jurisdiction predicated on *§5322(a)* falls within the category of personal jurisdiction known as specific jurisdiction, which "arises when a defendant has both purposefully directed its activities at residents of the forum state and the action arises from, or is directly related to, the defendant's actions within the forum state." *Dentsply Int'l, 516 F.Supp. 2d at 338* (citing *Burger King, 471 U.S. at 472*); *Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451 (3d Cir. 2003)* (quoting *Pinker, 292 F.3d at 368*).

HN48[🡅] In addition, the Pennsylvania long-arm statute authorizes the exercise of such personal jurisdiction "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with [Pennsylvania] allowed under the Constitution of the United States." *42 Pa. Cons. Stat. Ann. §5322(b)*. Thus, to satisfy due process, the defendant must have certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe, 326 U.S. at 316* **[*144]** (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940))* (other citations omitted). The minimum contacts requirement serves the purpose of "protect[ing] the defendant against the burdens of litigating in a distant and inconvenient forum" by requiring that the "defendant's conduct and connection with the

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[46] *Compare* *Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004)* (applying national contacts test to domestic corporation's contacts in antitrust case & finding defendant's status as a Virginia professional corporation and operating in U.S. constituted sufficient minimum contacts with U.S. to subject it to personal jurisdiction in California); ***Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127, 143-44 (W.D.N.Y. 1997)*** (worldwide service of process provision of *§12* could be used with domestic corporation via *28 U.S.C. §1391(b)* & *(c)*); *Icon Indus. Controls Corp. v. Cimetrix, Inc., 921 F.Supp. 375, 376 (W.D.La. 1996)* (finding personal jurisdiction existed over domestic corporation based on worldwide service **[*142]** of process provision in *§12* of Clayton Act); *with* *GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1351, 339 U.S. App. D.C. 332 (D.C. Cir. 2000)* (holding worldwide service of process clause in *§12 of Clayton Act* may only be invoked to establish personal jurisdiction over corporate defendant when venue requirements in *§12*'s first clause have been met) (citing *Goldlawr, Inc. v. Heiman, 288 F.2d 579, 581 (2d Cir. 1961)*, *rev'd on other grounds* ***369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962))***; *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc., 516 F.Supp. 2d 324, 337-38 (D.Del. 2007)* (declining to apply national contacts test to domestic corporations in antitrust case), *aff'd on other grounds,* *602 F.3d 237 (3d Cir. 2010)*; *Cumberland Truck Equip. Co. v. Detroit Diesel Corp., 401 F.Supp. 2d 415, 424 (E.D.Pa. 2005)* (holding that where defendants are domestic corporations asserting personal jurisdiction solely under the nationwide service of process clause in *§12*, venue must also be established pursuant to *§12*).

forum State [be] such that [a defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* (citations omitted). This framework enables "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id. at 297*. Moreover, a plaintiff cannot unilaterally create the necessary contacts between the defendant and the forum; rather, "minimum contacts" can arise only by "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Burger King, 471 U.S. at 475* (quoting *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958))*.

HN49[] The other category of personal jurisdiction under which a plaintiff may establish a court's **[*145]** jurisdiction over a defendant is general jurisdiction. A court's general jurisdiction may be invoked where the non-resident defendant's contacts with the forum are "continuous and substantial" but are not related to the plaintiff's cause of action. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998)* (citation omitted). To establish personal jurisdiction over a corporation under Pennsylvania's general jurisdiction statute, a plaintiff must demonstrate that the corporate defendant either: (1) is incorporated under or qualifies as a foreign corporation under Pennsylvania law; (2) consents to jurisdiction; or (3) carries on "a continuous and systematic part of its general business" within Pennsylvania. *42 Pa. Cons. Stat. Ann. §5301(a)(2)*. As neither the first nor second bases are present in this case, general jurisdiction can only be obtained under the third basis.

The court of appeals for this circuit has held that ***HN50***[] a plaintiff must prove significantly more than mere minimum contacts to invoke a court's general jurisdiction. *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987)* (citations omitted). Thus, to satisfy due process, **[*146]** the contacts of a nonresident defendant with the form must be continuous and substantial. *Id.* (citations omitted). For example, continuous and substantial contacts were found to exist where the evidence of record showed that defendants transacted business in the forum "[b]y maintaining an office and an agent in [the forum] on an ongoing basis, entering into contractual relationships in [the forum], and designating and maintaining billing and technical contacts within [the forum]," thereby subjecting the non-resident defendants to the general jurisdiction of the forum district. *Twentieth Century Fox Film Corp. v. iCraveTV, Nos. Civ.A. 00-121 and 00-120, 2000 U.S. Dist. LEXIS 11670, 2000 WL 255989, * 4 (W.D.Pa. Feb.8, 2000)* (citations omitted). With these precepts in mind, the Court will examine the sufficiency of VantageScore's contacts with Pennsylvania.

In the case at bar, VantageScore has submitted the Declaration of Michael J. Dunn, Vice President Strategic Planning & Communications of VantageScore ("Dunn Decl.") (Ex. A to VantageScore's Motion to Dismiss at ¶1, ECF No. 39-1), which shows that VantageScore was formed as a Delaware limited liability company in February 2006, with its principal and only place **[*147]** of business in Stamford, Connecticut. (Dunn Decl., ¶2.) According to Dunn, "VantageScore was formed for the purposes of owning the intellectual property rights to a credit scoring algorithm; licensing its algorithm solely to Equifax ..., Experian ..., and Trans Union ...; educating government regulators and lenders about the algorithm; and maintaining the algorithm by performing periodic validations." (Dunn Decl., ¶3.)

With respect to VantageScore's contacts with the forum state, Dunn attests that VantageScore does not have any customers or clients in Pennsylvania; does not furnish credit of any type to any person or entity in Pennsylvania; does not maintain credit data, receive credit data or process credit data for purposes of providing any individual consumer or entity with a credit report or credit score in Pennsylvania; does not produce or sell credit scores or credit reports to any person or entity in Pennsylvania; does not provide credit information to any credit reporting agency in Pennsylvania; nor does it produce credit scores to be used by any person or entity in Pennsylvania.[47] (Dunn Decl., ¶4.) Dunn further attests that VantageScore has never transacted business in Pennsylvania; **[*148]** has not entered into contracts with companies to supply products or services in Pennsylvania; is not licensed or registered to do business in Pennsylvania; does not have a registered agent for service in Pennsylvania; does not direct its business operations to any entities or individuals in Pennsylvania; does not own any real or personal property in Pennsylvania; and does not maintain bank accounts, telephone numbers or addresses in

[47] Dunn also attests that VantageScore does not otherwise engage in any of these activities. Dunn Decl., ¶4.

Pennsylvania. (Dunn Decl., ¶5.) According to Dunn, VantageScore's only contact with Pennsylvania occurs once a year during a week-long educational seminar offered by the American Banking Association for banking executives in Philadelphia, Pennsylvania. VantageScore has sponsored a social event at this seminar for the attendees for the last four years. (Dunn Decl., ¶6.) Based on this evidence, VantageScore submits that its contacts with Pennsylvania are insufficient for this Court to exercise either specific or general *in personam* jurisdiction over it.

The Court finds that VantageScore has presented competent evidence to establish that this Court lacks **[*149]** personal jurisdiction over it. Therefore, Plaintiff has the burden of presenting competent evidence of her own to establish a prima facie case of personal jurisdiction. For the reasons that follow, the Court finds that Plaintiff has failed to meet her burden.

Plaintiff argues that all of the "evidence" she was able to obtain show that VantageScore is engaged in business with Pennsylvania residents. (Pl.'s Mem. in Opp'n at 4, ECF No. 64.) This "evidence" consists of her Complaint and excerpts from various public records and websites, but does not include any affidavit(s). Plaintiff's primary focus appears to be on VantageScore's alleged continuous and systematic contacts with Pennsylvania, to support the exercise of this Court's general personal jurisdiction over VantageScore. The Court will examine below each of the documents Plaintiff proffers as "evidence" of such contact.

Plaintiff first refers the Court to allegations in paragraphs 11 and 36 of her Complaint. As noted above, however, Plaintiff may not rely on her Complaint once VantageScore has come forward with an affidavit supporting its argument that this Court lacks personal jurisdiction over it. *Chocolate Confectionary, 602 F.Supp. 2d at 556* **[*150]** (citing *Patterson, 893 F.2d at 603-04*); *Dayhoff, 86 F.3d at 1302*; *Time Share Vacation Club, 735 F.2d at 66 n. 9*. Moreover, looking at the substance of Plaintiff's allegations vis a vis VantageScore's contacts with the forum, paragraph 11 of the Complaint states that VantageScore is a Delaware LLC with its principal place of business in Stamford, Connecticut, and alleges in conclusory fashion that VantageScore does business within the Western District of Pennsylvania and elsewhere in the United States. Similarly, paragraph 36 of the Complaint contains only conclusory statements regarding credit scoring companies in general without any mention of specific acts directed toward the forum by VantageScore. Thus, even if Plaintiff could rely on the allegations in the Complaint, they establish only that VantageScore is a non-resident of Pennsylvania, and thus, otherwise lack the specificity required to establish a prima facie case of personal jurisdiction over VantageScore in Pennsylvania. *Decon Labs., 703 F.Supp. 2d at 485*.

In further support of her general jurisdiction argument, Plaintiff offers VantageScore's submission to the United States Patent and Trademark Office ("USPTO") for registration **[*151]** of its trademark, VantageScore® (Ex. D attached to Pl.'s Mem. in Opp'n to VantageScore's Mot. to Dismiss, ECF No. 64-4), as evidence that VantageScore engages in interstate commerce. That, combined with an excerpt from *Experian's* website inviting the customer to purchase his or her credit score, indicating that the product is a VantageScore® (Ex. E attached to Pl.'s Mem. in Opp'n to VantageScore's Mot. to Dismiss, ECF No. 64-5), is, according to Plaintiff, irreconcilable with VantageScore's argument that it sells nothing, has no clients or customers, and derives no significant revenue from Pennsylvanians, who order its product, including Plaintiff. Plaintiff's argument is unavailing for several reasons.

HN51[] First, mere ownership of a registered U.S. trademark does not subject a domestic company to personal jurisdiction in every state throughout the United States. *Love v. The Mail on Sunday, No. CV05-7798 ABCPJWX, 2006 U.S. Dist. LEXIS 95468, 2006 WL 4046170, at *7 (C.D. Cal. July 14, 2006)*; *Gen. Motors Corp. v. Ignacio Lopez De Arriortua, 948 F.Supp. 656, 666 n. 9 (E.D. Mich. 1996)*. To so hold would run afoul of "the mandate of the *Due Process Clause* or the limits on judicial authority that the Clause ensures." *J. McIntyre Mach. Co. v. Nicastro, __ U.S. __, 131 S.Ct. 2780, 2789-2791, 180 L. Ed. 2d 765 (2011)* **[*152]** (plurality op.) (holding "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. . . . Due process protects [an individual's] right to be subject only to lawful authority[,]" and the "authority to subject a defendant to judgment depends on purposeful availment," *i.e.,* an action of the defendant purposefully directed toward the forum state.) Thus, an approach which does not conduct a forum-by-forum analysis, but relies merely on ownership of a registered U.S. trademark as evidence of interstate commerce, violates the *Due Process Clause*.

Second, Plaintiff relies upon Exhibit E, which states "Get Your VantageScore For Only $7.95" (Ex. E, ECF No. 64-5), in support of her position that VantageScore derives revenue from Pennsylvanians purchasing the VantageScore® product through Experian, a co-owner of VantageScore Solutions, LLC. However, Plaintiff appears to ignore the fact that Exhibit E is actually a page from *Experian's* website, not VantageScore's, an important distinction. At most, Exhibit E demonstrates that consumers may purchase their credit scores from Experian, one of three credit reporting companies. Exhibit E does not establish that VantageScore **[*153]** made sales to or otherwise had contact with Pennsylvanians. In fact, Dunn's Declaration makes clear that VantageScore is not selling credit scores to *any* consumers or entities, let alone those residing in Pennsylvania. (Dunn Decl. ¶ 4.) Moreover, mere ownership of a subsidiary company, without more, is not sufficient to show that the subsidiary's revenues from the sale of the its product flow directly to the parent company. *See* discussion *supra* at 57-59. Plaintiff fails to cite any facts or legal authority that would justify leaping to such a conclusion.

The last infirmity with Plaintiff's argument regarding the trademark registration documents (Exhibits D and G) is that she concludes, without evidentiary support, that Pennsylvanians, including her, order VantageScore's product. She also presumes, incorrectly, that VantageScore actually sells a "product" to consumers. The record is completely devoid of any evidence showing that Pennsylvanians and/or Plaintiff purchased any VantageScore "product." Nowhere in either of the trademark documents proffered by Plaintiff (Exhibits D and G) is there any indication that VantageScore is offering to sell its credit scoring model/algorithm, let **[*154]** alone credit scores, to lenders or consumers. A close review of Plaintiff's Exhibit D reveals only that VantageScore is a Delaware LLC, with a registered office in Stamford, Connecticut, and that the goods and services provided consist of "[f]inancial services in the nature of credit modeling, namely, the evaluation of credit and other data as credit risk predictors, credit scoring services, and analytical services, namely, evaluation of credit and other data as credit risk predictors, all for purposes of evaluating credit worthiness." (Ex. D at 1, ECF No. 64-4.) Plaintiff's Exhibit G provides similar information, and additionally, reveals that VantageScore used counsel from Atlanta, Georgia, for its trademark registration work, and includes a specimen consisting of web page advertisements from Trans Union and VantageScore containing the mark and a description of the services. (Ex. G at 1-4, 7-12, ECF No. 64-7.) At most, the web page advertisements indicate that the VantageScore® credit scoring model can be accessed through one of the three credit scoring companies—Trans Union, Experian, or Equifax (Ex. G at 11, ECF No. 64-7)—who are licensees of VantageScore's algorithm (Dunn Decl. **[*155]** ¶3). Indeed, Dunn's Declaration confirms that VantageScore was formed for the purposes of owning the intellectual property rights to a credit scoring algorithm and licensing said algorithm solely to Equifax, Experian and Trans Union. (Dunn Decl. ¶3.) Thus, Mr. Dunn's declaration stands uncontroverted on this point.

In further support of her general jurisdiction argument, Plaintiff refers the Court to Exhibit F (ECF No. 64-6), which she alleges is her VantageScore® ordered from her computer in Pennsylvania. (Pl.'s Mem. in Opp'n to VantageScore's Mot. to Dismiss at 5, ECF No. 64.) However, Exhibit F does not represent anything ordered by Plaintiff, but rather, is VantageScore's October 20, 2010 issue of its newsletter, *The Score.* In fact, *The Score* actually directs lenders and consumers interested in obtaining credit scores calculated using VantageScore® to contact any of the credit reporting companies. (Ex. F at 2, ECF No. 64-6.)[48]

Next, Plaintiff appears to be arguing that because trademarks are used to identify the source of goods and services in the marketplace, it is reasonable to conclude that the source of the VantageScore®, routinely purchased by Pennsylvanians through its agents/licensees, is VantageScore Solutions, LLC, based solely on the appendage of the registered trademark symbol "®" to "VantageScore." Plaintiff's argument is flawed in several respects. First, Plaintiff's argument is based on presumptions that are not supported by competent evidence. For example, there is simply no evidence to show that Pennsylvanians, including Ms. Black, purchased a VantageScore® credit score from VantageScore or, for that matter, from any of its licensees, or that the credit reporting companies are agents of VantageScore.[49] Second, even if Plaintiff had presented evidence showing that she and/or other Pennsylvanians

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[48] The Court notes that Plaintiff filed a Sur-Reply Brief in Opposition to VantageScore's Motion to Dismiss (ECF No. 76) to which she could have attached documentation of the alleged purchase of her VantageScore® credit score from her home computer in Pennsylvania **[*156]** or an affidavit, yet she failed to attach any such evidence.

purchased VantageScore® credit scores from Experian, Equifax and/or Trans Union, that still would not establish that *VantageScore* sold credit scores or that it targeted Pennsylvania. The mere existence a license agreement between VantageScore **[*157]** and the credit reporting companies is not sufficient in and of itself to establish that VantageScore was directing its business activities to residents of the forum state. As Plaintiff herself concedes, regardless of what the license is used for (trademark intellectual property and/or patent intellectual property), "the outcome of the case would not change because it is the purposeful or expected sale of the product itself in the forum that confers jurisdiction, not the licensing arrangement." Pl.'s Mem. in Opp'n to VantageScore at 6, ECF No. 64 (citing *World-Wide Volkswagen, 444 U.S. at 298*). Here both Dunn's declaration and Plaintiff's "evidence" shows that there was no purposeful or expected sale by VantageScore of any of its products in the forum.

Also, contrary to Plaintiff's assertion, VantageScore's description of its goods and services on its trademark registration documents is not impossible to reconcile with Mr. Dunn's declaration that VantageScore does not have any customers or clients, produce or sell credit scores **[*158]** to any person or entity, or provide credit information to any credit reporting company. (Dunn Decl. ¶4.) Nothing in the description of its goods and services implies that VantageScore produces or sells credit scores to any person or entity. Plaintiff fails to offer any competent evidence to raise an issue of fact in this regard.

Having considered Plaintiff's "evidence" and concluding that none of it controverts any of the jurisdictional facts asserted in Dunn's declaration, this Court concludes that VantageScore has not engaged in continuous and substantial business activities which would allow this Court to properly exercise general jurisdiction over it. VantageScore is a non-resident company, does not transact any business in Pennsylvania, nor does it own property or maintain an agent for service of process in this forum. Thus, the Court finds that given the absence of business activities in the forum, VantageScore does not appear to derive any revenue from Pennsylvania. The Court further finds that VantageScore's presence in the forum one day a year for general educational purposes unrelated to the litigation does not provide the continuous and systematic contacts required to invoke **[*159]** this Court's general *in personam* jurisdiction. *See* *Regan v. Loewenstein, 292 F. App'x 200, 205 (3d Cir. 2008)* (defendants' alleged presence in forum during occasional concerts was clearly not a "continuous and systematic" contact). As Plaintiff has failed to come forward with competent evidence to show any continuous and substantial business activities in Pennsylvania, she cannot establish a prima facie case of general *in personam* jurisdiction over VantageScore.

Perhaps realizing the weakness of her general jurisdiction "evidence" and arguments, Plaintiff also advances a stream of commerce theory to establish specific personal jurisdiction over VantageScore. Plaintiff's attempt, however, falls short of the mark. Initially, Plaintiff argues that personal jurisdiction is not precluded because VantageScore is merely a holding company for intellectual property. (Pl.'s Mem. in Opp'n to VantageScore at 6, ECF No. 64.) In support, Plaintiff quotes from the court of appeals' decision in *Nuance Communications, Inc. v. Abbyy Software House, 626 F.3d 1222 (Fed. Cir. 2010)*, *cert. denied, 131 S. Ct. 3091, 180 L. Ed. 2d 912, 2011 U.S. LEXIS 5011, 2011 WL 500233 (2011)*, which held: "[a]lthough the foreign manufacturer had no license **[*160]** for doing business in the forum, no assets, employees, or agents for service of process in the forum, and no direct sales in the forum, this court found the exercise of jurisdiction proper because the manufacturer purposefully shipped products through an established distribution channel with the expectation that those products would be sold in the forum." *Nuance Commc'ns, 626 F.3d at 1233-34* (citing *Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1564-67 (Fed. Cir. 1994))*. Plaintiff then notes that the product in *Nuance* was covered by a patent license, as opposed to a trademark license, but nonetheless submits that "to the best of [her] knowledge, it appears that in addition to a trademark license, VantageScore Solutions also licenses U.S. Patent No. 7,801,812 entitled 'Methods and systems for characteristic leveling].]'" Pl.'s Mem. in Opp'n to VantageScore at 6, ECF No. 64. Then Plaintiff attempts to argue that her case and *Nuance* are analogous because both cases involve patent licenses,[50]

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[49] *See* discussion *supra* at 60-61 rejecting Plaintiff's attempt to predicate the Bureau Defendants' liability on an alleged agency relationship with VantageScore.

[50] VantageScore notes in its reply brief that technically it does not license its patent, but rather, it is the assignee of the patent. (VantageScore's Reply Br. at 3, ECF No. 69 & Ex. 1 at 2, ECF No. 69-1.)

"plac[ing] the case law directly on point." *Id.* However, simply because the defendant in *Nuance* and VantageScore may have been patent-holders/assignees, that does not make the cases **[*161]** analogous, especially where, as in *Nuance,* the court's jurisdictional ruling did not turn on the manufacturer's status as a patent-holder.

In actuality, *Nuance* is factually distinguishable from the case at bar. In *Nuance,* evidence showed that the defendant foreign manufacturer actually sold its products to a distributor who in turn sold the manufacturer's products to residents of the forum state. Second, the record in *Nuance* contained additional facts establishing that the foreign company purposefully directed the sale of its allegedly infringing product, a software program, in California. For example, the agreement in *Nuance* was between two corporate defendants—commonly owned sister companies, one domestic California company and the other foreign, operating under a global management team—which expressed a desire by the foreign company to "win the whole U.S. market" by issuing its software program in the United States. Also, the foreign manufacturer admitted to distributing its software **[*162]** to its domestic sister company, a California entity. *626 F.3d at 1232*. The record further showed that over 95% of the profits resulting from the sales of the software program flowed to the foreign manufacturer, and under its agreement with the California distributor, the foreign manufacturer retained ownership in the software even after it entered California. *Id. at 1233*. By contrast here, it is clear from Dunn's declaration that VantageScore is not selling a product (credit scores) to its licensees, Experian, Trans Union, and Equifax, for further distribution to consumers or lenders. Nor do the parties' submissions evidence any intent to target Pennsylvania on the part of VantageScore. Rather, the uncontroverted evidence shows that VantageScore licenses its algorithm exclusively to the three credit reporting companies for their use in calculating consumers' credit scores. Similarly, the public documents submitted by Plaintiff do not show any desire or action on the part of VantageScore to distribute and/or sell its algorithm to consumers or lenders in the state of Pennsylvania. Moreover, because VantageScore does not sell any products to consumers or lenders in Pennsylvania, it cannot, **[*163]** and does not, derive any revenues from activities in this forum. Thus, the proposition for which Plaintiff cites *Nuance* is inapposite to this case.

Plaintiff next argues that based on *World-Wide Volkswagen, 444 U.S. at 298*, the licensing arrangement is not determinative of the outcome vis a vis personal jurisdiction, but rather, what does confer personal jurisdiction is the purposeful or expected sale of the product itself in the forum. Quoting *World-Wide Volkswagen,* Plaintiff argues "a defendant could purposefully avail itself of a forum by 'deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum [s]tate.'" Pl.'s Mem. in Opp'n to VantageScore at 7 (quoting *World-Wide Volkswagen, 444 U.S. at 298*). To establish personal jurisdiction under this theory, Plaintiff attempts to show that VantageScore® "sold to Pennsylvanians does not end up in the forum by accident." Pl.'s Sur-Reply Br. at 3, ECF No. 76. She submits that because VantageScore owns both the trademark and patent to VantageScore®, VantageScore has absolute control over where VantageScore® ends up in the marketplace. Plaintiff maintains that VantageScore **[*164]** not only introduced VantageScore® into the marketplace, but continued to maintain control over its sale into Pennsylvania by dictating the license terms to retailers such as Experian as to where and to whom the product can be sold. *Id.* Plaintiff's argument is completely lacking an evidentiary foundation. None of the documents attached to Plaintiff's briefs provide any support for her argument. Indeed, none of her documents show that she or any Pennsylvanians purchased credit scores or any other product from VantageScore. On the other hand, Dunn's declaration establishes that VantageScore was formed for the purposes of owning the intellectual property rights to a credit scoring algorithm, and licensing its algorithm exclusively to Experian, Trans Union, and Equifax, and that VantageScore does not produce or sell credit scores or credit reports to any person or credit reporting agency, in Pennsylvania or otherwise. (Dunn Decl. ¶¶3-4.) Even giving Plaintiff the benefit of the doubt, it simply cannot be logically inferred from the jurisdictional evidence that VantageScore maintained control over the sale of VantageScore® into Pennsylvania when all of the evidence shows that VantageScore **[*165]** did not sell or produce any products to consumers or lenders in any state.

The stream of commerce theory has been invoked frequently in products liability actions to permit jurisdiction over a non-resident defendant, acting outside the forum, which places a product in the stream of commerce, *i.e.,* traveled through an extensive chain of distribution before reaching the ultimate consumer, that ultimately causes harm inside the forum. *Goodyear Dunlop Tires Operations, S.A. v. Brown, __ U.S. __, 131 S.Ct. 2846, 2855, 180 L. Ed. 2d 796 (2011)* (citing 18 W. Fletcher, *Cyclopedia of the Law of Corporations* §8640.40, p. 133 (rev. ed. 2007); Dayton, *Personal Jurisdiction and the Stream of Commerce,* 7 Rev. Litig. 239, 262-68 (1988)). The stream of commerce theory has also been applied in antitrust cases. Dayton, 7 Rev. Litig. at 261 & n. 73 (citing *Chrysler Corp. v. Gen. Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984)*; *Hitt v. Nissan Motor Co., 399 F. Supp. 838 (S.D.Fla. 1975))*. However, the Supreme Court has been unable to reach a consensus on whether the stream of commerce theory requires a showing of "something more" than the mere act of placing a product in the stream of commerce with the expectation it will **[*166]** be purchased in the forum state. *Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)*; *D'Jamoos, 566 F.3d at 105 n. 15*. Justice O'Connor, writing for a plurality of four justices in *Asahi,* concluded that something more was required—"*an action of the defendant purposefully directed toward the forum state.*" *480 U.S. at 112* (emphasis in original; citations omitted).[51] In a separate opinion, Justice Brennan, joined by three other justices, concluded that the showing of something more was unnecessary. *480 U.S. at 117*.[52] Recently, the Supreme Court attempted to clarify its position on the application of a stream of commerce theory, but unfortunately, only a plurality agreed with Justice O'Connor's "something more" approach, thus rejecting the conclusion reached by Justice Brennan, and leaving the lower courts without clear guidance once again. *See* *J. McIntyre Mach., 131 S.Ct. at 2790*. The court of appeals for this circuit has yet to decide the issue as well. *D'Jamoos, 566 F.3d at 105 n. 15*.

In any event, under either approach, this Court finds that Plaintiff has failed to establish a prima facie case of personal jurisdiction over VantageScore under a stream of commerce theory. Contrary to Plaintiff's argument at oral argument,[53] the court of appeals for this circuit has indicated that ***HN52***[] ""foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the *Due Process Clause*.'" *Id. at 105* (quoting *World-Wide Volkswagen, 444 U.S. at 295*). **[*168]** The court of appeals further explained:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. *[World-Wide Volkswagen, 444 U.S.] at 297, 100 S.Ct. at 567*.

D'Jamoos, 566 F.3d at 105. Under this standard, the *D'Jamoos* court found that the stream of commerce theory did not apply to the facts of that case, as the product there did not follow the regular and anticipated path to Pennsylvania—i.e., "'the regular and anticipated flow of products from manufacture to distribution to retail sale.'" *Id.* (quoting *Asahi, 480 U.S. at 117* (Brennan, J. concurring)).[54]

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[51] Justice O'Connor explained her application of the stream of commerce theory as follows:

> The "substantial connection" between the defendant and the forum State necessary for a finding **[*167]** of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.

Asahi, 480 U.S. at 112 (internal citations omitted).

[52] Justice Brennan opined that "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the *Due Process Clause*[.]" He went on to explain that "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *480 U.S. at 117* (opinion concurring in part and concurring in judgment).

[53] At oral argument on the motions to dismiss, Plaintiff argued that it was "absolutely foreseeable" that the VantageScore® was going to end up in Pennsylvania. Tr. of Mots. Proceedings on 2/10/11 at 70, ECF No. 82. To the extent her argument is based on a foreseeability test, Plaintiff ignores the court of appeals opinion in *D'Jamoos* finding that foreseeability alone is insufficient to establish personal **[*169]** jurisdiction under the *Due Process Clause*.

[54] The court of appeals further noted that the stream of commerce theory provides no basis for exercising general jurisdiction over a non-resident defendant, but rather only applies to the exercise of specific jurisdiction. *D'Jamoos, 566 F.3d at 106* (citing *Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 788 (7th Cir. 2003)*; *Bearry v. Beech Aircraft Corp., 818 F.2d 370, 375 (5th Cir. 1987))*.

Applying the relevant jurisprudence to the case at bar, this Court finds that the jurisdictional evidence shows that VantageScore's credit scoring algorithm did not follow the regular and anticipated flow of products from manufacture to distribution to retail sale. Indeed, the evidence shows that VantageScore did not sell credit scores to consumers or lenders in Pennsylvania, nor did it sell or distribute credit scores to its licensees, Experian, Trans Union and/or Equifax, let alone distribute such credit scores with the expectation that they would be sold to consumers or lenders in Pennsylvania. Moreover, it is arguable whether VantageScore's intellectual property, the credit scoring algorithm, is indeed a product. See *Primesource Bldg. Prods., Inc. v. Phillips Screw Co., No. 3-07-CV-0303-M, 2007 U.S. Dist. LEXIS 98971, 2008 WL 779906, at *4 (N.D. Tex. Mar. 25, 2008)* **[*170]** (noting that the defendant did not manufacture or sell any products but merely designed proprietary fastener drive systems and licensed the technology to other companies who manufactured and sold fasteners incorporating defendant's design). As the district court observed in *Primesource,* ***HN53***[] "merely entering into a licensing agreement with a company that delivers products into the stream of commerce is insufficient to support the exercise of personal jurisdiction." *Id.* (citing *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1360 (Fed. Cir. 1998))*.[55] Similarly here, VantageScore's only "product" was its intellectual property—a credit scoring model/algorithm—which **[*171]** it licensed exclusively to the three credit reporting agencies, for their use in calculating consumers' credit scores. The VantageScore® algorithm was not the final product that was being marketed by the credit reporting agencies for retail sale in Pennsylvania; rather, the credit reporting agencies were offering credit scores for sale, which were calculated by utilizing VantageScore's patented intellectual property.[56] Under these circumstances, the Court cannot conclude that VantageScore could have reasonably anticipated being haled into court in Pennsylvania. Thus, Plaintiff's argument that VantageScore® did not end up in Pennsylvania by accident is based entirely upon conjecture.

Moreover, the jurisdictional facts here stand in stark contrast to those in *Nuance,* where the court of appeals found that the forum state (California) had personal jurisdiction over the foreign manufacturer under the stream of commerce theory. There, unlike the case at bar, the court of appeals found the foreign manufacturer purposefully shipped the allegedly infringing software products into California through an established distribution channel (a California entity), with the expectation that copies of those products would be sold in California. *Id. at 1234*. In addition, under its agreement with the California distributor, the foreign manufacturer agreed to furnish the distributor with new versions and updates of its software, as well **[*173]** as technical support and oral and written consultations. *Id.* The *Nuance* court opined that this purposeful activity is the sort of activity the Supreme Court has endorsed as reinforcing the proper exercise of personal jurisdiction. *Id.* (citing *Asahi, 480 U.S. at 112*).

Accordingly, for the reasons articulated above, the Court finds that Plaintiff has failed to establish a prima facie case of personal jurisdiction over VantageScore.[57]

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[55] The district court in *Primesource* held that because the defendant did not manufacture or sell any products, but merely gave its licensees the right to sue the patented technology to manufacture their own products under the defendant's brand name without the risk of being sued by defendant, such a covenant not to sue was not a product sold in the stream of commerce. *2007 U.S. Dist. LEXIS 98971, 2008 WL 779906, at *5*.

[56] At oral argument, Plaintiff's counsel likened the situation between VantageScore and the credit reporting companies **[*172]** to that of a manufacturer and distributor, and argued that VantageScore manufactured the score and as owner of the product and ultimately the license, they controlled where the product goes in commerce. Tr. of Mots. Proceedings on 2/10/11 at 70, ECF No. 82. Plaintiff's argument is without merit as the uncontroverted evidence shows that VantageScore is neither the manufacturer nor seller of the credit scores sold by the three credit reporting agencies.

[57] As further support for its argument that this Court lacks personal jurisdiction over it, VantageScore points to Judge Conti's ruling during a motion hearing in *Schweitzer v. Equifax Information Solutions LLC, Fair Isaac Corporation and VantageScore Solutions LLC,* docketed at Civil Action No. 2:08-cv-00478, in this district, where Judge Conti granted VantageScore's motion to dismiss for lack of personal jurisdiction. *See* Minute Entry dated 7/14/2008, W.D.Pa. Docket No. 2:08-cv-00478. However, without the benefit of an opinion detailing the reasons for Judge Conti's ruling, this Court declines to accord her ruling any weight in this case. And, in any event, this Court is not bound by the decision of another district court judge in an unrelated case. The complaint **[*174]** in *Schweitzer* asserted claims against all defendants under the Fair Credit Reporting Act, *15 U.S.C. §1681 et*

c. Jurisdictional Discovery & Leave to Amend Complaint

In the alternative, Plaintiff requests leave of court to conduct jurisdictional discovery to determine which one of VantageScore's "mutually exclusive positions is true before briefing a rebuttal to the motion to dismiss." Plaintiff's request is premised on the notion that the Court must first determine whose product she purchased under the VantageScore® mark so that the entity can be served notice of the suit if, as VantageScore asserts, it derives no revenue from Pennsylvanians. She also seeks leave to amend her Complaint to name the entity that derives revenue from the VantageScore® product which is sold to Pennsylvanians. (Pl.'s Mem. in Opp'n to VantageScore at 7, ECF No. 64.)

VantageScore objects to Plaintiff's request **[*175]** for jurisdictional discovery, arguing that Plaintiff is in the best position to know where she obtained, if she did at all, her "VantageScore credit score." VantageScore further submits that the three credit reporting companies (Experian, Trans Union, and Equifax) that sell VantageScore credit scores are already parties to this lawsuit. VantageScore submits, therefore, that Plaintiff's request should be denied.

The court of appeals for this circuit has held that ***HN54***[] a plaintiff's request for jurisdictional discovery should be granted "[i]f the plaintiff presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state[.]'" *Eurofins Pharma US Holdings v. BioAlliance Pharma SA, 623 F.3d 147, 157 (3d Cir. 2010)* (quoting *Mellon Bank PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992))*. "A plaintiff may not, however, undertake a fishing expedition based only upon bare allegations, under the guise of jurisdictional discovery." *Id.* (citing *Belden Techs., Inc. v. LS Corp., 626 F.Supp. 2d 448, 459 (D.Del. 2009)*.

As discussed above with respect to paragraphs 11 and 36 of her Complaint, Plaintiff **[*176]** has failed to present factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between VantageScore and Pennsylvania. Further, none of Plaintiff's other evidence suggests such contacts. Most importantly, Plaintiff failed to provide her own affidavit to counter VantageScore's evidence, or to provide documentation to support her statement that she purchased her VantageScore for $7.95. Plaintiff alone is in the best position to know the details of her alleged purchase of her credit score. Consequently, the Court finds that Plaintiff has not made the requisite showing to suggest the possible existence of the requisite contacts between VantageScore and Pennsylvania. In this Court's opinion, allowing jurisdictional discovery on the bare allegations presented here would result in a fishing expedition. Accordingly, the Court recommends that Plaintiff's request for jurisdictional discovery be denied.

The Court also recommends that Plaintiff's request for leave to amend her Complaint to name the entity that derived revenue from the sale of VantageScore credit scores in Pennsylvania be denied. It is clear from the documents submitted that **[*177]** the only possible entities who could have derived revenues from the sale of credit scores, including those credit scores calculated using the VantageScore algorithm, are already named parties to this lawsuit. In addition, Plaintiff's request for leave to amend is mooted by the Court's recommendation that her request for jurisdictional discovery be denied.

Accordingly, the Court recommends that the Complaint against VantageScore be dismissed with prejudice for lack of personal jurisdiction.

2. Failure to State a Claim under *Rule 12(b)(6)*

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seq., and a state common law negligence claim. The Court notes that unlike the Sherman Act, the Fair Credit Reporting Act does not contain a statutory provision allowing nationwide service of process. *Korzeniowski v. NCO Financial Systems, No. 3:09-cv-1399 (WWE), 2010 U.S. Dist. LEXIS 10437, 2010 WL 466162, *2 (D. Conn. Feb. 8, 2010)*.

Even if this Court had found that it could exercise personal jurisdiction over VantageScore, the Court would still recommend granting VantageScore's motion to dismiss on the basis that the Complaint fails to state a claim against VantageScore under *Rule 12(b)(6)*.

Defendant VantageScore has also moved to dismiss the Complaint for failure to state a claim pursuant to *Rule 12(b)(6)* (ECF No. 39). In support of its 12(b)(6) motion, VantageScore joins in, and incorporates by reference, the motions to dismiss and the memoranda of law in support thereof submitted by the Lender Defendants, as well as the implausibility argument advanced by the Credit Bureau Defendants **[*178]** in Section I.A. their motion memorandum of law. In addition, VantageScore submits that dismissal of the Complaint is warranted because it is clear from the allegations in the Complaint that Plaintiff's lawsuit focuses on consumer lending. (VantageScore's Mem. of Law in Supp. of Mot. to Dismiss at 8, ECF No. 41 (citing Compl. ¶¶1, 18, 22-23, 25, 27, 43-50).) VantageScore further contends that Plaintiff does not allege and cannot allege that it is a consumer lender, and indeed, the Complaint alleges VantageScore is one of two credit scoring companies. (*Id.* (citing Compl. ¶21).) Therefore, according to VantageScore, paragraphs addressed to Defendants generally that involve consumer lending, i.e. Compl. ¶¶43-45, 48-50, 52) do not apply to VantageScore. (*Id.* at 9.)

VantageScore also submits that the few allegations directed specifically to VantageScore or to credit scoring companies do not state facts pertaining to wrongful conduct of VantageScore which, under *§1 of the Sherman Act*, requires the factual averments concerning an illegal agreement. In particular, VantageScore submits neither paragraph 21 nor 29 alleges an illegal agreement. Plaintiff's averment in paragraph 36 to the effect **[*179]** that credit scoring companies "use the reported information from credit bureaus to create a derivative score which incorporates all of the consumer's credit data as well as the consumer's profitability[,]" does not, according to VantageScore, allege illegal conduct. And although paragraphs 40 and 71 discuss credit scoring, VantageScore submits that neither paragraph alleges an agreement between it and any other Defendant to fix the prices of consumer loans. (*Id.*)

Finally, VantageScore argues that the Complaint fails to allege it engaged in any parallel conduct with the Lender Defendants to restrict borrowing, let alone facts to support an inference that an illegal agreement existed to which VantageScore was a party. According to VantageScore, Plaintiff's Complaint "'furnishes no clue'" as to details involving when or where VantageScore's purported illegal agreement with the Lender Defendants occurred. (*Id.* (citing *Twombly, 550 U.S. at 565 n. 10*).)

In response, Plaintiff incorporates by reference the previous arguments and legal standards presented in her brief opposing the Lender Defendants' motion to dismiss. Plaintiff also advances several arguments specific to VantageScore, none of **[*180]** which has any merit. First, Plaintiff perceives VantageScore to be arguing that because it is not a lender, it is immune from antitrust liability and should be dismissed from this lawsuit, and responds that the courts have never recognized a defense to antitrust based on whether a conspirator sold the object of the price fixing scheme. In support, Plaintiff cites several cases for the proposition that an entity which does not sell any products can still be held liable for a §1 violation as long as there is cooperation in the price fixing scheme. (Pl.'s Mem. in Opp'n to VantageScore at 8-9, ECF No. 64.) Thus, Plaintiff maintains, the fact that VantageScore "sells nothing" is irrelevant in determining whether it is liable for engaging in price fixing. This argument is, in essence, the same argument advanced by Plaintiff in response to FICO's motion to dismiss. *See* Pl.'s Mem. in Opp'n to FICO at 5, ECF No. 62. The Court finds that Plaintiff's first argument fails for the same reasons as those stated above with regard to FICO's motion to dismiss. *See* discussion *supra* at 71-73.

Second, Plaintiff takes issue with VantageScore's argument that she failed to allege anything illegal in the Complaint **[*181]** sufficient to suggest an agreement. (Pl.'s Mem. in Opp'n to VantageScore at 9, ECF No. 64.) In support, Plaintiff relies on paragraphs 11 and 36 of the Complaint. However, paragraph 11 contains no factual allegations of an agreement, illegal or otherwise, and the factual allegations in paragraph 36, as explained above, suggest VantageScore's involvement in the alleged conspiracy consisted of using information from credit bureaus to create a derivative score, and assisting lenders by creating a derivative metric. The remaining allegations in paragraph 26 consist of unsupported conclusory allegations which are not entitled to any presumption of truth. Plaintiff then claims she has discovered additional factual evidence from which a conspiracy can be inferred—a statement on VantageScore's website to the effect that "credit scores . . . are used by lenders not only to 'assess a borrower's loan eligibility' (i.e., creditworthiness, which is a potentially lawful use of the data) but also [sic] 'set loan/credit terms' (which in situations such as coordinating pricing is an unlawful use of data)." Pl.'s Mem. in Opp'n to VantageScore at 9, ECF No. 64. Based on this evidence, Plaintiff contends **[*182]** the Complaint properly pleads a factual basis for an illegal act by VantageScore. The Court considered this same argument raised by Plaintiff in response to the Lender Defendants' motion to dismiss, and rejected it. *See* discussion *supra* at 29-31. Therefore, the Court rejects Plaintiff's argument that the statement on VantageScore's website provides evidence from which a conspiracy can be inferred for the same reasons articulated above with regard to the Lender Defendants' motion to dismiss.

Next, Plaintiff submits that VantageScore "has also admitted that [it] provides a uniform model for competing lenders to adopt so that lenders can consistently fix loan terms." Pl.'s Mem. in Opp'n to VantageScore at 9, ECF No. 64. Plaintiff reaches this conclusion based on the following statement appearing in VantageScore's newsletter, *The Score,* dated October 20, 2010, and authored by VantageScore's president: "VantageScore is the generic credit scoring created by America's three major credit reporting companies. Our highly predictive model uses an innovative, patent-pending scoring methodology to provide lenders with a consistent interpretation of consumer credit files." (Ex. F attached to Pl.'s Mem. in Opp'n to VantageScore at 4, **[*183]** ECR No. 64-6.) Plaintiff argues that this "consistent interpretation" is intended to (and does) lead to consistent, uniform pricing in the lending industry as properly alleged in the Complaint (Compl. ¶¶11, 36), and as demonstrated factually in VantageScore's specimen submitted to the USPTO in its Trademark/Service Mark Statement of Use (Ex. G attached to Pl.'s Mem. in Opp'n to VantageScore, ECF No. 64-7). In particular, Plaintiff refers to page 11 of Exhibit G, which is entitled "VantageScore Fact Sheet" and focuses on the following excerpt:

> **Use of VantageScore assists lenders with decisions in a manual or automated environment:**
> • Set a cut-off score strategy to reduce the time to review an application manually.
> • Use the score for tiered offers with multiple cut-off strategies. For example, extend the most favorable offer to the most creditworthy clients while extending appropriately adjusted offers to those consumers that are in the middle segment of credit risk and those consumers that are more risky.

Ex. G at 11 (attached to Pl.'s Mem. in Opp'n to VantageScore, ECF No. 64-7).

The Court finds that contrary to Plaintiff's assertion, this evidence does not demonstrate that VantageScore® **[*184]** is intended to be a consistent model for fixing the price of loans. This Court considered a similar argument in response to the Lender Defendants' motion to dismiss and rejected it. *See* discussion *supra* at 50. Simply because VantageScore touts its credit scoring model as being "consistent" does not automatically suggest, in and of itself, that VantageScore has engaged in an agreement with lenders and/or credit reporting companies to fix the price of consumer loans. Previously, this Court found that a review of the excerpts from VantageScore's website revealed that the purpose behind VantageScore's scoring model is developing a statistically sound, and therefore reliable and accurate, prediction of a consumer's credit risk or creditworthiness, which is in complete accord with the purpose of the FCRA—to ensure accuracy and fairness in credit reporting. *15 U.S.C. §1681*. *See* discussion *supra* at 50. With regard to the excerpt from the VantageScore Fact Sheet, the statements are not directed to any particular persons or entities, and thus, cannot be used to show concerted action or a "meeting of the minds" between Defendants. In addition, there is no indication of when these statements first **[*185]** appeared, and therefore, Plaintiff has not established that they preceded the decision to reduce her credit limit. At best, the information provided on the VantageScore Fact Sheet constitutes a one-way communication from VantageScore to potential clients—banks, credit card companies, and other lenders—recommending certain uses of VantageScore®. Moreover, VantageScore's website does not instruct potential clients to use its VantageScore® exclusively to set loan prices. Absent such instruction, the excerpted material on the VantageScore Fact Sheet does not provide either direct or circumstantial evidence that the banks, credit card companies, and other lenders entered into an agreement to use the credit scores to fix credit at a certain price. *See* discussion *supra* at 30-31.

Thus, for these and the reasons set forth above with regard to the Lender Defendants', Bureau Defendants', and FICO's motions to dismiss, the Court finds Plaintiff has failed to state a plausible §1 claim against VantageScore. Therefore, the Court recommends that the Complaint as to VantageScore be dismissed with prejudice.[58]

III. CONCLUSION

For the reasons set forth above, it is respectfully recommended that the Motion of Defendants JP Morgan Chase & Co. and Bank of America Corporation to Dismiss the Complaint (ECF No. 32) be granted with prejudice. It is further recommended that the Motion of Defendant Fair Isaac Corporation to Dismiss the Complaint (ECF No. 36) be granted with prejudice. It is further recommended that the Motion of Defendant VantageScore Solutions LLC to Dismiss the Complaint (ECF No. 39) be granted with prejudice. It is further recommended that the Motion of Defendants Trans Union, Experian and Equifax to Dismiss the Complaint (ECF No. 42) be granted with prejudice.

In addition, although not separately filed, Plaintiff requested leave to file an amended complaint in her opposition briefs to each of the above motions. It is respectfully recommended that those requests be denied. It is further recommended that Plaintiff's **[*187]** request for jurisdictional discovery, lodged in her opposition brief to VantageScore Solutions LLC's motion to dismiss, also be denied.

In accordance with the Magistrate Judges Act, *28 U.S.C. § 636(b)(1)(B)* and *(C)*, and Rule 72.D.2 of the Local Rules of Court, the parties shall have fourteen (14) days from the date of service of this Report and Recommendation to file written objections thereto. Any party opposing such objections shall have fourteen (14) days from the date on which the objections are served to file its response. A party's failure to file timely objections will constitute a waiver of that party's appellate rights.

Dated: August 10, 2011

BY THE COURT:

/s/ Lisa Pupo Lenihan

LISA PUPO LENIHAN

Chief U.S. Magistrate Judge

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[58] In the alternative, Plaintiff summarily requests leave to amend her complaint. (Pl's Mem. in Opp'n to VantageScore at 11, **[*186]** ECF No. 64.) The Court recommends that Plaintiff's request be denied for the same reasons set forth with regard to the same request in her briefs in opposition to the motions to dismiss filed by the Lender Defendants and Bureau Defendants. *See* discussion *supra* at 51-53, 70.

![LexisNexis]

In re Wellbutrin XL Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

August 11, 2011, Decided; August 11, 2011, Filed

CIVIL ACTION NO. 08-2431 (Direct)

Reporter

2011 U.S. Dist. LEXIS 90075 *; 2011-2 Trade Cas. (CCH) P77,565

IN RE: WELLBUTRIN XL ANTITRUST LITIGATION

Subsequent History: Class certification denied by, in part, Class certification granted by, in part *In re Wellbutrin XL Antitrust Litig., 2011 U.S. Dist. LEXIS 90697 (E.D. Pa., Aug. 12, 2011)*

Prior History: *In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 2010 U.S. Dist. LEXIS 135566 (E.D. Pa., 2010)*

Core Terms

generic, purchasers, overcharge, class member, antitrust, damages, branded, extended-release, hydrochloride, defendants', bupropion, prices, anti trust law, indirect, entities, class action, calculations, manufacturer, predominate, drugs, class certification, parties, bypass, numerosity, monopolization, methodology, Shoe, class period, class-wide, wholesaler

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For ABRIKA, LLLP, ABRIKA PHARMACEUTICALS, INC., ABRIKA, PHARMACEUTICALS, LLLP, Movants: RICHARD P. MCELROY, MEDIA, PA.

Judges: MARY A. McLAUGHLIN, J.

Opinion by: MARY A. McLAUGHLIN

Opinion

MEMORANDUM

McLaughlin, J.

The plaintiff Professional Drug Company ("PDC") is a direct purchaser of Wellbutrin XL, a once-a-day antidepressant, who is suing the producers of Wellbutrin XL (Biovail Corp., Biovail Laboratories, Biovail Laboratories International (together, "Biovail")) and its distributors (SmithKline Beecham Corp. and GlaxoSmithKline PLC (together, "GSK")) for illegally conspiring to prevent generic versions of Wellbutrin XL from entering the American market through the use of sham patent litigation. The plaintiff has moved to certify a class of 35 direct purchasers of Wellbutrin XL under federal ***antitrust law***.

The defendants contend that the plaintiff has failed to meet several requirements for class certification under *Federal Rule of Civil Procedure 23*. The defendants' primary argument against certification is that common issues do not predominate over individual issues for antitrust impact and damages. The defendants argue that **[*4]** class members may have economically benefitted from the alleged exclusionary conduct, and individual evidence will be required to demonstrate which, if any, class members suffered actual harm. The defendants also argue that individual proof will be required for several class members who did not purchase generics or purchased generics indirectly from other wholesalers.

The Court concludes that the plaintiff has demonstrated that common issues will predominate and that the *Rule 23* requirements for class certification have been met. The Court, however, will exclude from the class definition direct purchasers of Wellbutrin XL that did not purchase generic extended-release buproprion hydrochloride after it became available. The Court will therefore grant in part and deny in part the plaintiff's motion.

I. Background and Procedural History

PDC seeks to represent a class of 35 plaintiffs (the "direct purchaser plaintiffs") that purchased Wellbutrin XL directly from the defendants during the period of November 14, 2005 through August 31, 2009. PDC has stated a claim for (1) conspiracy to monopolize under *§ 2 of the Sherman Act* against GSK and Biovail, (2) monopolization under *§ 2 of the Sherman Act* **[*5]** against GSK, and (3) agreement in restraint of trade under *§ 1 of the Sherman Act* against GSK and Biovail. See *In re Wellbutrin XL Antitrust Litig., No. 08-2431, 2009 U.S. Dist. LEXIS 21286, 2009 WL 678631, at *9 (E.D. Pa. Mar. 13, 2009)* (dismissing substantive monopolization claim against Biovail, but otherwise allowing claims to proceed). The plaintiff's proposed class is:

> All persons or entities in the United States and its territories who purchased Wellbutrin XL directly from any of the Defendants at any time during the period of November 14, 2005 through August 31, 2009 (the "Class Period"). Excluded from the class are Defendants and their officers, directors, management, employees, parents, subsidiaries, and affiliates, and federal government entities.

(Docket No. 306 at 1**.**)

The plaintiff's complaint alleges that the defendants conducted a four-part scheme to delay the entry of generic equivalents of Wellbutrin XL into the market, primarily by misusing patent litigation. Specifically, the plaintiff alleges that the defendants (1) filed three sham patent litigations, (2) filed a sham listing with the FDA's Approved Drug Products with Therapeutic Equivalence Evaluation (the "Orange Book") (3) filed a baseless **[*6]** FDA citizen petition and suit against the FDA, and (4) formed agreements with potential generic competitors. PDC contends that the effect of these activities was to delay the market entry of cheaper, generic alternatives to Wellbutrin XL.

On July 10, 2080, Meijer, Inc., Meijer Distribution, Inc. (collectively "Meijer), Rochester Drug Co-Operatrive ("RDC"), and American Sales Company, Inc. filed a consolidated class action complaint. On September 4, 2008, American Sales Company, Inc. voluntarily dismissed its claims pursuant to *Rule 41(a)(1)(A)(i)*. On September 10, 2008, Biovail and GSK each filed motions to dismiss. The Court held a hearing on the motions on February 26, 2009. In a Memorandum and Order dated March 16, 2009, the Court granted Biovail's motion to dismiss as to one count that alleged that Biovail engaged in substantive monopolization under *section 2 of the Sherman Act*, and the Court denied the motions for all other counts. See *Wellbutrin XL, No. 08-2431, 2009 U.S. Dist. LEXIS 21286, 2009 WL 678631, at *9 (E.D. Pa. Mar. 13, 2009)*.

The direct purchaser plaintiffs filed a motion for class certification on December 14, 2009. The parties then engaged in extensive discovery. For a partial overview of the **[*7]** parties' discovery disputes, see *In re Wellbutrin XL Antitrust Litig., 268 F.R.D. 539, 541-43 (E.D. Pa. 2010)*. On March 17, 2010, the Court granted Meijer's oral motion for voluntary dismissal under *Rule 41(a)*. On May 14, 2010, RDC moved for voluntary dismissal and the direct purchaser plaintiffs moved to substitute Professional Drug Company, Inc. ("PDC") as class representative. On July 21, 2010, the Court granted RDC's motion for voluntary dismissal provided that it comply with its pending discovery obligations and the Court substituted PDC as class representative. *In re Wellbutrin XL Antitrust Litig., 268 F.R.D. at 547*. Because the three original direct purchaser plaintiffs have voluntarily dismissed their claims, PDC is now the sole remaining named plaintiff seeking to represent direct purchasers of Wellbutrin XL.

The Court held a day-long evidentiary hearing on the plaintiff's motion for class certification on April 5, 2011. PDC presented the expert testimony of Dr. Jeffery Leitzinger and the defendants presented the expert testimony of Dr. Andrew Joskow. [1] On July 11, 2011, the defendants' submitted a supplemental memorandum of law in opposition to the plaintiff's motion for class **[*8]** certification. On July 19, 2011, the plaintiff submitted a rebuttal memorandum.

II. Analysis

To certify a class under *Federal Rule of Civil Procedure Rule 23*, a court must find that the action satisfies all four requirements of *Rule 23(a)* — numerosity, commonality, typicality, and adequacy of representation — and at least one provision of *Rule 23(b)*. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. PDC seeks certification under *Rule 23(b)(3)*. *Rule 23(b)(3)* requires the court to find that questions of law or fact common to class **[*9]** members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

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[1] Both experts are highly qualified. Dr. Leitzinger has a Ph.D. in economics from the University of California, Los Angeles. He is the president and founder of Econ One Research, Inc. and has offered expert opinions regarding class certification in similar cases that address alleged exclusion of generic competition in the pharmaceutical market. See, e.g., ***Am. Sales Co. v. SmithKline Beecham Corp., 274 F.R.D. 127 (E.D. Pa. 2010)***. Dr. Andrew Joskow has a Ph.D. in economics from Yale University. He was the chief economist for the Antitrust Division of the Department of Justice. He is now Senior Vice President at National Economic Research Associates, Inc.

A proper analysis under *Rule 23* requires "rigorous" consideration of all the evidence and arguments offered by the parties. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)*. A court must "consider carefully all relevant evidence and make a definitive determination that the requirements of *Rule 23* have been met before certifying a class." *Id. at 320*. Factual determinations necessary for *Rule 23* findings must be made by a preponderance of the evidence. Id. The court must resolve factual or legal disputes relevant to class certification, even if they overlap with the merits. *Id. at 307*. Furthermore, "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands." *Id. at 323*. A determination that an expert's opinion is persuasive on a *Rule 23* requirement does not preclude a different view at the merits stage of the case. *Id. at 324*.

The defendants contend that the plaintiff has failed **[*10]** to satisfy the numerosity, predominance, and superiority requirements. The defendants argue that: (1) the proposed class is insufficiently numerous such that joinder is impracticable, (2) common issues do not predominate over individual issues for antitrust impact and damages, and (3) the superiority requirement has not been met. The Court will address each of the *Rule 23(a)* and *(b)* requirements in turn.

A. *Rule 23(a)*

1. Numerosity

Rule 23(a)(1) requires a finding that the class is so numerous that joinder of all class members is impracticable. Although there is no precise number for establishing numerosity, classes that exceed forty or more class members generally satisfy this prerequisite. See *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met.").

In Stewart, the Court of Appeals for the Third Circuit cited favorably to the *Rule 23* numerosity discussion in Moore's Federal Practice. See *Stewart, 275 F.3d at 227* (citing 5 James Wm. Moore, et al., *Moore's Federal Practice § 23.22[3][a]*). **[*11]** Moore explains that classes with between 21 and 40 members are considered mid-sized classes. These mid-sized classes may or may not meet the numerosity requirement depending on the circumstances of each particular case. See 5 James Wm. Moore, et al., *Moore's Federal Practice § 23.22[3][a]*.

In addition to the number of class members, other factors that are relevant to determining the impracticability of joining all members include (1) judicial economy, (2) geographic dispersion, (3) financial resources of class members, (4) the claimants' ability to institute individual suits, and (5) requests for injunctive relief that could affect future class members. Id.

The Court must determine whether a class of 33 geographically dispersed, direct purchasers is so numerous that joinder of all class members is impracticable. [2] The defendants argue that joinder is practicable in this case because the direct purchasers of Wellbutrin XL are large, sophisticated entities with sufficient financial resources to pursue their own claims and that each member could seek significant damages, if the claims are proven on the merits. Although the defendants are correct about the nature of the class members, judicial **[*12]** economy and geographic dispersion of the parties more heavily favor the use of a class action.

The proposed class includes more than 30 entities that are located across the country. Putative class members are located in California, Illinois, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Carolina, Vermont, and West Virginia. The class members' geographic dispersion would cause substantial difficulty for the parties to conduct discovery efficiently and to coordinate the

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[2] PDC seeks to certify a class of 35 members of the putative class. The proposed class members include 34 pharmaceutical wholesalers as well as the Ohio Department of Mental Health. As the Court discusses below, two of these proposed class members, Allied Med Wholesale Drug, Co. and Goodwin Drug Co., did not purchase any generic extended-release bupropion hydrochloride after it became available. The Court concludes that it is appropriate to limit the class definition to direct purchasers who purchased extended-release bupropion hydrochloride after it became available.

litigation. Furthermore, this complex case has involved numerous discovery disputes **[*13]** and repeated joint requests for extensions of the case schedule. The Court finds that such delays and other complications would be greatly increased if all direct purchasers were joined in this suit. Judicial economy and geographic dispersion therefore weigh in favor of the numerosity requirement. Because of the complexity and sheer volume of discovery in this case and because the 33 direct purchasers are located across the country, the Court finds that the numerosity requirement is satisfied.

This result is consistent with other courts that have addressed the numerosity requirement for direct purchaser antitrust class actions that allege unlawful delay of generic competition. See *Am. Sales Co. v. SmithKline Beecham Corp., 274 F.R.D. 127, 2010 WL 4644426, at *4 (E.D. Pa. 2010)* (class certification uncontested) (33 class members sufficient); *In re K-Dur Antitrust Litig., No. 1419, 2008 U.S. Dist. LEXIS 118396, 2008 WL 2699390, at *3 (D.N.J. Apr. 14, 2008)* (45 class members sufficient); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd., 246 F.R.D. 293, 306 (D.D.C. 2007)* (29 class members sufficient).

2. Commonality

Rule 23(a)(2) requires that there must be questions of law or fact common to the class. To **[*14]** satisfy the commonality requirement, the class's claims must depend upon a common contention. *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550-51, 180 L. Ed. 2d 374 (2011)*. The common contention must be capable of class-wide resolution. *Id. at 2551*. A contention is capable of class-wide resolution if determination of its truth or falsity will resolve an issue that is central to the validity the claims "in one stroke." Id. A single common question is sufficient. *Id. at 2556-57*.

The Court finds that the commonality requirement is met here. PDC alleges that the defendants engaged in a scheme to delay the entry of less expensive generic versions of Wellbutrin XL into the market. The plaintiff contends that this scheme caused 300 mg extended-release bupropion hydrochloride to enter the market in December, 2006 instead of in November, 2005 and that the scheme prevented entry of 150 mg extended-release bupropion hydrochloride until May, 2008. Each class member's claims depend on whether or not the defendants unlawfully engaged in anticompetitive behavior to limit the entry of generic competitors in violation of federal ***antitrust law***.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the **[*15]** representative parties be typical of the claims or defenses of the class. The typicality requirement ensures that the class representatives' interests are aligned with those of the absent class members, so that the representatives work to benefit the class as a whole. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 311 (3d Cir. 1998)*. "The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)* (citing 7A Charles A. Wright, et al., Federal Practice and Procedure § 1764).

If the representative's claims and those of the absent class members arise from the same course of conduct and are based on the same legal theories, the class satisfies typicality, regardless of factual differences underlying the individual claims. *Baby Neal v. Casey, 43 F.3d at 57-58*. The Court finds that the typicality requirement is met because the claims of PDC arise from the same course of conduct and are based on the same legal theories as those of the absent class members.

4. Adequacy of Representation

Rule 23(a)(4) requires that the proposed class representative will fairly and adequately protect the interests **[*16]** of the class. The United States Court of Appeals for the Third Circuit has held that adequacy of representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class. *New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007)*.

The Court is satisfied that this requirement is met here. The plaintiff's counsel are well-qualified to represent the proposed class in this case. They have extensive experience in similar class actions involving delayed generic competition. See, e.g., *In re K-Dur Antitrust Litig., No. 01-1652, 2008 U.S. Dist. LEXIS 118396 (D.N.J. Apr. 14, 2008)*. The plaintiff's counsel also have vigorously and capably prosecuted this action.

The Court also finds that PDC does not have interests that are antagonistic to those of the class. The absence-of-conflict requirement "seeks to uncover conflicts of interest between named parties and the class they seek to represent." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004)* (internal quotation marks omitted). This requirement **[*17]** is not defeated merely "because of a potential conflict of interest that may not become actual." *Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 680 (7th Cir. 2009)*. In this case, the plaintiff seeks overcharge damages for purchases made during the class period. If the plaintiff's claims are proven on the merits, each of the class members would likewise be entitled to seek overcharge damages. The named plaintiff has the same incentive as any other class member to recover damages from any illegal overcharges for conduct that has already taken place.

B. *Rule 23(b)*

Once the requirements of *Rule 23(a)* are satisfied, a plaintiff must also satisfy one of the three criteria in *Rule 23(b)*. The plaintiff seeks to have this class certified under *Rule 23(b)(3)*. *Rule 23(b)(3)* requires the court to find (1) that questions of law or fact common to class members predominate over any questions affecting only individual members and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. These are often referred to as the predominance and superiority requirements.

1. Predominance

To establish predominance, the plaintiff must show by a preponderance **[*18]** of the evidence that the elements of their claim can be proven by evidence common to all in their class. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008)*. "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id. at 311* (quoting *Newton, 259 F.3d at 172*). The elements of the plaintiff's antitrust claims are (1) a violation of the antitrust laws, (2) individual injury or antitrust impact, and (3) measurable damages. *Id. at 311*. The Court will discuss each element in turn.

a. Violation of ***Antitrust Law***

The plaintiff has stated a claim for three violations of federal ***antitrust law***: (1) conspiracy to monopolize under *§ 2 of the Sherman Act* against GSK and Biovail, (2) monopolization under *§ 2 of the Sherman Act* against GSK only, and (3) agreement in restraint of trade under *§ 1 of the Sherman Act* against GSK and Biovail. See *Wellbutrin XL, No. 08-2431, 2009 U.S. Dist. LEXIS 21286, 2009 WL 678631, at *9 (E.D. Pa. Mar. 13, 2009)* (granting Biovail's motion to dismiss for substantive monopolization, and otherwise denying the defendants' motions to dismiss). [3]

[3] The elements of a charge of conspiracy to monopolize under **[*19]** *section 2 of the Sherman Act* are (1) an agreement between two or more economic entities; (2) a specific intent to monopolize the relevant market; (3) the commission of an overt act in furtherance of the alleged conspiracy; and (4) that there was a dangerous probability of success. *2009 U.S. Dist. LEXIS 21286, [WL] at *4*.

The elements of a *section 2* monopolization claim are (1) the possession of monopoly power and (2) the willful acquisition and maintenance of that power as distinguished from growth or development or consequences of a superior product, business acumen, or historical accident. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., 159 F.3d 129, 141 (3d Cir. 1998)*.

The elements of restraint of trade in violation of *section 1 of the Sherman act* are (1) the defendant was a party to a "contract, combination ... or conspiracy" and (2) the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade. *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 218 (3d Cir. 2008)* (internal quotation omitted).

Proof of antitrust violations in this case involve predominantly common issues. If each class member pursued its claims individually, the class member would have to prove the **[*20]** same antitrust violations using the same documents, witnesses, and other evidence. Furthermore, the issues of relevant market, monopoly power, and exclusionary conduct can be proven using common, class-wide evidence because such issues focus on the defendants' conduct rather than individual class members. See *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004)* (noting that liability for anticompetitive conduct focuses on the defendants' actions, not the conduct of individual class members).

b. Antitrust Impact

Antitrust impact, also known as individual injury or antitrust injury, is the second element of each of the plaintiff's causes of action. Antitrust impact requires proof that the plaintiff has suffered an injury that was caused by the defendants' antitrust violation. [4] "[T]o prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." *Hydrogen Peroxide, 552 F.3d at 311*. The Court of Appeals has observed that antitrust impact often is critically important for the purpose of evaluating the predominance requirement because it is an element of the claim that may call for individual, as opposed to common, **[*21]** proof. Id.

At the class certification stage, the plaintiff's burden is not to prove the element of antitrust impact. The plaintiff must instead demonstrate that the element of antitrust impact is "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id. at 311-12*. The district court must conduct a "rigorous" assessment of the available **[*22]** evidence and the method or methods by which the plaintiff proposes to use the evidence to prove impact at trial. *Id. at 312*.

The plaintiff's theory of antitrust impact is that the direct purchaser class members paid an illegal overcharge when they purchased Wellbutrin XL because the defendants excluded cheaper generics from the market. The defendants dispute this theory of overcharge because the price of Wellbutrin XL did not decrease after generic entry. The defendants conclude that because the price of Wellbutrin XL did not go down, the class members did not pay an overcharge.

If there has been no illegal overcharge, the defendants argue that individualized proof will be required to know which direct purchasers, if any, actually suffered economic injury to satisfy the antitrust impact requirement. The defendants also argue that class members do not satisfy the statutory injury requirement of *Section 4 of the Clayton Act* because they may have economically benefitted from delayed generic entry. The defendants contend that the payment of an overcharge by itself is insufficient to establish statutory injury.

The Court first discusses the parties' divergent theories of illegal overcharge. **[*23]** The Court then considers the statutory injury requirement of *Section 4 of the Clayton Act*. Finally, the Court examines the evidence presented to assess whether the plaintiff has demonstrated that antitrust impact is capable of proof through common evidence.

(1) Plaintiff's and Defendants' Overcharge Theories

If a direct purchaser pays an illegal overcharge for a product, it may recover for the full amount of the overcharge. See *Hanover Shoe, Inc. v. United Machinery Corp., 392 U.S. 481, 489, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. As a general matter, "[t]he overcharge usually reflects the difference between the price actually charged and the price that would have prevailed in the absence of the alleged anticompetitive conduct (i.e., the 'but-for' price under

[4] The Court notes the difference between antitrust impact and the calculation of damages. "In antitrust and securities fraud class actions, '[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury).'" *Hydrogen Peroxide, 552 F.3d at 311* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. 2001))*. The Supreme Court has explained that plaintiffs under *§ 4 of the Clayton Act* must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701, (1977))*.

the 'counterfactual')." ABA Section of ***Antitrust Law***, Proving Antitrust Damages: Legal and Economic Issues 197 (2d ed. 2010). See also *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689 (2d Cir. 2009)* (finding that direct purchasers of desmopressin acetate tablets had stated a claim and noting that "overcharges are the difference between the defendants' supra-competitive price and the competitive price.").

The plaintiff's theory of antitrust impact **[*24]** is that the class members suffered an illegal overcharge by purchasing branded Wellbutrin XL during the class period when the class could have instead purchased cheaper, generic bioequivalent drugs, but for the defendants' alleged anticompetitive conduct. The defendants argue that the price differential between branded and generic Wellbutrin XL is irrelevant for antitrust impact because the products are not fungible in the marketplace. Instead, the defendants urge the Court only to consider whether the price charged for Wellbutrin XL was higher than it would have been in the "but for world." In support of this argument, Dr. Joskow, presented evidence that the price of Wellbutrin XL did not decrease after generic entry. Defs.' Opp'n Ex. 1 ("Joskow Decl.") ¶¶ 42-55; Defs.' Sur-Reply Ex. A ("Joskow Reb. Decl.") ¶¶ 1-7.

The issue presented by this dispute is the appropriate reference point for the but-for "competitive price." The Court must decide whether an illegal overcharge for Wellbutrin XL is based on a comparison between the pre- and post-generic entry price differences for the branded drug itself or whether an overcharge should take into account the difference in prices between the **[*25]** foreclosed generic and the branded drug. The starting point for any such decision is the landmark Supreme Court case, *Hanover Shoe, Inc. v. United Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In Hanover Shoe, a shoe machinery manufacturer, United, refused to sell its machinery to its customers, including Hanover Shoe. Instead, United would lease the machinery to customers. The District Court determined that if United had sold its machines, the cost to Hanover would have been less than the rental paid for leasing the same machines. This overcharge, trebled, was the amount of damages awarded to Hanover.

On appeal before the Supreme Court, United argued that Hanover had not suffered an antitrust injury because it had passed on the illegal overcharge to the end shoe purchasers. The Supreme Court rejected this theory and held that a direct purchaser suing for treble damages under *§ 4 of the Clayton Act* is injured by the full amount of the overcharge, even if the excess cost was passed on to the end purchasers. *Hanover Shoe, 392 U.S. at 494*.

The Hanover Shoe decision rested on two major policy concerns. First, the Court was concerned with the additional complication that would be required by a pass-on **[*26]** defense. See *id at 492-93*. Second, the Court was concerned with the effectiveness of enforcement of the antitrust laws through private actions. The Court explained that end customers might "have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available who would bring suit against them." *Id. at 494*. "As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows." *Id. at 489*.

The defendants argue that the overcharge in Hanover Shoe is distinguishable from the plaintiff's theory of overcharge in this case. In support of this argument, the defendants rely on an indirect purchaser case from the Third Circuit. See *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363 (3d Cir. 2005)*. In Howard Hess, the plaintiffs were dental laboratories who were indirect purchasers of artificial teeth, which are used to make dentures. The plaintiffs alleged that the defendant manufacturer foreclosed other competitors' access to intermediary dealers, which are the primary distributors to dental **[*27]** labs and set the dealers' resale prices. The indirect purchaser plaintiffs argued, among other things, that they had standing to recover lost profits damages caused by their lost opportunities to purchase and resell the defendant's competitors' products. The Court held that they did not. *Id. at 376*. The Court concluded that Illinois Brick's prohibition on indirect purchaser actions could not be circumvented on a theory of lost profits caused by lost opportunities to purchase and resell the competitors' products. Id.

Howard Hess, the defendants argue, "confirmed that the concept of an overcharge applies where the product itself has an illegally high price." (Defs.' Sur-reply at 7.) The defendants are correct that the price of the goods actually purchased must be illegally high. In Howard Hess, the Court observed that:

> When antitrust violators cause prices to increase through monopolization, a price-fixing conspiracy, or exclusionary conduct, the harm they cause members of the distribution chain comes in two forms: (1) overcharges paid for goods actually purchased; and (2) lost profits resulting from the lost opportunity to buy and resell a greater volume of goods.

Howard Hess, 424 F.3d at 373 **[*28]** (emphasis added) (footnote omitted). The defendants' reliance on Howard Hess, however, conflates two important issues: (1) whether a plaintiff suffered antitrust impact at all (i.e., by actually purchasing a product with an illegally high price) and (2) the proper reference point for the overcharge. Although the product actually purchased must have an illegally high price, this does not resolve the question as to the proper "but for" competitive market price.

The United States Court of Appeals for the Third Circuit has recognized that an overcharge may be measured with respect to the prices of lower cost competitors. In In re Lower Lake Erie, the Court of Appeals upheld overcharge damages that were based on the difference between the defendants' services and the lower prices the plaintiffs would have paid for more efficient, competing services that were excluded from the market. See *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1169 (3d Cir. 1993)* (measuring overcharges as the difference between the amount paid to transport ore and the lower prices that would have been paid for a more efficient, lower cost system).

The services in Lower Lake Erie were not identical, **[*29]** but rather were substitutes for each other. The defendants in Lower Lake Erie excluded the adoption of self-unloading transport that did not require the use of a hulett, which is a type of manually operated crane. *Lower Lake Erie, 998 F.2d at 1153*. The difference in cost between use of the two systems was the measure of the overcharge. *Id. at 1169*. See also *In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 311 (E.D. Mich. 2001)* ("***Antitrust law*** requires only that the two products at issue be close substitutes for each other.").

The defendants argue that branded and generic Wellbutrin XL are not fungible and that any difference in price between branded and generic Wellbutrin XL is caused in part by factors such as consumer perceptions that the branded drug is safer or more effective. The defendants presented anecdotal reports regarding the quality of Teva Pharmaceuticals' 300 mg version of extended-release bupropion hydrochloride. In the wake of these reports, a consolidated class action has been filed that alleges that Teva's version of 300 mg extended-release bupropion hydrochloride had a more rapid release that made it less effective. See *In re Budeprion XL Mktg. & Sales Litig., MDL No. 2107, 2010 U.S. Dist. LEXIS 51980 (E.D. Pa. May 26, 2010)* **[*30]** (Schiller, J.) (denying defendants' motion to dismiss).

The defendants' expert, Dr. Joskow, observed that such quality perception issues "might" have affected the price of generic extended-release bupropion hydrochloride. See Pl.'s Opp'n Ex. BB at 32:16-17. The defendants also argue that branded drugs in general have a market value above generics that is in part a reflection of quality assurance that the brand is intended to convey. The defendants conclude that price differences between branded and generic Wellbutrin reflect, at least in part, differences in perceived value. [5]

Although there may be some qualitative differences between branded Wellbutrin XL and its generic equivalents, the FDA's certification of bioequivalence supports the plaintiff's theory of overcharge. "FDA-approved generic drugs are certified by the FDA as bioequivalent to the branded drug whose [New Drug Application] the generic **[*31]** drug relied upon in its [Abbreviated New Drug Application], and are completely interchangeable with that branded drug." *Meijer, Inc., 246 F.R.D. at 297*. See also N.T. at 118 (quoting FDA, Generic Drugs: Questions and Answers, *http://www.fda.gov/drugs/resourcesforyou/consumers/questionsanswers/ucm100100.htm* (last visited Aug. 2, 2011) ("A generic drug is identical — or bioequivalent — to a brand name drug in dosage form, safety, strength, route of

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[5] To the extent that the defendants' quality perception arguments relate to the amount of damages instead of the existence of antitrust impact, the Court will address that issue below. See Joskow Dep. Feb. 15, 2011 at 46-47 (referring to quality perception issues "as mostly a damages issue.").

administration, quality, performance characteristics and intended use. Although generic drugs are chemically identical to their branded counterparts, they are typically sold at substantial discounts from the branded price.").

Almost all states encourage generic competition through laws that allow pharmacists to substitute brand-name drugs with their AB-rated generic equivalents, unless a physician directs otherwise. See N.T. at 55; *Meijer, Inc., 246 F.R.D. at 297*. Many health insurance plans encourage the substitution of available AB-rated generic drugs for their branded counterparts. *Meijer, Inc., 246 F.R.D. at 297* (citations omitted). Market data from the introduction of generic Wellbutrin XL also demonstrates that generic Wellbutrin XL quickly **[*32]** captured the vast majority of sales volume and that generic Wellbutrin XL is indeed a substitute for branded Wellbutrin XL. See N.T. at 38:10-39:25 ("[D]epending on the time period, 70 to 90 percent of the volume converts to the generic.").

The defendants' approach would also fail to capture the full economic loss caused by the exclusionary conduct during the period when competition was suppressed. Cf. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)* (certifying settlement class) ("Notably, [indirect purchasers] suffered direct economic harm when . . . they paid supracompetitive prices for Coumadin instead of purchasing lower-priced generic warfarin sodium."). The defendants' narrow view of overcharge is inconsistent with the underlying justification for the direct purchaser rule established by *Hanover Shoe* and *Illinois Brick*.

The Court concludes that the plaintiff may demonstrate antitrust impact by showing that class members paid an illegal overcharge by purchasing Wellbutrin XL instead of generic extended-release bupropion hydrochloride as a result of the defendants' alleged anticompetitive conduct. This result is consistent with other cases that have addressed **[*33]** this legal issue. See, e.g., *In re Neurontin Antitrust Litig., MDL No. 1479, 2011 U.S. Dist. LEXIS 7453, at *26-27 & n.12 (D.N.J. Jan. 25, 2011)* (noting that an increase in the price of Neurontin after generic entry is "irrelevant" to antitrust impact); *Am. Sales Co. v. SmithKline Beecham Corp., 274 F.R.D. 127, 136 (E.D. Pa. 2010)* ("Delayed generic entry into the market necessarily injures those direct purchasers, because those purchasers are forced to pay for the more expensive branded drugs."); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 310 (D.D.C. 2007)* (same). Cf. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)* ("[I]t [is] well recognized that a purchaser in a market where competition has been wrongfully restrained has suffered an antitrust injury . . . ."). The Court is not aware of any courts that have reached a different conclusion.

(2) Statutory Injury Requirement

Section 4 of the Clayton Act creates a private right of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)* (emphasis added). The defendants initially conceded that if the direct **[*34]** purchasers paid an illegal overcharge, then there is no need for the plaintiff to prove actual economic harm from the complained of conduct. See Defs.' Opp'n at 15-16 ("[W]here a direct purchaser pays an overcharged price it may be able to recover damages even though it has suffered no actual economic harm. This is a significant departure from the normal rule in antitrust cases that an antitrust plaintiff must show economic injury in fact to his business or property, as a prerequisite to prevailing in its antitrust suit.") (emphasis in original).

In supplemental briefing, the defendants argued that a recent decision by the United States Court of Appeals for the Third Circuit recognizes that plaintiffs seeking antitrust damages must have suffered some "actual injury." See Defs.' Supp. Opp'n at 1 citing *Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 2011 WL 2321393 (3d Cir. 2011)*. Hanover Shoe, the defendants argue, could not eliminate the statutory injury requirement of *Section 4 of the Clayton Act*, *15 U.S.C. § 15(a)*. Under the defendants' view, direct purchasers are not injured within the meaning of *Section 4* if they economically benefitted from the alleged exclusionary conduct. **[*35]** The defendants argue that because PDC relies on an overcharge theory, it has failed to offer class-wide means of proving "actual injury" to class members.

In Warren General v. Amgen, Warren General Hospital was an indirect purchaser of pharmaceuticals that were manufactured by Amgen and distributed by AmerisourceBergen. Warren General alleged that Amgen violated federal ***antitrust law*** by "tying" the purchase of two of its drugs, Neupogen and Neulasta, to the sale of another Amgen drug, Aranesp. The hospital argued that it could assert claims under federal ***antitrust law*** against Amgen because it was the entity harmed by Amgen's tying scheme, not AmerisourceBergen. The Court concluded that Warren General could not assert a federal antitrust claim.

> It is a basic tenet of ***antitrust law*** that a cause of action will not lie if the plaintiff has not been harmed. However, the hospital's argument conflates the different components of antitrust standing: the statutory requirement contained in *Section 4* that the plaintiff be the direct purchaser as set forth in Illinois Brick and the requirement that the plaintiff have suffered a recognizable injury. . . .
>
> The question in this case is whether Warren **[*36]** General is a direct purchaser under Illinois Brick, and we hold that it is not.

Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 92 (3d Cir. 2011). (citations omitted).

In rejecting the hospital's argument, the Court of Appeals emphasized the logic of the direct purchaser rule because a wholesaler can be injured even though an indirect purchaser bears the majority of the injury. *Id. at 94* ("Because of the complicated interplay between market forces, the possibility that the wholesaler was harmed by defendant's actions exists even if the majority of the injury is borne by the indirect purchaser."). The Court explained that consistent application of the direct purchaser rule is necessary to avoid being mired in difficult calculations between direct and indirect purchaser injuries. Id. The injury that direct purchasers suffer is the full extent of the overcharge, even though the overcharge may be absorbed by other parties.

> [O]n balance . . . the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the **[*37]** overcharge among all that may have absorbed a part of it.

Id. at 95 (quoting *Illinois Brick, 431 U.S. at 746*) (emphasis added).

The Court reads Warren General as reaffirming the longstanding rule that a direct purchaser suffers injury within the meaning of *15 U.S.C. § 15(a)* from an overcharge even if "the majority of the injury" is borne by indirect purchasers. *Warren General, 643 F.3d at 94-95*. If the direct purchaser class members paid an illegal overcharge, they have been injured within the meaning of *Section 4 of the Clayton Act*. See *id. at 92*; *Hanover Shoe, 392 U.S. at 491* (noting the "general principle" that "the victim of an overcharge is damaged within the meaning of *§ 4* to the extent of that overcharge.").

(3) Application

The Court concludes that to demonstrate antitrust impact, the plaintiff must first show that the price of generic extended-release bupropion hydrochloride would have been lower than Wellbutrin XL absent the defendants' anticompetitive conduct. The plaintiff must also show that the class members would have substituted at least some generic extended-release bupropion hydrochloride for Wellbutrin XL during the class period. See *Neurontin, 2011 U.S. Dist. LEXIS 7453, at *28 (D.N.J. Jan. 25, 2011)*.

The **[*38]** next issue is whether common evidence can demonstrate that generic prices would have been lower than branded prices in the "but for world." The plaintiff's expert, Dr. Leitzinger, presented three types of evidence to support class-based evidence of antitrust injury: (1) economic research and literature relating to the price relationship between branded and generic drugs, (2) the defendants' and generic manufacturers' internal forecasting documents, (3) and empirical data demonstrating that generics did enter the market at lower prices and were rapidly substituted for branded Wellbutrin XL. See N.T. 34-46; Pl.'s Mot. Ex. N ("Leitzinger Decl."); Pl.'s Reply Ex. W ("Leitzinger Reb. Decl.") ¶¶ 4-7.

Dr. Leitzinger presented evidence that the price of extended-release bupropion hydrochloride would have been lower than Wellbutrin XL at all times in the "but for world" absent the defendants' anticompetitive conduct. Dr. Leitzinger explained that economic literature provides an understanding regarding the general effects of generic entry on the market for a branded pharmaceutical. See N.T. at 34-35 ("[The literature has] a common bottom line . . . which is generic drugs save a lot of money.").

Dr. **[*39]** Leitzinger also presented Biovail's internal forecasting documents, which showed that within 12 months, Biovail forecasted that the branded market share would decrease to around 12%-13%, from 100% in the previous year. N.T. 36-37, Pl.'s Ex. 8. Dr. Leitzinger also presented sales data from five generic manufacturers of extended-release bupropion hydrochloride. Upon initial generic entry, the average price of the generic was approximately 25% below the branded price, which decreased to about 10% of the branded price two years after generic entry. N.T. at 39. Dr. Leitzinger acknowledged that there is some variability in generic prices based upon negotiations with generic manufacturers and other factors, but prices of generics are always cheaper than branded prices. N.T. 43-44. The defendants' rebuttal evidence failed to contradict this point. See N.T. at 122 (Dr. Joskow testifying that prices for generics, whether purchased directly or indirectly from generic manufacturers, were always lower than prices for Wellbutrin XL).

The defendants, however, did present evidence that raises questions regarding whether common proof can be used to demonstrate antitrust impact for class members that **[*40]** did not purchase extended-release bupropion hydrochloride after it became available and for class members who were indirect purchases of generic extended-release bupropion hydrochloride.

Two direct purchasers did not purchase extended-release bupropion hydrochloride after it became available, Allied Med Wholesale Drug, Co. and Goodwin Drug Co. N.T. at 40-41. For entities that did purchase extended-release bupropion hydrochloride after it became available, it is a reasonable inference that these entities would have purchased extended-release bupropion hydrochloride in the "but for world," absent the alleged exclusionary conduct. This inference, however, is not persuasive for Allied Med Wholesale Drug, Co. and Goodwin Drug Co. without additional evidence. Proof of antitrust impact for these class members would require individual analysis into the antitrust impact, if any, they suffered from the alleged conduct. The Court finds that the plaintiff has not proven that it can demonstrate antitrust impact with class-wide evidence for these two entities and the Court will exclude them from the class definition. Plaintiffs and courts in other delayed generic entry cases have modified class definitions **[*41]** to accommodate this concern. See *Neurontin, 2011 U.S. Dist. LEXIS 7453, at *34 (D.N.J. Jan. 25, 2011)*; *K-Dur, 2008 U.S. Dist. LEXIS 118396, 2008 WL 2699390, at *21* ("[E]xcluded are persons or entities who have not purchased generic versions of K-Dur 20 after the introduction of generic versions of K-Dur 20.").

Four of the direct purchasers, including the plaintiff PDC, were indirect purchasers of extended-release bupropion hydrochloride. These direct purchasers of Wellbutrin XL did not buy generics directly from the generic manufacturer, but rather bought generics indirectly from other wholesalers or distributors.

These indirect purchasers of generics, however, were still direct purchasers of Wellbutrin XL under *Hanover Shoe* and *Illinois Brick*. The relevance of the generic purchases is that a fact finder could infer that these entities would have made generic purchases in the "but for" world, and thereby may have suffered an alleged overcharge for actual purchases of branded Wellbutrin XL. See *Howard Hess, 424 F.3d at 373*.

These class members' direct branded purchases can be shown through common data applicable to all direct purchasers. The class members' indirect generic purchasers can also be demonstrated through **[*42]** chargeback data from Teva and sales data from four generic distributors, Top Rx, Masters Pharmaceuticals, Auburn Pharmaceuticals, and Quest Pharmaceuticals. See Leitzinger Reb. Decl. ¶ 36 & n.43. These purchasers may have paid more for extended-release bupropion hydrochloride because they purchased from distributors instead of directly from the manufacturers, but any differences relate to the amount of damages, not fact of damages. N.T. at 44 (Leitzinger testifying) ("[Y]ou may have people that buy [generics] further down the distribution chain . . . [b]ut that doesn't change at all the basic reality that those prices are going to be much lower than the brand would have been."). Because the alleged overcharge for these purchasers can be demonstrated with distributor and manufacturer data that does not depend on individual class members, any individual issues for proof of antitrust impact for these four class members will not predominate over issues common to the class.

The Court concludes that the plaintiff has shown that for the class members that purchased branded Wellbutrin XL during the class period and extended-release bupropion hydrochloride after it became available, these class **[*43]** members would have converted some purchases of branded Wellbutrin XL to generic extended-release bupropion hydrochloride in the "but for world." The plaintiff has also shown that evidence of the alleged overcharge can be shown with data that is common to the class. The Court therefore finds the predominance requirement has been satisfied for class members who purchased both extended-release bupropion hydrochloride and Wellbutrin XL. The Court excludes from the class definition direct purchasers who did not purchase extended-release bupropion hydrochloride after it became available.

c. Measurable Damages

The third element for each of the plaintiff's causes of action is measurable damages. At trial, "[i]t is not necessary to show with total certainty the amount of damages sustained." *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 483 (3d Cir. 1998)*. A jury is permitted to calculate the actual damages suffered using a "reasonable estimate, as long as the jury verdict is not the product of speculation or guess work." *Id. at 484* (citations and quotations omitted). See also *Lower Lake Erie, 998 F.2d at 1176* ("the relaxed measure of proof is afforded to the amount, not the causation of loss **[*44]** . . . .") (citations omitted).

At the class certification stage, the plaintiff is not required to prove damages by calculating specific damages figures for each member of the class, but rather they must show that a reliable method is available to prove damages on a class-wide basis. See *Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 303 (5th Cir. 2003)* (noting that *section 4* plaintiffs must provide a "just and reasonable estimate of the damage based on relevant data."); *Neurontin, 2011 U.S. Dist. LEXIS 7453, at *40 (D.N.J. Jan. 25, 2011)*.

The Third Circuit has explained that plaintiffs may choose in an antitrust case between either seeking overcharges or lost profits, and in this case, the plaintiff has chosen to pursue overcharges. See *Howard Hess, 424 F.3d at 375* (noting that overcharges avoid "the complex netting associated with lost profits") (quoting Roger D. Blair & William H. Page, "Speculative" Antitrust Damages, *70 Wash. L. Rev. 423, 433-34 (1995)*). [6]

Dr. Leitzinger's damages methodology is based on the "before and after" method. This methodology produces an aggregate damages estimate that is based on deriving a benchmark for generic prices in the "but for world" based on the actual experience for branded and generic prices after entry. The market data for actual sales is "backcasted" to estimate prices, but for the alleged delay. Dr. Leitzinger proposes to calculate damages as the difference between the weighted-average price that class members paid for all extended-release bupropion hydrochloride products (branded plus generics) and the weighted average that class members would have paid but for the alleged conduct. Dr. Leitzinger then multiplies the difference by the volume of extended-release bupropion hydrochloride in the but-for world to arrive at an aggregate measure of overcharge. See Leitzinger **[*46]** Decl. at 37-43; Leitzinger Reb. Decl. ¶¶ 38-58; N.T. at 46-59. [7]

The defendants present three main critiques of Dr. Leitzinger's damages model. First, Dr. Joskow argues that the plaintiff's model fails to account for price effects unrelated to the defendants' conduct such as quality differences between generic and name brand Wellbutrin XL. Second, Dr. Joskow faults the model for using a single ratio and average prices to calculate aggregate damages. Third, Dr. Joskow argues that the model is overinclusive because the direct purchasers would have made fewer purchases in the "but for world."

The plaintiffs have adequately rebutted the defendants' argument that the damages model fails to account for the possible price effects of quality perception issues. Dr. Joskow noted that he had not done an empirical analysis to address whether the price of Teva's generics was affected by perception issues, but he opined that a damages

[6] See also *id. at 374* (quoting ABA Section of ***Antitrust Law***, Proving Antitrust Damages 193-94 (1996) ("Where a group of suppliers conspires to . . . prevent a more efficient supplier from entering the market . . . purchasers from the **[*45]** conspirators would also have antitrust claims because they pay higher prices as a result of the exclusionary practice. The purchasers' damages would be based on the overcharge they paid measured by the difference between the price actually paid and the price that would have been paid absent collusion, multiplied by the quantity.").

[7] This methodology has been used in similar cases that allege unlawful delay of generic competition. See, e.g., *Neurontin, 2011 U.S. Dist. LEXIS 7453, at *41 (D.N.J. Jan. 25, 2011)*; *K-Dur, 2008 U.S. Dist. LEXIS 118396, 2008 WL 2699390, at *19-20*; *Cardizem, 200 F.R.D. at 323*.

model should account for **[*47]** the difference. See Pl.'s Opp'n Ex. BB at 46. Dr. Leitzinger countered that the data showed that Teva's prices were actually higher than prices charged by other generic manufacturers. See Leitzinger Reb. Decl. ¶ 57. Biovail's internal analysis also concluded that "it seems like the data is showing that the market has not penalized Teva's formulation." Id. Furthermore, Dr. Leitzinger testified that the overcharge model could accommodate this concern, if borne out by the data. N.T. at 56:1-12.

Dr. Leitzinger has also clarified that his methodology does not rely on a single price ratio for the damages period, as Dr. Joskow suggested. Rather, Dr. Leitzinger used a single ratio as an example in his initial declaration because he was modeling data from the first six months of entry when there was only one generic entrant. See Leitzinger Reb. Decl. ¶ 44. Dr. Leitzinger also explained that the use of average prices and price ratios properly accounts for "chargebacks," which result when direct purchasers are reimbursed for sales to contract customers that are priced below the direct purchasers' acquisition price. Dr. Joskow's calculations based on daily price calculations, Dr. Leitzinger observes, **[*48]** "reflect wild swings day-to-day purely as a result of the inherent mismatch between sales and chargebacks that daily averages produce." Id. ¶ 48. By averaging sales transactions over longer periods of time, the actual price is more accurately reflected. Id. The Court is persuaded that Dr. Leitzinger has set forth a reliable damages methodology.

The defendants also argue that the plaintiff's model is flawed because it fails to account for generic bypass. Generic bypass refers to the situation whereby direct purchasers may lose sales volume because end purchasers often buy generics directly from the generic manufacturer and "cut out the middle man" or "bypass" the wholesaler. The defendants argue that Dr. Leitzinger's methodology calculates total damages based on the total number of tablets that class members actually purchased rather than the number of tablets that the class members would have purchased in the but-for world. The number of tablets in the but-for world would likely be lower because of the generic bypass phenomenon. In response to the defendants' generic bypass arguments, Dr. Leitzinger explained that bypass can be "readily incorporated into my overcharge calculation by **[*49]** reducing the volumes used in calculating the overcharge by the amount of bypass the occurred following generic entry in the actual world." Leitzinger Reb. Decl. ¶ 42.

In In re Relafen Antitrust Litigation, the United States District Court for the District of Massachusetts concluded that reducing damages because of generic bypass argument is inconsistent with Hanover Shoe. See *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 369 (D. Mass. 2004)*. At this stage, however, the Court need not resolve whether the effects of generic bypass must be deducted from damages because the plaintiff's burden at this stage is to demonstrate a reliable methodology to estimate class-wide damages. The plaintiff has done so here. See *Neurontin, 2011 U.S. Dist. LEXIS 7453, at *42-43 (D.N.J. Jan. 25, 2011)* (noting that the plaintiffs offered a reasonable, judicially recognized methodology for calculating damages and have shown that the data needed to make these calculations is available and common to the class). Whether or not generic bypass must be accounted for is a matter that can be accommodated within the methodology proposed by Dr. Leitzinger.

2. Superiority

Lastly, the Court considers whether a class **[*50]** action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. This "requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication." In *Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998)*. It is meant to ensure that resolution by class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision without sacrificing procedural fairness or bringing about other undesirable results." *Amchem, 521 U.S. at 615* (quoting Advisory Committee's Note on *Fed. R. Civ. P. 23*).

The Court finds that the superiority requirement is met here. As discussed above, this action involves numerous complex issues of law and fact that are common to the class. Individual treatment of each class members' claims would require duplicative, expensive litigation, which would come at enormous expense to the parties and judicial economy. Class resolution would also avoid problems of inconsistent resolution. This result is consistent with other courts that have addressed similar **[*51]** cases. See, e.g., *Neurontin, 2011 U.S. Dist. LEXIS 7453, at *45-47 (D.N.J. Jan. 25, 2011)*; *Meijer, 246 F.R.D. at 313*; *Relafen, 218 F.R.D. at 346*.

III. Conclusion

The Court concludes that the plaintiff has satisfied its burden to certify a class of direct purchasers of Wellbutrin XL who also purchased extended-release buproprion hydrochloride after it became available.

An appropriate order will follow separately.

ORDER

AND NOW, this 11th day of August, 2011, upon consideration of the Direct Purchaser Plaintiffs' Motion for Class Certification (Docket No. 134), the opposition, reply, sur-reply, supplemental opposition, and supplemental reply thereto, the accompanying expert declarations, the hearing on April 5, 2011, and for the reasons stated in a memorandum of today's date, IT IS HEREBY ORDERED that the motion is GRANTED IN PART AND DENIED IN PART. IT IS FURTHER ORDERED that:

1. The following direct purchaser litigation class is hereby certified pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)*: "All persons or entities in the United States and its territories who purchased Wellbutrin XL directly from any of the Defendants at any time during the period of November 14, 2005 through **[*52]** August 31, 2009 (the 'Class Period'). Excluded from the class are Defendants and their officers, directors, management, employees, parents, subsidiaries, and affiliates, and federal government entities. Further excluded from the class are persons or entities who have not purchased generic versions of Wellbutrin XL during the class period after the introduction of generic versions of Wellbutrin XL."

2. Class claims, issues, and defenses are those incorporated into the Court's memorandum of today's date as well as the affirmative defenses raised in the defendants' answers. See Docket Nos. 83, 84.

3. Professional Drug Company, Inc. is hereby appointed representative of the direct purchaser class.

4. The following firms are hereby appointed as counsel to the direct purchaser class:

Co-lead Counsel
Hagens Berman Sobol Shapiro, LLP
Thomas M. Sobol, Esquire
David S. Nalven, Esquire
Berger & Montague, P.C.
David F. Sorenson, Esquire

Liaison Counsel
Rodanast, P.C.
Joseph F. Roda, Esquire
Dianne M. Nast, Esquire
Jennifer S. Snyder, Esquire

Additional Class Counsel
Faruqi & Faruqi, LLP
Peter Kohn, Esquire
Taus, Cebulash, and Landau, LLP
Barry Taus, Esquire
Archana Tamoshounas, Esquire
Don Barrett, P.A.

Don Barrett, **[*53]** Esquire

5. Within 30 days of the date of this Order, the parties shall submit an agreed upon proposed notice program and forms of notice to class members. If the parties are unable to agree as to the proposed notice program and/or forms of notice, they shall submit separate proposals.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. McLAUGHLIN, J.

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In re Wellpoint Out-Of-Network "UCR" Rates Litig.

United States District Court for the Central District of California

August 11, 2011, Decided; August 11, 2011, Filed

Case No. MDL 09-2074 PSG (FFMx)

Reporter

865 F. Supp. 2d 1002 *; 2011 U.S. Dist. LEXIS 89512 **; 2011-2 Trade Cas. (CCH) P77,563; 52 Employee Benefits Cas. (BNA) 1371

In re WellPoint, Inc. Out-of-Network "UCR" Rates Litigation

Subsequent History: Dismissed by, in part, Without prejudice, Dismissed by, in part, Motion denied by, in part *In re WellPoint, Inc. Out-Of-Network "UCR" Rates Litig., 903 F. Supp. 2d 880, 2012 U.S. Dist. LEXIS 152498 (C.D. Cal., Sept. 6, 2012)*

Dismissed by, in part, Motion denied by, in part *In re WellPoint, Inc. Out-of-Network "UCR" Rates Litig., 2013 U.S. Dist. LEXIS 208787 (C.D. Cal., July 19, 2013)*

Prior History: *Samsell v. WellPoint, Inc. (In re Wellpoint, Inc.), 652 F. Supp. 2d 1375, 2009 U.S. Dist. LEXIS 124175 (J.P.M.L., Aug. 20, 2009)*

Core Terms

Plaintiffs', Defendants', allegations, reimbursements, insurers, database, Provider, motion to dismiss, enterprise, participating, Subscriber, benefits, Sherman Act, Conspirators, pleaded, conspiracy, predicate act, mail, fraudulent, futility, rates, insurance business, depressed, rule of reason, misleading, cause of action, wire fraud, fiduciary, plans, breach of fiduciary duty

LexisNexis® Headnotes

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

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

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a complaint under *Rule 12(b)(6)*, the courts must be mindful that the Federal Rules of Civil Procedure require that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. Nevertheless, judicial precedent instructs that a complaint that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

In resolving a *Fed. R. Civ. P. 12(b)(6)* motion, the court must first accept as true all nonconclusory, factual allegations made in the complaint. Based upon these allegations, the court must draw all reasonable inferences in favor of the plaintiff. After accepting as true all nonconclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the court must then determine whether the complaint alleges a plausible claim to relief. In determining whether the alleged facts cross the threshold from the possible to the plausible, the court is required to draw on its judicial experience and common sense. *Fed. R. Civ. P. 8* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN3[] Standing, Elements

U.S. Const. art. III standing is a jurisdictional prerequisite to a federal court's consideration of any claim. A plaintiff in federal court must show three things: (1) injury-in-fact; (2) causation, and (3) redressibility.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN4[] Standing, Requirements

For U.S. Const. art. III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation.

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

HN5[] Motions to Dismiss, Failure to State Claim

Naked assertions devoid of further factual enhancement cannot withstand a *Fed. R. Civ. P. 12(b)(6)* motion.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] Justiciability, Standing

If a challenge to standing is based only on the insufficiency of the allegations in the complaint on their face, the challenge is said to be a facial attack. If, on the other hand, a challenge to standing disputes the truth of the allegations purportedly conferring standing, the challenge is said to be a factual attack.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN7[] **Motions to Dismiss, Failure to State Claim**

A district court is permitted to review evidence beyond the complaint when resolving a factual attack on jurisdiction. Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

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

HN8[] **Motions to Dismiss, Failure to State Claim**

The United States Court of Appeals for the Ninth Circuit has cautioned that jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and must satisfy the requirements specified in judicial precedent. Dismissal is warranted where the alleged claim under the United States Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous. In fact, where the jurisdictional issue and substantive issues are so intertwined, or stated somewhat differently, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a factual attack is proper only when the allegations of the complaint are frivolous. If the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The requirements for standing to maintain a civil action under RICO and the antitrust laws are similar. Both provide a private right of action for damages only to those individuals injured in their business or property by reason of a violation of the law's substantive provisions.

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN10[] **Standing, Particular Parties**

An abstract concern with issues facing an association's membership is insufficient to confer individual standing upon that association.

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN11[] **Standing, Particular Parties**

An association may have representative standing if (1) its members would have standing to sue in their own right, (2) the interests that the association seeks to protect in the litigation are germane to the association's organizational purpose, and (3) the claims and relief will not require the participation of the association's individual members.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] Sherman Act, Claims

15 U.S.C.S. § 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade. Not every agreement that restrains competition violates the Sherman Act. Rather, the Sherman Act prohibits conspiracies and agreements that unreasonably restrain trade.

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

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

Claims under 15 U.S.C.S. § 1 of the Sherman Act are evaluated under either a per se analysis or the rule of reason.

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

HN14[] Per Se Rule & Rule of Reason, Sherman Act

The Sherman Act prohibits some arrangements as a matter of law, and restraints that fall within certain narrow categories are deemed to be per se violations. In order to state a claim for a per se violation of the Sherman Act, the plaintiffs must allege sufficient facts that the defendants (1) entered into an agreement (2) to fix prices, rig bids, or divide a market.

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

HN15[] Per Se Rule & Rule of Reason, Sherman Act

Under 15 U.S.C.S. § 1, plaintiffs must offer particular factual allegations that the defendants entered into an illegal agreement. In order to allege a conspiracy under § 1 of the Sherman Act, a plaintiff must provide the specific time, place, or persons involved in the alleged conspiracy. Mere allegations of parallel conduct will not suffice. See id.

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

HN16[] Per Se Rule & Rule of Reason, Sherman Act

While allegations of opportunities to conspire alone are insufficient to infer a conspiracy under 15 U.S.C.S. § 1, such opportunities demonstrate how and when the defendants had opportunities to exchange information or make agreements.

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

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

HN17[] Cartels & Horizontal Restraints, Price Fixing

As a general matter, agreements to fix prices among competitors is one of the discrete categories of restraints reserved for per se treatment. Horizontal price fixing is per se unlawful regardless of whether the prices set are minimum or maximum.

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

HN18[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The question of whether a plaintiff's allegations comprise a per se claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment.

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

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

HN19[] **Vertical Restraints, Price Fixing**

Vertical price fixing is not subject to per se analysis and must be evaluated according to the rule of reason.

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

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

As a general matter, agreements among competitors to exchange information are analyzed under the rule of reason because such exchanges can facilitate competition.

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

HN21[] **Per Se Rule & Rule of Reason, Sherman Act**

In order to state a rule of reason claim under the Sherman Act, a plaintiff must demonstrate the following three elements: (1) the persons or entities to the agreement intend to harm or restrain competition; (2) an actual injury to competition occurs; and (3) the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint.

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

HN22[] **Per Se Rule & Rule of Reason, Sherman Act**

In stating a rule of reason claim under the Sherman Act, a plaintiff must identify a relevant market, which must be defined in terms of both product and geography. In addition to identifying a relevant market, a plaintiff must allege that the defendant has market power within that market; otherwise the defendant's restraint on trade would not have a substantial anticompetitive effect. As the United States Court of Appeals for the Ninth Circuit has observed, there is no requirement that these relevant market and market power elements of the antitrust claim be pled with specificity.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN23[] **Federal Regulations, McCarran-Ferguson Act**

The McCarran-Ferguson Act exempts from federal antitrust laws all conduct that (1) is part of the business of insurance, (2) is regulated by state law, and (3) is not a boycott, coercion, or intimidation. *15 U.S.C.S. §§ 1011-1015*.

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > McCarran-Ferguson Act

HN24[] **Federal Regulations, McCarran-Ferguson Act**

In order to constitute part of the business of insurance under the McCarran-Ferguson Act, the practice must (1) have the effect of transferring or spreading a policyholder's risk, (2) be an integral part of the policy relationship between the insurer and the insured, and (3) be limited to entities within the insurance industry. Judicial precedent instructs that the McCarran-Ferguson exemption was focused on the relationship between the insurer and its agents and the insured. Moreover, the statute exempts the business of insurance and not the business of insurance companies. Finally, exemptions from antitrust laws under the McCarran-Ferguson Act are to be narrowly construed.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN25[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

See *18 U.S.C.S. § 1962(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN26[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

For a plaintiff to state a claim under *18 U.S.C.S. § 1962(c)*, he or she must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Governments > Legislation > Interpretation

HN27[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act is to be read broadly and liberally construed to effectuate its remedial purposes.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN28[] Private Actions, Racketeer Influenced & Corrupt Organizations

The Racketeer Influenced and Corrupt Organizations Act defines enterprise in a fairly pedestrian manner: any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(4). This seemingly innocuous definition, however, has commanded much attention, particularly with respect to the meaning of a group of individuals associated in fact. Judicial precedent stepped in early and defined an associated-in-fact enterprise as an ongoing organization whose various associates function as a continuing unit. Though this is not a stringent standard, an associated-in-fact enterprise must have three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN29[] Private Actions, Racketeer Influenced & Corrupt Organizations

For purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), an enterprise is not wholly defined by its system of governance or one particular structure. In fact, liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. Direction need not come down through a hierarchical structure or a chain of command; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Moreover, members of the group need not have fixed roles; different members may perform different roles at different times. And the group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. Finally, while the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by quiescence.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN30[] Private Actions, Racketeer Influenced & Corrupt Organizations

For purposes of the Racketeer Influenced and Corrupt Organizations Act, an associated-in-fact must have a common purpose.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN31[] Private Actions, Racketeer Influenced & Corrupt Organizations

It is clear that a hierarchical structure or a chain of command is not required in order for a Racketeer Influenced and Corrupt Organizations Act (RICO) relationship to be present. And, members of the group need not have fixed roles. However, allegations that several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates are not enough to show membership in an enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN32[] Private Actions, Racketeer Influenced & Corrupt Organizations

Liability for participating in the conduct of a Racketeer Influenced and Corrupt Organizations Act enterprise extends only to those who have some part in directing the enterprise's affairs. As it is used here, directing has a different meaning than commonly understood. More is required than simply being involved, but a defendant need not be in-charge or have significant control over or within the enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN33[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after 1970 and the last of which occurred within 10 years after the commission of a prior act of racketeering activity. *18 U.S.C.S. § 1961(5)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN34[] **Claims, Fraud**

Where the Racketeer Influenced and Corrupt Organizations Act is asserted against multiple defendants, a plaintiff must allege at least two predicate acts by each defendant.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN35[] **Claims, Fraud**

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must allege that the conduct complained of qualifies as racketeering activity. Racketeering activity is defined in RICO by reference to certain predicate acts. *18 U.S.C.S. § 1961*. Included predicate acts are, among others, mail fraud under *18 U.S.C.S. § 1341*, wire fraud under *18 U.S.C.S. § 1343*, and embezzlement from pension and welfare funds under *18 U.S.C.S. § 664*. *18 U.S.C.S. § 1961(1)(B)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN36[] **Claims, Fraud**

To state a claim for mail and wire fraud, a plaintiff must plead, in addition to the other elements of a Racketeer Influenced and Corrupt Organizations Act claim, (1) a scheme or artifice devised with (2) specific intent to defraud and (3) use of the United States mail or interstate telephone wires in furtherance thereof.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

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

HN37[] **Claims, Fraud**

Although the Racketeer Influenced and Corrupt Organizations Act itself is not subject to *Fed. R. Civ. P. 9(b)*'s heightened pleading standards, predicate acts alleging fraud must be pleaded with particularity. At a minimum, this requires that the complaint must state the time, place and specific content of the false representation as well as the identities of the parties to the misrepresentation. The plaintiff must also set forth more than neutral facts necessary to identify the transaction; he must explain why the statement complained of was false or misleading. In the context of a fraud suit involving multiple defendants, a plaintiff must also identify the role of each defendant in the alleged fraudulent scheme. Although the complaint need not identify false statements made by each and every individual, *Rule 9(b)* does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to inform each defendant separately of the allegations surrounding his alleged participation in the fraud.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN38[] **Claims, Fraud**

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), the plaintiff is required to show that a RICO predicate offense not only was a but for cause of his injury, but was the proximate cause as well.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN39[] **Claims, Fraud**

Judicial precedent does not say that there is no requirement to plead any reliance for purposes of the Racketeer Influenced and Corrupt Organizations Act, but only that first-party reliance is not required.

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > General Overview

HN40[] **Theft & Related Offenses, Embezzlement**

See *18 U.S.C.S. § 664*.

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > General Overview

HN41[] **Theft & Related Offenses, Embezzlement**

The United States Court of Appeals for the Ninth Circuit recognized that embezzlement traditionally encompassed the fraudulent appropriation of the property of another. The court went on, however, to say that embezzlement under *18 U.S.C.S. § 664* goes beyond traditional embezzlement concepts and imposes liability for an intentional breach of special fiduciary duties imposed by other regulatory statutes or governing instruments.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN42[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Conspiring to violate the Racketeer Influenced and Corrupt Organizations Act is a separate offense under *18 U.S.C.S. § 1962(d)*.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Plan Benefits

HN43[] Causes of Action, Suits to Recover Plan Benefits

The Employee Retirement Income Security Act (ERISA) was enacted primarily to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting of financial and other information and to establish standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans. *29 U.S.C.S. § 1001(b)*. To meet those goals, Congress empowered participants, beneficiaries, and fiduciaries of qualified ERISA benefit plans, along with the United States Secretary of Labor, to sue for, inter alia, benefits owed. *29 U.S.C.S. § 1132(a)*.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Plan Benefits

HN44[] Causes of Action, Suits to Recover Plan Benefits

The United States Court of Appeals for the Ninth Circuit ruled that claims for benefits under *29 U.S.C.S. § 1132(a)(1)(B)* can be asserted against an entity other than the plan itself or the plan administrator. The Ninth Circuit's ruling expands the set of defendants who may be properly sued under *§ 1132(a)(1)(B)* to include the insurer.

Pensions & Benefits Law > ... > Civil Litigation > Remedies > Exhaustion of Administrative Remedies

HN45[] Remedies, Exhaustion of Administrative Remedies

As a general rule, a plaintiff must exhaust administrative remedies under the relevant benefit plan prior to bringing suit under *29 U.S.C.S. § 1132(a)(1)(B)*. Federal courts have the authority to enforce the exhaustion requirement in suits under the Employee Retirement Income Security Act, and that as a matter of sound policy they should usually do so. However, the demonstrated futility of administrative appeals constitutes an exception to the prudential exhaustion doctrine. A plaintiff can demonstrate futility by pointing to a similarly situated plaintiff who exhausted administrative remedies to no avail. Bare assertions of futility are not enough to invoke the futility exception. A plan's refusal to pay does not, by itself, show futility.

Pensions & Benefits Law > ERISA > Civil Litigation > Standing

HN46[] Civil Litigation, Standing

A health care provider with an allegedly valid assignment has the same standing as the beneficiary and may bring suit under the Employee Retirement Income Security Act.

Pensions & Benefits Law > ... > Civil Litigation > Remedies > Exhaustion of Administrative Remedies

Pensions & Benefits Law > ERISA > Civil Litigation > Standing

HN47[] Remedies, Exhaustion of Administrative Remedies

Health care providers with valid assignments are not required to bill the patient when seeking an Employee Retirement Income Security Act claim against a defendant.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

HN48[] Causes of Action, Breach of Fiduciary Duty

29 U.S.C.S. § 1132(a)(2) authorizes plan participants to bring suit for relief under *29 U.S.C.S. § 1109*.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

HN49[] Causes of Action, Breach of Fiduciary Duty

See *29 U.S.C.S. § 1109*.

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

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

HN50[] Motions to Dismiss, Failure to State Claim

For purposes of *29 U.S.C.S. § 1109*, the fiduciary relationship is one with the plan as a whole, and individual beneficiaries bringing a breach of fiduciary duty claim must do so for the benefit of the plan, not to recover solely for individual injuries. To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a plaintiff must allege in the complaint that the fiduciary injured the benefit plan or otherwise jeopardized the entire plan or put at risk plan assets. But, after adoption of the Twombly standard, merely alleging that an Employee Retirement Income Security Act breach of fiduciary duty claim is brought on behalf of, and for the benefit of, the plan and all its participants is not enough.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Annuity Benefits

HN51[] Causes of Action, Suits to Recover Annuity Benefits

29 U.S.C.S. § 1132(a)(3) makes no mention at all of which parties may be proper defendants, and there is no reason to read a limitation into *29 U.S.C.S. § 1132(a)(1)(B)* that judicial precedent does not perceive in *§ 1132(a)(3)*.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > General Overview

HN52[] Civil Litigation, Causes of Action

Judicial precedent terms an Employee Retirement Income Security Act breach of fiduciary duty cause of action as a catchall provision or a safety net, offering appropriate equitable relief for injuries caused by violations that *29 U.S.C.S. § 1132* does not elsewhere adequately remedy. The United States Court of Appeals for the Ninth Circuit similarly held that when relief is available under *29 U.S.C.S. § 1132(a)(1)*, courts will not allow relief under *29 U.S.C.S. § 1132(a)(3)* catchall provision.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Failures to Respond

HN53[] **Causes of Action, Failures to Respond**

While an insurer can properly be sued under *29 U.S.C.S. §§ 1132(a)(1)(B)* and *(a)(3)*, only the plan administrator can be held liable for failing to comply with *29 U.S.C.S. § 1132(c)*. The Employee Retirement Income Security Act specifically defines an administrator as: (1) the person specifically so designated by the terms of the instrument under which the plan is operated; (2) if an administrator is not so designated, the plan sponsor; or (3) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the United States Secretary of Labor may by regulation prescribe. *29 U.S.C.S. § 1002(16)(A)*.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Failures to Respond

HN54[] **Causes of Action, Failures to Respond**

With few exceptions, courts in the Ninth Circuit consistently conclude that *29 U.S.C.S. § 1132(c)* liability cannot attach to a third party insurer that assumes administrative responsibilities under the de facto administrator theory.

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

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

HN55[] **Breach of Contract Actions, Elements of Contract Claims**

A plaintiff who sues on a written contract is not required to attach a copy of the contract to the complaint, but its existence and how it was breached must be identified.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN56[] **Deceptive & Unfair Trade Practices, State Regulation**

California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, prohibits unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising, as well as any act prohibited by California's false advertising statute. An unlawful business act under *§ 17200* is any business practice that is prohibited by law, whether civil or criminal, statutory or judicially made, federal, state or local. A business act is unfair under *§ 17200* "if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits. Finally, a fraudulent business practice under *§ 17200* is one which is likely to deceive the public, and may be based on representations to the public which are untrue, and also those which may be accurate on some level, but will nonetheless tend to mislead or deceive.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

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

HN57[] **Deceptive & Unfair Trade Practices, State Regulation**

Claims under California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, based on fraud are subject to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*. Plaintiffs must plead the who, what, when, where, and how of the alleged fraudulent conduct and explain why a statement or omission complained of was false and misleading.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN58[] Deceptive & Unfair Trade Practices, State Regulation

Under California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, plaintiffs must specifically allege that the fraudulent conduct caused them injury. This is really an issue of a plaintiff's standing to assert a UCL or California's False Advertising Law, *Cal. Bus. & Prof. Code § 17500 et seq.*, claim and requires a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition. In cases of fraud, the fraudulent conduct must be an immediate cause of injury and that, but-for the fraudulent statements, the plaintiffs in all reasonable probability would not have engaged in the injury-producing conduct.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN59[] Deceptive & Unfair Trade Practices, State Regulation

An unlawful business act under *Cal. Bus. & Prof. Code § 17200* is any business practice that is prohibited by law, whether civil or criminal, statutory or judicially made, federal, state or local. A plaintiff can establish that a business practice was unfair by showing that such conduct threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

HN60[] False Advertising, State Regulation

California's false advertising statute makes it unlawful for a business to disseminate any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. *Cal. Bus. & Prof. Code § 17500*. The law encompasses not just false statements but those statements which may be accurate on some level, but will nonetheless tend to mislead or deceive.

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

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

HN61[] False Advertising, State Regulation

District courts in California consistently hold that claims under California's False Advertising Law, *Cal. Bus. & Prof. Code § 17500 et seq.*, are grounded in fraud. Accordingly, the pleading requirements of *Fed. R. Civ. P. 9(b)* apply.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN62[] Deceptive & Unfair Trade Practices, State Regulation

N.Y. Gen. Bus. Law § 349 provides a private right of action to any person injured by a business' deceptive act or practice. A plaintiff must prove three elements to recover under *§ 349*: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act. Furthermore, where there is a simultaneous claim for breach of contract, a plaintiff must plead losses independent of the loss caused by the alleged breach of contract.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN63[] **Deceptive & Unfair Trade Practices, State Regulation**

Courts interpreting New York law find denial of insurance benefits to be actionable under *N.Y. Gen. Bus. Law § 349*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN64[] **Deceptive & Unfair Trade Practices, State Regulation**

The United States District Court for the Central District of California recognizes that *N.Y. Gen. Bus. Law § 349* imposes liability for material omissions on coconspirators.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN65[] **Trade Practices & Unfair Competition, State Regulation**

California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seq.*, is designed to promote free competition, and it, like other antitrust laws, is about the protection of competition, not competitors. Individual damage awards are a tool by which these pre-competitive purposes are carried out, even though the main purpose of the law is to protect the public.

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

HN66[] **Federal Preemption, State Laws**

The Employee Retirement Income Security Act (ERISA) preempts state law causes of action and a plaintiff cannot obtain relief by dressing up an ERISA benefits claim in the garb of state law.

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Plan Benefits

HN67[] **Causes of Action, Suits to Recover Plan Benefits**

The Employee Retirement Income Security Act provides that a civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan. *29 U.S.C. § 1132(a)*.

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

HN68[] **Federal Preemption, State Laws**

Even state law claims that do not duplicate Employee Retirement Income Security Act (ERISA) remedies are preempted because Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the *29 U.S.C.S. § 1132(a)* remedies were permitted.

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For WellPoint, Blue Cross of California, doing business as Anthem Blue Cross, Wellchoice Insurance of New Jersey, Inc., Wellchoice, Inc., Wellpoint, Inc., Anthem, Inc., Wellpoint Health Networks, Inc., Empire Blue Cross Blue Shield, Inc., Defendants: E Desmond Hogan, LEAD ATTORNEY, PRO HAC VICE, Craig A Hoover, Hogan Lovells US LLP, Washington, DC; Julie A Shepard, LEAD ATTORNEY, David R Singer, Hogan Lovells US LLP, Los Angeles, CA; Miranda L Berge, LEAD ATTORNEY, PRO HAC VICE, Hogan & Lovells US LLP, Washington, DC; Peter R Bisio, LEAD ATTORNEY, PRO HAC VICE, Hogan Lovells LLP, Washington, DC.

For Anthem Blue Cross Blue Shield Partnership Plan, Inc., Empire HealthChoice Assurance, Inc., doing business as Empire Blue Cross Blue Shield, Defendants: David R Singer, Hogan Lovells US LLP, Los Angeles, CA.

For Anthem Health Plans of Virginia, Inc., doing business as Anthem Blue Cross and Blue Shield, DOES, 1 through 10 inclusive, Defendant: David R Singer, Julie A Shepard, Hogan Lovells US LLP, Los Angeles, CA.

For UnitedHealth Group, Inc., Defendant: Gregory Daniel Hull, LEAD ATTORNEY, Weil Gotshal & Manges LLP, Redwood Shores, CA; Brian D'Amico, PRO HAC VICE, Weil **[**12]** Gotshal & Manges LLP, Miami, FL; Christopher

RJ Pace, Weil Gotshal & Mangels LLP, Miami, FL; Elizabeth M Velez, PRO HAC VICE, Weil, Goshal & Manges LLP, Miami, FL.

For Anthem Blue Cross Life and Health Insurance Company, Defendant: Craig A Hoover, David R Singer, Julie A Shepard, Hogan Lovells US LLP, Washington, DC; E Desmond Hogan, PRO HAC VICE, Craig A Hoover, Hogan Lovells US LLP, Washington, DC.

Judges: Present: The Honorable Philip S. Gutierrez, United States District Judge.

Opinion by: Philip S. Gutierrez

Opinion

[*1015] CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order Granting in Part and Denying in Part Defendants WellPoint, Inc., United HealthGroup, Inc., and Ingenix, Inc.'s Motions to Dismiss

Pending before the Court are Defendants WellPoint, Inc., United HealthGroup, Inc., and Ingenix, Inc.'s Motions to Dismiss the Second Amended Multi-District Litigation Complaint. The Court heard argument on the motions on November 22, 2011. Having read and considered the moving and opposing papers, as well as the arguments presented at the hearing, the Court GRANTS in part and DENIES in part the motions to dismiss.

I. Background

This case concerns insurance subscribers and healthcare providers who claim that the nation's **[**13]** largest healthcare insurer failed to properly reimburse them for out-of-network services ("ONS"). They were allegedly promised a "usual, customary, and reasonable" ("UCR") rate of reimbursement, but were underpaid due to flawed UCR data provided by the country's largest database.

A. WellPoint's ONS Coverage

Defendant WellPoint, Inc. ("WellPoint") is the largest health insurer in the United States. WellPoint and its many subsidiaries and affiliates (collectively, the "WellPoint Defendants") [1] offer insurance coverage for medical treatment

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[1] The WellPoint Defendants include the following WellPoint subsidiaries and affiliates: Anthem Benefit Administrators, Inc.; Anthem Blue Cross and Blue Shield Plan Administrator, LLC; Anthem Blue Cross Blue Shield Partnership Plan, Inc.; Anthem Blue Cross Life and Health Insurance Company; Anthem Health Plans of Kentucky, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Plans of Maine, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Plans of New Hampshire, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Insurance Company of Nevada, Inc.; Anthem Health Plans of Virginia, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Health Plans, Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem Insurance Companies , Inc., d/b/a Anthem Blue Cross and Blue Shield; Anthem HMO of Nevada; Anthem Life Insurance Company; Anthem Life **[**15]** & Disability Insurance Company; Anthem East, Inc.; Anthem Southeast, Inc.; Blue Cross and Blue Shield of Georgia, Inc.; Blue Cross Blue Shield Healthcare Plan of George, Inc.; Blue Cross Blue Shield of Wisconsin, d/b/a Anthem Blue Cross and Blue Shield; Blue Cross of California, d/b/a Anthem Blue Cross; Blue Cross of California Partnership Plan, Inc., d/b/a Anthem Blue Cross Partnership Plan; Claim Management Services, Inc., d/b/a Anthem Blue Cross and Blue Shield; Community Insurance Company, d/b/a Anthem Blue Cross and Blue Shield; Compcare Health Services Insurance Corporation, d/b/a Anthem Blue Cross and Blue Shield; Empire HealthChoice Assurance, Inc. d/b/a Empire Blue Cross Blue Shield; Empire HealthChoice HMO, Inc., d/b/a Empire Blue Cross Blue Shield HMO; Golden West Health Plan, Inc; HealthKeepers, Inc.; HealthLink, Inc.; HealthLink HMO, Inc.; Healthy Alliance Life Insurance Company, d/b/a Anthem Blue Cross and Blue Shield; HMO Colorado, Inc.; HMO Missouri, Inc., d/b/a Anthem Blue Cross and Blue Sheild; Lumenos, Inc.; Machigonne, Inc.; Matthew Thornton Health Plan, Inc., d/b/a Anthem Blue Cross and Blue Shield; Peninsula Health Care, Inc.;

provided by various healthcare providers, including **[*1016]** physicians, physician groups, hospitals, clinics, and ambulatory and surgical centers. *See Second Consolidated Am. Compl. ("SAC").* ¶ 8, n.1. Healthcare providers are classified as either (a) "in-network" providers who have negotiated discounted rates with WellPoint or (b) out-of-network providers who charge their normal rates. *See id.* ¶ 8. WellPoint allegedly promises to reimburse subscribers for ONS obtained from out-of-network providers at a percentage of the lesser of either (1) the actual amount of the subscribers' medical bills or (2) the UCR rate charged by providers "in the same or similar geographic **[**14]** area" for "substantially the same service." *See id.* ¶ 10. The primary concern in this action is whether WellPoint paid the UCR rate when reimbursing ONS. This question turns on how WellPoint determines what reimbursement rate would be "usual, customary, and reasonable" for a given medical procedure in a particular geographic area.

B. <u>The Genesis of Ingenix</u>

WellPoint contracts with Defendant Ingenix, Inc. ("Ingenix") to obtain ONS reimbursement data. Ingenix is a wholly owned subsidiary of Defendant UnitedHealth Group, Inc. ("UHG") (together with Ingenix, the "UHG Defendants") and maintains a proprietary database, which compiles ONS reimbursement data provided by various health insurance companies and provides billing rates back to those same insurance companies (the "Ingenix Database"). *See id.* ¶ 117. In 1973, the Health Insurance Association **[**17]** of America ("HIAA"), a trade group for the health insurance industry, developed the Prevailing Health Charges System ("PHCS"), a database used to obtain charging information for various medical procedures. *See id.* ¶¶ 63(c), 105. [2] HIAA members developed and managed the PHCS database, which eventually became the largest pool of charge data for medical services in the country. *See id.* ¶ 105. The PHCS was not intended to set UCR rates, and HIAA included a disclaimer that PHCS data was provided "for information purposes only." *Id.* ¶ 109.

In October 1998, the members of HIAA, including WellPoint, sold the PHCS to Ingenix, which was in the process of acquiring more than 50 medical databases in order to "acquire a dominant position in the market for the provision of data services used to calculate UCR." *See id.* ¶ 110. **[*1017]** As part of the PHCS sale, members of HIAA, including WellPoint, were permitted to participate in an ongoing "Ingenix PHCS Advisory Committee," which provided for industry input into how Ingenix acquired and managed its data. *See id.* **[**18]** ¶ 111. HIAA entered into a 10-year Cooperation Agreement, which guaranteed HIAA's continued input into the management of the Ingenix Database in the form of a joint "Liaison Committee" and provided discounts for HIAA members who contributed data to the Ingenix Database. *See id.* ¶ 112. Additionally, upon the PHCS sale, the parent of Ingenix (UHG) agreed to become a member of HIAA without having to pay any membership dues during this period.

C. <u>Criticism of the Ingenix Database</u>

Ingenix provides participating insurers with uniform pricing schedules that provide billing ranges for given medical procedures in various geographic locations. *See id.* ¶ 116. This information is allegedly calculated according to just four data points: (1) the date of service, (2) the Current Procedural Terminology ("CPT") code, (3) the zip code where the service was provided, and (4) the amount billed by the provider. *See id.* ¶ 119. In addition to this purportedly flawed methodology, Ingenix and the participating insurers allegedly manipulate the data in order to populate the Ingenix Database with deflated UCR figures. First, the participating insurers "scrub" their submissions to Ingenix by removing the highest **[**19]** value claims. *See id.* ¶ 120. This practice allegedly persisted since 2003, when Ingenix began requiring participant insurers to certify that their submissions were complete. *See id.* Second,

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Plan of Georgia, Inc.; Priority Health **[**16]** Care, Inc.; RightCHOICE Managed Care, Inc., d/b/a Anthem Blue Cross and Blue Shield; Rocky Mountain Hospital and Medical Service, Inc. d/b/a Anthem Blue Cross and Blue Shield; UNICARE National Services, Inc.; UNICARE Health Insurance Company of Texas; UNICARE Health Insurance Company of the Midwest; UNICARE Health Insurance Company of Kansas, Inc.; UNICARE Health Insurance Company of West Virginia, Inc.; UNICARE Health Insurance Company of Texas, Inc.; UNICARE Health Insurance Company of the Midwest, Inc.; UniCare Life & Health Insurance Company; UNICARE of Texas Health Plans, Inc.; WellChoice Insurance of New Jersey, Inc.; and WellPoint Behavioral Health, Inc. *SAC* ¶ 60.

[2] In September 2003, HIAA merged with the American Associations of Health Plans ("AHIP"), and now exists under the name "HIAA/AHIP." *See SAC* ¶ 59(c).

Ingenix pools all of the claims submissions and removes "high-end" values as statistical outliers. *See id.* ¶ 125. The data provided by Ingenix is further skewed because Ingenix allegedly fails to accurately tabulate data according to geographic area. *See id.* ¶ 126. Ingenix then produces two cycles of pricing schedules for participating insurers. *See id.* ¶ 129. WellPoint uploads these schedules onto its computerized claims platform to determine ONS reimbursement rates. *See id.* ¶ 130. Neither WellPoint nor the other participating insurers independently verify the accuracy of the data received from Ingenix. *See id.* ¶ 133.

This system of ONS reimbursement has become the subject of an investigation by the New York Attorney General ("NYAG"), and an investigative task force of the NYAG determined that health insurers who participate in the Ingenix data collection have an incentive to provide artificially low claims information and, thus, produce a "garbage in, garbage out" effect. *See id.* ¶¶ 142-51. On **[**20]** January 13, 2009, the NYAG issued its "Health Care Report: The Consumer Reimbursement System is Code Blue," which concluded that the Ingenix Database was an "industry-wide problem," "a rigged system," "fraudulent," "and critically ill." *Id.* ¶ 148. In response to the investigation, UHG, WellPoint, and other participating insurers entered into agreements with the NYAG to discontinue use of the Ingenix Database and to establish an independent system to determine UCR reimbursements. *See id.* ¶ 151. Even the United States Congress became involved, with the Senate Committee on Commerce, Science, and Transportation holding two hearings on how the healthcare industry calculates UCR reimbursements for ONS. *See id.* ¶¶ 152-55.

E. Procedural History

Since early 2009, subscriber, provider and association plaintiffs (collectively, the "MDL Plaintiffs" or "Plaintiffs")) have filed lawsuits against WellPoint, its subsidiaries, UHG, and Ingenix, challenging WellPoint's **[*1018]** use of the Ingenix Database and the adequacy of WellPoint's ONS reimbursements. On August 20, 2009, the United States Judicial Panel on Multidistrict Litigation designated this Court as the transferee court for pretrial proceedings in *In re WellPoint, Inc., Out-of-Network "UCR" Rates Litigation, 652 F. Supp. 2d 1375* **[**21]** . Since the transfer, several cases have been consolidated with *652 F. Supp. 2d 1375*. [3]

On July 12, 2010, the Plaintiffs of MDL No. 2074 (collectively, "Plaintiffs") filed a Second Consolidated Amended Complaint ("SAC" or "Complaint") against the WellPoint Defendants and the UHG Defendants (collectively, "Defendants"), asserting claims under the Sherman Antitrust Act, *15 U.S.C. § 1*, the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1001 et seq.*, the Racketeer **[**22]** Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962 et seq.*, and various state laws. In particular MDL Plaintiffs assert the following 13 causes of action: (1) violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; claim for unpaid benefits under group plans governed by ERISA, *29 U.S.C. § 1132(a)(1)(B)*; breach of fiduciary duty under ERISA, *29 U.S.C. § 1132(a)(2)*; (4) failure to provide full and fair review as required under ERISA, *29 U.S.C. § 1132(a)(3)*; (5) failure to provide accurate records under ERISA, *29 U.S.C. § 1132(c)*; (6) violation of RICO based on predicate acts of mail and wire fraud, *18 U.S.C. § 1962(c)*; (7) violation of RICO for predicate acts of embezzlement, *18 U.S.C. § 1962(c)*; (8) conspiracy to violate RICO, *18 U.S.C. § 1962(d)*; (9) breach of contract; (10) breach of the implied covenant of good faith and fair dealing; (11) violation of California's unfair and deceptive practices statutes, *Cal. Bus. & Prof. Code §§ 17200*, *17500*; (12) violation of the New York General Business Law ("GBL") *§ 349*; and (13) violation of California's Cartwright Antitrust Act.

In asserting their various claims, Plaintiffs are divided into several categories. First, the **[**23]** "Subscriber Plaintiffs" are Michael Roberts ("Roberts") (on behalf of himself and as guardian for his daughter, D. Roberts), J.B.W. (a minor by and through his parent and guardian *ad litem*), Darryl and Valerie Samsell (the "Samsells"), Mary Cooper

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[3] *652 F. Supp. 2d 1375* currently includes the following cases: *Michael Roberts v. UnitedHealth Group, Inc. et al.* (CV 09-1886 PSG (FFMx)), *American Medical Association et al. v. WellPoint, Inc.* (CV 09-2039 PSG (FFMx)), *J.B.W. v. UnitedHealth Group, Inc. et al.* (CV 09-2488 PSG (FFMx)), *S. Higashi v. Blue Cross of California* (CV 09-4223 PSG (FFMx)), *North Peninsula Surgical Center, L.P. v. WellPoint, Inc. et al.* (CV 09-4510 PSG (FFMx)), *Michael Pariser v. WellPoint, Inc.* (CV 09-4783 PSG (FFMx)), *Darryl and Valerie Samsell v. WellPoint, Inc. et al.* (CV 09-6079 PSG (FFMx)), and *American Podiatric Medical Association et al. v. WellPoint, Inc.* (CV 09-6725 PSG (FFMx)).

("Cooper"), Ivy Seigle-Epstein ("Seigle-Epstein"), and Ivette Rivera-Giusti ("Rivera-Giusti"). *See id.* ¶¶ 24-29. The Subscriber Plaintiffs each allegedly had an insurance policy with WellPoint or one of its subsidiaries, received ONS medical care, were reimbursed at a depressed rate, and incurred "more out-of-pocket expense than [he or she] would have absent the unlawful conduct alleged." *See id.*

Second, the "Provider Plaintiffs" are as follows: Dr. Stephen D. Henry is a primary care internist, Dr. James G. Schwendig is a trauma surgeon, Dr. James Peck is a clinical psychologist, Dr. Michael Pariser is a licensed psychologist, Dr. Carmen Kavali is a plastic surgeon, Dr. Stephani Higashi is a chiropractic doctor, and the North Peninsula Surgical Center, L.P. ("NPSC") is an ambulatory surgical center. *See id.* ¶¶ 30-37. The Provider **[*1019]** Plaintiffs allegedly provided ONS to WellPoint subscribers, were assigned the policies to be reimbursed, and received **[**24]** deflated UCR reimbursements. *See id.* ¶ 80.

Third, the "Association Plaintiffs" are the American Medical Association ("AMA"), the California Medical Association ("CMA"), the Medical Association of George ("MAG"), the Connecticut State Medical Society ("CSMS"), the North Carolina Medical Society ("NCMS"), the American Podiatric Medical Association ("APMA"), the California Chiropractic Association ("CCA"), and the California Psychological Association ("CPA"). *See id.* ¶¶ 38-53. The Association Plaintiffs sue Defendants in their individual and representative capacities to redress injuries sustained by them and their members. *See id.*

On August 6, 2010, WellPoint Defendants filed a motion to dismiss pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. [4] That same day, UHG Defendants filed their own motion to dismiss, joining WellPoint Defendants' motion to the extent that it relates to the claims against the UHG Defendants and offering some additional insight. *See UHG Mot.* 1:21-27. On August 31, 2010, Plaintiffs filed an opposition, followed by separate replies filed by the WellPoint Defendants and the UHG Defendants on September 20, 2010.

II. Legal Standard

HN1[] Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a complaint under *Rule 12(b)(6)*, the courts must be mindful that the Federal Rules of Civil Procedure require that the complaint contain "a short and plain statement of the claim showing that the pleader **[*1020]** is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Nevertheless, the U.S. Supreme Court has instructed that "a complaint that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S.*

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[4] The WellPoint Defendants offer several **[**25]** declarations and exhibits to accompany their *Rule 12(b)(1)* factual attack on the pleadings. Pursuant to *Rule 12(b)(1)*, a party may move to dismiss a case for lack of subject matter jurisdiction. When a defendant brings a factual attack upon subject matter jurisdiction, the Court may consider extrinsic evidence, weigh the evidence, and resolve factual disputes. *See* *Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)*. The plaintiff bears the burden of establishing subject matter jurisdiction. *See* *Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir. 1995)*. Until the plaintiff proves otherwise, federal jurisdiction is presumed to be lacking. *See* *Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989)*. In their Objections and Request to Strike, Plaintiffs argue that factual attacks can only be entertained after the filing of an answer. *See Reply to Opp. to Pls.' Objs. and Request to Strike* 2:23-27 (citing *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 892 n.17 (3d Cir. 1977))*. However, as noted by WellPoint Defendants, the *Mortensen* dictum relating to the timing of a *Rule 12(b)(1)* factual attack has been clearly rejected. **[**26]** *See* *Berardi v. Swanson Mem. Lodge No. 48 of the Fraternal Order of Police, 920 F. 2d 198, 200 (3d Cir. 1990)* ("Long before *Mortensen*, the Supreme Court made clear that a facially sufficient complaint may be dismissed before an answer is served if it can be shown by affidavits that subject matter jurisdiction is lacking."). The gist of these declarations is that the reimbursement rates of several Plaintiffs' ONS were not determined according to UCR rates. As such, the WellPoint Defendants argue that these Plaintiffs lack standing. The Court is satisfied that these declarations were made with personal knowledge, that the exhibits were properly authenticated, *see* *Fed. R. Evid. 901(a)*, and that the attached insurance policies are not hearsay, *see* *Stuart v. UNUM Life Ins. Co. of Am., 217 F.3d 1145, 1154 (9th Cir. 2000)* (finding that an insurance policy was "excluded from the definition of hearsay and is admissible evidence because it is a legally operative document that defines the rights and liabilities of the parties in this case"). Accordingly, to the extent that the Court relies upon the declarations offered in support of Defendants' motion, the Court OVERRULES Plaintiffs' objections **[**27]** and DENIES their Motion to Strike.

662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (*quoting* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

HN2[] In resolving a Rule 12(b)(6) motion, the Court must first accept as true all non-conclusory, factual allegations made in the complaint. *See* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). Based upon these allegations, the Court must draw all reasonable **[**28]** inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949 (9th Cir. 2009)*. After accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the Court must then determine whether the complaint alleges a plausible claim to relief. *See* Iqbal, 129 S. Ct. at 1950. In determining whether the alleged facts cross the threshold from the possible to the plausible, the Court is required "to draw on its judicial experience and common sense." *Id.* "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*

III. Discussion

The Court first addresses the standing issues raised in WellPoint Defendant's motion, followed by an evaluation of the individual claims asserted in the Second Consolidated Amended Complaint ("Complaint").

A. Plaintiffs' Standing

HN3[] Article III standing is a jurisdictional prerequisite to a federal court's consideration of any claim. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A plaintiff **[**29]** in federal court must show three things: (1) injury-in-fact; (2) causation, and (3) redressibility. Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). **HN4**[] "For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation." Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1255 (9th Cir. 2008).

Defendants challenge (1) all Plaintiffs' standing as it relates to "ONS benefit reductions," (2) certain subscriber Plaintiffs' standing generally, and (3) the Association Plaintiffs' standing generally. *See Mot.* 49:6-53:14. The Court addresses each in the order they are raised.

1. Standing of Plaintiffs to Assert "ONS Benefit Reduction" Claims

Plaintiffs Second Consolidated Amended Complaint includes claims based on ONS benefit reductions unrelated to the Ingenix database or UCRs. *See SAC* ¶¶ 16-17, 180-90. Specifically, they allege that ONS Benefits were allegedly reimbursed based on "extremely low and unrepresentative Medicare rates," and "use of in-network provider fee schedules," among others. *Id.* ¶ 16. Defendants argue that Plaintiffs have failed to "allege any facts **[**30]** to establish that they have standing to bring claims for ONS Benefit Reductions, and their allegations regarding ONS Benefit Reductions are conclusory assertions that are not entitled to a presumption of truth." *Mot.* 49:22-25. The Court agrees. Plaintiffs have failed to identify which individuals were affected by **[*1021]** the non-Ingenix ONS benefit reductions, and how each was injured. Conclusory statements about faulty reimbursements do not plausibly show that Plaintiffs' have standing to complain about the ONS benefit reductions and the Court GRANTS Defendants' motion to dismiss claims based on non-Ingenix ONS benefit reductions. *See* Iqbal, 129 S. Ct. at 1949 (**HN5**[] "naked assertions devoid of further factual enhancement" cannot withstand a Rule 12(b)(6) motion).

2. Certain Subscriber Plaintiffs' Standing

Defendants next identify particular subscriber Plaintiffs and argue that they lack standing in whole or in part. *See Mot.* 50:4-51:25. Specifically, they suggest that Plaintiffs Siegle-Epstein and the Samsells lack standing to assert any claim, and that Plaintiff Cooper lacks standing to seek declaratory and injunctive relief. *See Mot.* 50:4-51:25.

At the outset, the Court notes that this is a factual, **[**31]** rather than facial, attack on Plaintiffs' standing. **HN6**[] If a challenge to standing is based only on the insufficiency of the allegations in the complaint on their face, the challenge is said to be a facial attack. *See* Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If, on the other hand, a challenge to standing "disputes the *truth* of the allegations" purportedly conferring standing, the challenge is said to be a factual attack. *See id.* (*citing* *Morrison v. Amway Corp., 323 F.3d 920 n.5 (11th Cir. 2003)* (jurisdictional challenge was a factual attack where it "relied on extrinsic evidence and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings")). WellPoint Defendants' attack of Siegle-Epstein, the Samsells, and Cooper's standing is factual because they allege that under no set of facts could those Plaintiffs assert the claims in the Complaint. *See Mot.* 50:4-51:25.

HN7[] A district court is permitted to review evidence beyond the complaint when resolving a factual attack on jurisdiction. *See* *Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)*. "Once the moving party has converted the motion to dismiss into a factual **[**32]** motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.*

HN8[] The Ninth Circuit has cautioned, however, that "jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and must satisfy the requirements specified in *Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*." *Safe Air for Everyone, 373 F.3d at 1039*. *Bell* warrants dismissal "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." *Bell, 327 U.S. at 682-83, 66 S. Ct. 773*. In fact, where the "jurisdictional issue and substantive issues are so intertwined," or stated somewhat differently, "when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief," a factual attack "is proper only when the allegations of the complaint are frivolous." *Safe Air for Everyone, 373 F.3d at 1039-40* **[**33]** (*quoting* *Thornhill Publ'g Co. v. Gen. Tel. Co., 594 F.2d 730, 734 (9th Cir. 1979))*. If "the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a **[*1022]** direct attack on the merits of the plaintiff's case." *Id. at 1039 n.3* (citations omitted).

At this stage in the litigation, the Court does not dismiss Plaintiffs Seigle-Epstein, Cooper, and the Samsells' claims for lack of standing. Plaintiffs' allege that Seigle-Epstein was insured by WellPoint Defendants and "received . . . artificially depressed reimbursement[s] for ONS." *SAC* ¶ 28; RICO Case Statement at 22-23. Moreover, those injuries were caused by Defendants' unlawful conduct including breach of contract and an illegal agreement to depress UCRs paid to Seigle-Epstein and others. *See SAC* ¶ 72-76. As a remedy, Seigle-Epstein seeks compensation for the difference in what she received as reimbursement and what she should have received if the UCRs were computed correctly. *See SAC Prayer for Relief*, I. Plaintiffs Cooper and the Samsells make similar allegations, **[**34]** *see SAC* ¶¶ 26-27, 339-40; RICO Case Statement at 20-21, 23-25, and seek similar relief. All have pleaded actual injuries (loss of money), caused by WellPoint Defendants, that can be remedied by the Court (compensation). Thus, Article III is satisfied on the face of the Complaint.

That Article III is satisfied by the facial allegations in the Complaint is of no consequence to WellPoint Defendants' "factual attack," however. WellPoint Defendants submitted declarations from its employees challenging the factual basis of Plaintiffs' complaint. See Dkt. ## 135-41. Notwithstanding the factual attack, it is clear from the Complaint that the merits of the claims are intertwined with the standing issues presented by Defendants. Simply stated, the federal claims asserted, including RICO and the Sherman Act, both provide for jurisdiction and the substantive claim itself. *See* *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 (9th Cir. 1999)* (***HN9***[] "The requirements for standing to maintain a civil action under RICO and the antitrust laws are similar. Both provide a private right of action for damages only to those individuals injured in their business or **[**35]** property by reason of a violation of the law's substantive provisions." (internal citations omitted)).

To the extent that WellPoint Defendants' declarations contest the factual bases for standing other than the merits, the Court notes that Plaintiffs have not had an adequate opportunity to depose Defendants' declarants and the claims in the Complaint are not clearly "frivolous" or "made solely for the purpose of obtaining federal jurisdiction." *See* *Mortensen v. First Federal Sav. & Loan Ass'n, 549 F.2d 884, 896 (3rd Cir. 1977)* ("because the facts are not fully developed, subject-matter jurisdiction under [the Sherman Act] cannot be conclusively determined at this stage of the proceedings." (internal citations omitted)). Even if Plaintiffs had produced affidavits to counter Defendants' affidavits, the Court would likely still not grant Defendants' motion at this time. *See A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n, 484 F.2d 751 (7th Cir. 1973)* (reversing a dismissal for lack of subject matter jurisdiction and stating that: "We hold that such a conclusion can better be determined after a thorough exploration of all evidence that either side can produce, rather **[**36]** than by a motion to dismiss, particularly when based on conflicting affidavits."); *see also Berardi, 920 F.2d at 200* (reversing a district court's dismissal under *12(b)(1)* because the "the record must clearly establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention.").

[*1023] For these reasons, WellPoint Defendants' motion to dismiss the claims of Seigle-Epstein, Cooper and the Samsells for lack of standing is DENIED. [5]

3. Association Plaintiffs

The Association Plaintiffs (the AMA, CMA, APMA, NSPC, CCA, and CPA) assert claims that are (1) direct to injuries they sustained as organizations and (2) derivative of the claims of their members. *See SAC* ¶ 171. WellPoint Defendants argue that the Association Plaintiffs lack standing to sue in either their individual or representative capacities. *See Mot.* 51:23-53:14. The Court finds that the Association Plaintiffs have standing.

a. Individual Standing

Defendants' argument focuses on the nature of the injury allegedly suffered by the Association Plaintiffs, claiming that the Association Plaintiffs' "abstract concern" with the issues underlying the complaint and their voluntary expenditures in response to these issues do not rise to a cognizable injury under Article III. The Court finds that the Association Plaintiffs have **[**38]** alleged sufficient injury to themselves as organizations.

The Association Plaintiffs maintain that the alleged scheme has caused "the Association Plaintiffs to expend significant time, energy and money to, *inter alia*, counsel members on how to counteract the practices at issue, monitor the Insurer Conspirators' practices, advocate on their members' behalf, and/or lobby for legislative or other insurance reform." *SAC* ¶ 169. They also allege that these costs would not have been incurred "but for" the Defendants' scheme, *see id.*, which suggests that the alleged activities were not wholly voluntary. WellPoint Defendants are right to observe that ***HN10***[] an abstract concern with issues facing an association's membership is insufficient to confer individual standing upon that association. *See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)* ("Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact.").

However, the Association Plaintiffs have not alleged an abstract concern with ONS reimbursements; **[**39]** rather, they allegedly suffered a financial injury caused by the need to counsel their members in responding to the ONS reimbursements. [6] *See Havens Realty Corp. v. Coleman, 455 U.S. 363, 369, 102 S. Ct. 1114, 71 L. Ed. 2d 214*, (finding that an association adequately alleged an injury in fact where **[*1024]** "the steering practices of [the

[5] WellPoint Defendants also argue that the Samsells cannot assert any of the claims in the Complaint because they are contractually time barred. *See Mot.* 53:16-22. The contract provision attached to Defendants' declaration says that "[n]o action can be brought after three years from the time written proof has been given to [Defendants]." *See Ward Decl.*, Ex. A, Art. VII, ¶ GG. Defendants suggest that the last time the Samsells provided "written proof" was in May 2005, beyond the three year period, *Reply* 27:14, but it is unclear what "written proof" means in the provision provided. As a result, Defendants' motion to dismiss the Samsells' **[**37]** claims as untimely is DENIED. The Court notes that Plaintiffs raise the issue of fraudulent concealment in response to WellPoint Defendants' argument to dismiss the Samsells' claims as untimely. *Opp'n* 60:15-16. That argument is limited to Plaintiffs' Opposition, however, and without factual support in the Complaint, the Court cannot consider it.

[6] WellPoint Defendants further contend that the Association Plaintiffs also lack individual standing to pursue their RICO and Sherman Act claims. *See Mot.* 52:15-20. However, the **[**40]** Association Plaintiffs have alleged a direct injury to their business in the form of increased counseling expenses. *SAC* ¶ 169.

defendant] had frustrated the organization's counseling and referral services, with a consequent drain on resources"); *In re Managed Care Litig., 298 F. Supp. 2d 1259, 1306 (S.D. Fla. 2003)* (holding that medical associations suffered injury caused by "systematic practices regarding payments [that] directly affect[ed] medical associations who must deal with the fallout of such behavior."). Such "general factual allegations of injury" are sufficient at this stage. *See* *In re Managed Care Litig., 298 F. Supp. 2d at 1306* (*quoting* *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. Therefore, the Association Plaintiffs have standing to pursue their individual claims.

b. Representative Standing

The Association Plaintiffs also assert their claims on behalf of their members. ***HN11***[] An association may have representative standing if (1) its members would have standing to sue in their own right, (2) the interests that the association seeks to protect in the litigation are germane to the association's organizational purpose, and (3) the claims and relief will not require the participation of the association's individual members. *See* *Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*. WellPoint Defendants focus on the third prong, arguing that the representative claims require participation of the individual members to show that they received "valid assignments of benefits, that available administrative remedies had been exhausted for each claim, and that [they] were entitled to additional payments for particular claims." *Mot.* 53:1-6.

In support of this argument, WellPoint Defendants cite to *Am. Med. Ass'n v. United HealthCare Corp., No. CV 00-2800 LMM, 2007 U.S. Dist. LEXIS 44196, 2007 WL 1771498 (S.D.N.Y. June 18, 2007)* ("*AMA IV*"), where, on a motion **[**41]** for summary judgment, the court determined that the medical association plaintiffs lacked representative standing to pursue ERISA claims on behalf of their members because individual members were required to show that they exhausted their administrative remedies. *See* *2007 U.S. Dist. LEXIS 44196, [WL] at *21*. That same case, however, expressly held that the medical association plaintiffs could proceed on their non-ERISA claims on a representative basis. *See* *2007 U.S. Dist. LEXIS 44196, [WL] at 22 n.23*. Moreover, that court, in an earlier opinion, allowed the medical association plaintiffs to proceed with its representation "insofar as it relates to claims for injunctive and declaratory relief only." *Am. Med. Ass'n v. United HealthCare Corp.*, No. CV 00-2800 LMM, 2002 WL 31413668, at *3 (S.D.N.Y. October 23, 2002) ("*AMA II*"). In this case, the Association Plaintiffs are pursuing prospective relief, *see SAC* 150:15-24, and they represent to the Court at this time that any particular proof of assignment and exhaustion will be provided after discovery, *see Opp'n* 59:25-28. Therefore, the Court does not dismiss the Association Plaintiffs' claims on this ground. For these reasons, the Association Plaintiffs have standing to pursue their representative **[**42]** claims on behalf of their members.

B. Antitrust Claims

1. Violation of Section 1 of the Sherman Act (Claim 1)

HN12[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." *15 U.S.C. § 1*. Not every agreement that restrains competition violates the Sherman Act. *See McDaniel v. Appraisal Inst., 117 F.3d 421, 422 (9th Cir. 1997)*. Rather, the Sherman Act "prohibits conspiracies and agreements that *unreasonably* restrain trade." *Thurman Indus., Inc. v. Pay 'N Pak* ***[*1025]*** *Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. ***HN13***[] Claims under *§ 1* of the Sherman Act are evaluated under either a *per se* analysis or the rule of reason. *See id.* In this case, Plaintiffs allege that Defendants conspired to fix ONS reimbursement rates, and that the alleged conduct "constitutes both a *per se* and Rule of Reason claim under the Sherman Act." *SAC* ¶ 84.

1. Whether Plaintiffs State a *Per Se* Claim under the Sherman Act

HN14[] The Sherman Act prohibits some arrangements as a matter of law, and restraints that fall within certain narrow categories are deemed to be *per se* violations. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623* **[**43]** ("The rule of reason does not govern all restraints. Some types 'are deemed unlawful *per se*.' The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." (internal citations omitted)). In order to state a claim for a *per se* violation of the Sherman Act, Plaintiffs must allege sufficient facts that Defendants (1) entered into an agreement (2) to fix prices, rig bids, or divide a market.

a. Allegations of an Agreement

HN15[] Plaintiffs must offer particular factual allegations that Defendants entered into an illegal agreement. *See Twombly, 550 U.S. at 556* ("In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). In order to allege a conspiracy under *§ 1* of the Sherman Act, a plaintiff must provide **[**44]** the "specific time, place, or person[s]" involved in the alleged conspiracy. *See id. at 565 n.10*. Mere allegations of parallel conduct will not suffice. *See id.*

In this case, Plaintiffs have not merely alleged that the WellPoint Defendants and other participating insurers engaged in parallel conduct—*i.e.*, that each participating insurer merely exchanged data with Ingenix and allegedly underpaid ONS reimbursements. More than just identifying WellPoint Defendants' and other insurers possible motivations to use and manipulate the Ingenix database, Plaintiffs also provide dates, players, purposes, and effects. Plaintiffs generally allege a conspiracy to fix ONS reimbursements: "WellPoint reached an agreement with the Insurance Conspirators, who are direct competitors, including UnitedHealth *via* its alter ego Ingenix to determine maximum UCRs using primarily the Ingenix Database . . . even while knowing that use of the database would result in artificially low reimbursements to Subscriber and Provider Class members." *SAC* ¶ 85; *see also id.* ¶ 117 ("All of the [participating insurers] provide raw pricing data to Ingenix and receive UCR pricing data in return. Ingenix uses the billing data **[**45]** provided by the Insurer Conspirators to create False UCR schedules, and those False UCR schedules are used by the Insurer Conspirators to determine how much to reimburse their members for ONS.").

Plaintiffs also allege that the PHCS was designed by HIAA members in 1973, and sold by the HIAA (including WellPoint) to Ingenix in 1998. *See id.* ¶¶ 105-10. Under the terms of the sale, HIAA members (including WellPoint) served on an ongoing Ingenix PHCS Advisory Committee to **[*1026]** provide input on what data Ingenix would gather and how that data would be used. *See id.* ¶ 111. HIAA members and Ingenix also formed a "Liason Committee" to advise and evaluate Ingenix in its management of the Ingenix Database. *See id.* ¶ 112. Additionally, UHG became a member of the HIAA without having to pay any membership dues during the 10-year Cooperation Agreement. *See id.* ¶ 113. Ingenix entered into a Confidentiality Agreement to shield the identities of participating insurers who submit information to Ingenix, *see id.*, and participating insurers promised not to provide any UCR data to competing data services, *see id.* ¶ 96.

In addition to the post-1998 connection between participating insurers and Ingenix, Plaintiffs **[**46]** allege that participating insurers have had "ample opportunities to communicate, and have communicated, among themselves about the conspiracy." *Id.* ¶ 99. These communications allegedly occurred "routinely" at HIAA/AHIP conferences and board meetings. *See id.* HN16[] While allegations of opportunities to conspire alone are insufficient to infer a conspiracy, *see In re Citric Acid Litig., 191 F.3d 1090, 1103 (9th Cir. 1999)* (noting that allegations of meetings and telephone conversations between competitors was insufficient "to infer participation in the conspiracy from the opportunity to do so"), such opportunities "demonstrate[] how and when Defendants had opportunities to exchange information or make agreements," *In re Static Random Access Memory, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008)*. The allegations here amount to more than simple "opportunities to conspire," as Plaintiffs further allege that participating insurers did not compete on ONS reimbursements even though they compete on many other plan provisions, including co-pay levels, deductibles, out-of-pocket maximums, number of covered visits, pre-existing condition coverage, drug benefits, and availability of mental health benefits. **[**47]** *See SAC* ¶ 101.

The Court finds that all the alleged facts, taken as true, sufficiently allege the existence of a plausible conspiracy among Defendants and other participating insurers to use the Ingenix Database to coordinate maximum ONS reimbursements. The WellPoint Defendants argue that the Complaint fails to specifically identify how an "alleged rate suppression agreement was reached." *Mot.* 7:24-26. However, no discovery has occurred in this case which would make Plaintiffs' allegations less plausible. In cases of collusion and conspiracy, it is reasonable to expect that discovery will uncover specific answers to Plaintiffs' fact-based allegations. Furthermore, WellPoint Defendants do not offer sufficient authority to conclude that *Twombly* actually requires concrete answers to each of these questions at the pleadings stage. In light of the Complaint's specific allegations that the participating insurers were involved in the maintenance and design of the Ingenix Database and all maintained depressed levels of ONS reimbursements, Plaintiffs have alleged facts providing circumstantial evidence of a price fixing agreement.

The Court observes that the Southern District of New York found **[**48]** that insurance subscribers and out-of-network providers adequately stated a § 1 claim against other participating insurers, UHG, and Ingenix on the basis of substantially similar allegations:

> Plaintiffs easily satisfy the requisite pleading standard with respect to their allegation of conspiracy. In fact the FAC is replete with factual support—including specific times, places, and persons—for the conspiracies alleged. . . . [T]he FAC alleges that: "an association of health insurance companies created a **[*1027]** database in 1973 that it expressly disclaimed for use in making UCR determinations"; in turn, "[t]hese health insurers including United Healthcare, use the database for making UCR determinations in direct violation of their contractual requirements to their respective subscribers to pay the lower of the actual charge or the usual and customary charge; the UCR rates are inaccurate and lower than the actual rate due to the use of flawed data; 'supposedly competing health insurers, comprising the HIAA Group . . . had representatives sitting on the HIAA committees overseeing the development . . . of the PHCS database and made decisions to allow data suppliers to submit flawed and inadequate **[**49]** data"; and "in 1998 HIAA allowed a health insurer, United Healthcare, to acquire the PHCS database after it had already acquired the only other competing database."

Am. Med. Ass'n v. United Healthcare Corp., 588 F. Supp. 2d 432, 446-47 (S.D.N.Y. 2008) (internal citations omitted). While *American Medical Association* did not address the pleading requirements of a *per se* violation because the plaintiffs in that case did not defend their *per se* claims, *see* *id. at 447 n.6*, Defendants do not offer any authority to suggest that the allegations of agreement are subject to more scrutiny in *per se* cases than in typical rule of reason cases. Therefore, the Court finds that Plaintiffs have sufficiently alleged that Defendants and other participating insurers entered into an agreement.

b. Allegations of a *Per Se* Violation

HN17[] As a general matter, agreements to fix prices among competitors is one of the discrete categories of restraints reserved for *per se* treatment. *See* *Leegin, 551 U.S. at 887* ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . ." (*citing* *Texaco Inc. v. Dagher, 547 U.S. 1, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*). Horizontal price **[**50]** fixing is *per se* unlawful "regardless of whether the prices set are minimum or maximum," *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000)*, and Plaintiffs in this case allege that Defendants and other participating insurers conspired to set maximum ONS reimbursements. That Plaintiffs allege that the Ingenix Database produced "modules" or uniform price schedules specifying a range of ONS reimbursements, *see SAC* ¶ 116, does not necessarily mean that participating insurers did not "fix" a *maximum* ONS reimbursement. Furthermore, WellPoint Defendants claim that UCR information is one factor used in calculating a particular ONS reimbursement, but Plaintiffs allege that participating insurers "adopted a standard formula for making UCR determinations, based on a database that is designed and intended to reduce reported charges artificially." *Id.* ¶ 89.

WellPoint Defendants claim that the alleged conspiracy is inappropriate for *per se* treatment because Plaintiffs fail to allege a horizontal agreement among competitors that "always or almost always" restrains competition. *See Mot.* 5:24-25 (*citing* *Leegin, 551 U.S. at 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. **[**51]** Even if the restraint alleged was ancillary to some pro-competitive venture, it would be inappropriate to dismiss the *per se* claim at this time. *See* *Nat. Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Ok., 468 U.S. 85, 104 n.26, 104 S. Ct. 2948, 82 L. Ed. 2d 70*, ("Indeed, there is often no bright line separating per se from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before *the evidence* justifies a presumption of anticompetitive conduct." **[*1028]** (emphasis added)). While ***HN18***[] the question of whether a plaintiff's allegations "comprise a *per se* claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment," *In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008)*, the Court declines to dismiss the *per se* claim at this time, especially considering Plaintiffs' allegations that information was falsified by participating insurers providing information to Ingenix and by Ingenix in compiling the data. *See SAC* ¶¶ 122-24.

In their papers, WellPoint Defendants try to characterize Plaintiffs' allegations as something other than a price fix. At one point in the motion, **[**52]** WellPoint Defendants suggest that the alleged agreement between WellPoint and Ingenix to provide and purchase data is a vertical agreement. *See Mot.* 5:28. ***HN19***[] Vertical price fixing is not subject to *per se* analysis and must be evaluated according to the rule of reason. *See Leegin, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623*. While Plaintiffs do allege a vertical dimension to the conspiracy—the participating insurers' agreement to purchase UCR data from Ingenix—the gravamen of the allegation is that the participating insurers conspired amongst themselves to fix ONS reimbursements (something that Ingenix was not in the business of paying because Ingenix is not an insurer). *See SAC* ¶ 85. ("WellPoint reached an agreement with the Insurance Conspirators, who are direct competitors, including UnitedHealth *via* its alter ego Ingenix to determine maximum UCRs using primarily the Ingenix Database."). Moreover, WellPoint Defendant "cannot escape the *per se* rule [for certain horizontal restraints of trade] simply because their conspiracy depended upon the participation of a 'middle-man;'" in this case, Ingenix. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 337 (3d Cir. 2010)* (*citing U.S. v. All Star Indus., 962 F.2d 465, 473 (5th Cir. 1992)*) **[**53]** (finding that a conspiracy between pipe distributor bidders that required coordination through a middle-man bid rigger was still a horizontal conspiracy subjected to the *per se* analysis). Indeed, Plaintiffs clearly allege that the agreement was an "unreasonable *horizontal* restraint on trade." *Id.* ¶ 85 (emphasis added).

Additionally, WellPoint Defendants claim that Plaintiffs' allegations are nothing more than an agreement to exchange information, which can have significant pro-competitive effects in an industry. *See Mot.* 11:28-12:3. For example, WellPoint Defendants suggests that centralizing data collection for determining UCR rates can result in cost savings for participating insurers. *See id.* 12:12. ***HN20***[] As a general matter, agreements among competitors to exchange information are analyzed under the rule of reason because such exchanges can facilitate competition. *See U.S. v. U.S. Gypsum Co., 438 U.S. 422, 443 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* (noting that an exchange of price information among competitors is not a "*per se* violation of the Sherman Act"). The Court, however, will not read into Plaintiffs' allegations as WellPoint Defendants suggest. For these reasons, the Court **[**54]** DENIES Defendants' motion to dismiss Plaintiff's *§ 1* of the Sherman Act claim for failure to state a *per se* violation.

2. Whether Plaintiffs State a Sherman Act Claim Under the Rule of Reason

In addition to their *per se* allegations, Plaintiffs state a Sherman Act claim against Defendants under the rule of reason. ***HN21***[] In order to state a rule of reason claim, a plaintiff must demonstrate the following three elements: "(1) the persons or entities to the agreement intend to **[*1029]** harm or restrain competition; (2) an actual injury to competition occurs; and (3) the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint." *Cal. Dental Ass'n v. FTC, 224 F.3d 942, 947 (9th Cir. 2000)* (*quoting Am. Ad Mgmt. v. GTE Corp., 92 F.3d 781, 789 (9th Cir. 1996)*). As discussed with respect to Plaintiffs' *per se* claim, the Complaint adequately alleges that Defendants and other participating insurers conspired to set maximum ONS reimbursements by using the Ingenix Database. More is required, however, under the rule of reason.

HN22[] In stating a rule of reason claim, a plaintiff must identify a "relevant market," *see Tanaka v. University of So. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*, **[**55]** which must be defined in terms of both product and geography, *see Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008)* ("***Antitrust law*** requires allegation of both a product market and a geographic market."). In addition to identifying a relevant market, a plaintiff must allege that the defendant has "market power" within that market—otherwise the defendant's restraint on trade would not have a substantial anticompetitive effect. *See Newcal, 513 F.3d at 1044*. As the Ninth Circuit has observed, "[t]here is no requirement that these [relevant market and market power] elements of the antitrust claim be pled with specificity." *Id.* (*citing Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co., 99 F.3d 937, 950 (9th Cir. 1996)*); *In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 993 (N.D. Cal. 2010)*.

In this case, Plaintiffs allege that the conspiracy to fix maximum ONS reimbursements occurred in the following "linked" markets:

> The relevant product market is the market for data used to calculate UCRs for reimbursements of claims by health insurance beneficiaries for out-of-network, non-negotiated medical services (the "Data Market"). The Data Market is directly and **[**56]** inextricably linked to the market for ONS (the "Linked ONS Market") in that the Data Market constitutes the primary input to the Linked ONS Market, and the Insurer Conspirators use the Data Market to control and depress amounts reimbursed in the Linked ONS Market.

SAC ¶ 90. Furthermore, Plaintiffs allege that the "relevant geographic market is the United States." *Id.* ¶ 91.

In their motion, WellPoint Defendants argue that Plaintiffs fail to adequately identify a "relevant market" and that the market allegations lack factual support. *See Mot.* 13:12-15:14. The Court disagrees. First, Defendants claim that Plaintiff must have been injured in the relevant market, and cite *McGlinchy v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988)* to support this contention. Defendants, however, misread that case because the *McGlinchy* plaintiff failed to allege an injury to the market, rather than a mere injury to himself. *See id. at 812* ("Thus appellants fail to state an antitrust claim based on defendants' conduct with respect to PB and PB-related products. It is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant."). Therefore, *McGlinchy* **[**57]** concerned the requirement of antitrust injury, and Defendants argument appears to be directed at Plaintiffs' standing, though standing to assert the Sherman Act claims is not raised in the papers. WellPoint Defendants fail to offer any authority on point to conclude that the relevant market must be the *plaintiff's* market and the alleged injury to Plaintiffs was precisely the intended consequence of Defendants' conspiracy. *See Blue Shield of Va. v. McCready, 457 U.S. 465, 479,* ***[*1030]*** *102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (stating "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations . . . would be likely to cause") (internal citations omitted).

Second, Defendants claim that Plaintiffs fail to make out the alleged "link" between the Data Market and the Linked ONS Market. While detailed factual allegations are not required in defining the market, *see Newcal, 513 F.3d at 1045*, Plaintiffs extrapolate on how the alleged conspiracy in the Data Market affects their rates of ONS reimbursement in the ONS Market. *See SAC* ¶¶ 92-98. Plaintiffs allege that WellPoint Defendants **[**58]** and other participating insurers used the Ingenix Database to coordinate depressed UCR rates for ONS reimbursements, and thus "although the Plaintiffs and Classes were not competitors of the Insurer Conspirators in the Data Market when the False UCRs were set by WellPoint and the Conspirators, the injury they suffered was inextricably linked with the competitive harm arising from the Insurer Conspirators' agreement to use False UCRs to depress and set a ceiling for ONS reimbursements." *Id.* ¶ 92. Plaintiffs were required to pay out-of-pocket to cover the difference between the actual cost and the ONS reimbursement.

Finally, the Court also notes that WellPoint Defendants do not dispute Plaintiffs' allegations of market power. Ingenix is alleged to dominate the Data Market as it has the "majority of major health insurers" contributing data to the Ingenix Database, *see id.* ¶ 95, including the three largest health insurers in the country, *see id.* ¶¶ 54, 57, 63. UHG claims that Ingenix's market domination was not a result of any unlawful conspiracy because its market domination was "the result of (a) Ingenix acquiring and combining various competing provider charge databases and (b) natural **[**59]** barriers to entry into the Data Market. *UHG Mot.* 5:24-28. The cause of Ingenix's dominance of the Data Market, however, is irrelevant to Plaintiffs' allegation that it dominates that market and that the alleged conspiracy harmed competition in that market and Plaintiffs' ONS reimbursements. For these reasons, the Court DENIES Defendants' motion to dismiss Plaintiffs' rule of reason claim.

3. Whether Plaintiffs' Sherman Act Claim is Barred by the McCarran-Ferguson Act

HN23[] The McCarran-Ferguson Act exempts from federal antitrust laws all conduct that (1) is part of the "business of insurance," (2) is regulated by state law, and (3) is not a "boycott, coercion, or intimidation." *15 U.S.C. §§ 1011-15*; *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 207 n.1, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)* (quoting the text of the McCarran-Ferguson Act). WellPoint Defendants claim that Plaintiffs allegations satisfy each of these elements. *See Mot.* 12:12-15:2. The Court disagrees.

HN24[] In order to constitute part of the "business of insurance," the practice must (1) have the effect of transferring or spreading a policyholder's risk, (2) be "an integral part of the policy relationship between the **[**60]** insurer and the insured," and (3) be limited to entities within the insurance industry. *Royal Drug, 440 U.S. at 210*. The Supreme Court instructs that the McCarran-Ferguson exemption was focused on the relationship between the insurer and its agents and the insured. *See id. at 215-16*. Moreover, the statute "exempts the 'business of insurance' and not the 'business of insurance companies.'" *Union Lab. Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)* (citation omitted). **[*1031]** Finally, exemptions from antitrust laws under the McCarran-Ferguson Act are to be narrowly construed. *Id. at 126*.

This case bears many similarities to the facts in *Pireno*, and for many of the same reasons, WellPoint Defendants' use and manipulation of the Ingenix database is not part of the "business of insurance." In *Pireno*, a chiropractor challenged an insurance company's practice of using a peer review committee to determine whether claims submitted were both reasonable and necessary. *See Pireno, 458 U.S. at 122-23*. The Court evaluated the practice under the three-prong *Royal Drug* test and held that the referral practice did not transfer risk, but only reduced costs. More specifically, **[**61]** the Court stated that the practice was "logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies." *Id. at 130*. The Court agreed with the Second Circuit's determination that the committee determined "only . . . whether the insured's loss falls within the policy limits"— that is, not whether risk of loss was transferred, but only the extent to which it was transferred. *Id.* The Court also held that the insurer's practice of using the peer review committee was neither integral to the relationship between the insurer and the insured, nor limited to entities within the insurance industry. *See id. at 129-33*. It was not integral because it was a "separate arrangement between the insurer and third parties not engaged in the business of insurance," and because the arrangement was "obviously distinct from [the insurance company's] contracts with its policyholders." *Id. at 131*. The Court reached its conclusion by analogizing the facts in *Pireno* to the facts in *Royal Drug*, where an arrangement between an insurance company and a pharmacy about drug pricing was said to be a "separate contractual arrangement[]"with a company "engaged in the sale and distribution **[**62]** of goods and services other than insurance." *Id.* (*citing Royal Drug, 440 U.S. at 216*).

Plainly, Defendants' use of the Ingenix database does not involve the spreading or underwriting of risk. Like in *Pireno*, the Ingenix database determines whether and to what extent the "insured's loss falls within the policy limits." *See id. at 130*. Defendants cannot, and do not, argue that acquiring cost data from the Ingenix database and using it to determine a reasonable reimbursement transfers risk from the insured to the insurer as contemplated by the McCarran-Ferguson Act and *Pireno.* It is doubtless the case that each reimbursement determination varies the *amount* of risk incurred by the insurance companies, but it is clear that reduction in costs alone is not sufficient for a practice to fall within the "business of insurance." *See id.* Defendants' use of an outside tool to determine the reasonableness of charges incurred was insufficient to fall within the "business of insurance" in *Pireno* and is insufficient to fall within the "business of insurance" here.

Defendants' only argument that the use of Ingenix falls within the business of insurance stems from the Supreme Court's decision in *U.S. Dep't **[**63]** of Treasury v. Fabe*, which states that "[t]here can be no doubt that the actual performance of an insurance contract falls within the business of insurance." *Fabe, 508 U.S. 491, 503, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993)*. Defendants' reliance on *Fabe* overlooks the fact that the Supreme Court expressly squared *Fabe* with *Royal Drug* and *Pireno*, and involved critically different facts. In *Fabe*, the question was whether a state law allowing insureds to make claims against bankrupt insurance companies regulated **[*1032]** the "business of insurance," not whether a particular practice of an insurance company was part of the "business of insurance." *Id. at 493-94*. If the state law did regulate the business of insurance, then policy holders would have priority over claims against the bankrupt company by others, *i.e.* the policy holders' contracts would remain enforceable. *Id.* The distinction between that case and the present facts cannot be overstated. It is a business practice at issue, not a law, and it is the determination of the reasonableness of claim amounts at issue, not the enforceability of a contract as a whole. Defendants' arguments are without merit, and because the use of data from the **[**64]** Ingenix database is not part of the "business of insurance," Plaintiffs' Sherman Act claims are not barred by the McCarran-Ferguson Act.

C. RICO Claims

Plaintiffs also allege that WellPoint Defendants' conduct violates sections 1962(c) and 1962(d) of RICO. *See* 18 U.S.C. §1962(c)-(d). WellPoint Defendants insist that Plaintiffs insufficiently pleaded their RICO claims and that they should be dismissed. *See Mot.* 17:23.

1. Participation in a RICO Enterprise — 18 U.S.C. § 1962(c)

Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") states that: **HN25**[] "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). **HN26**[] For a plaintiff to state a claim under § 1962(c), he or she must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; *Walter v. Drayson, 538 F.3d 1244, 1247 (9th Cir. 2008)*. **[**65]** **HN27**[] "RICO is to be read broadly" and "liberally construed to effectuate its remedial purposes." *Sedima, 473 U.S. at 497-98*; *Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007)*. WellPoint Defendants' attack each of the RICO elements except the "pattern" requirement.

a. Associated-in-Fact Enterprise

HN28[] RICO defines "enterprise" in a fairly pedestrian manner: "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This seemingly innocuous definition, however, has commanded much attention, particularly with respect to the meaning of "a group of individuals associated in fact." *See* *Odom, 486 F.3d at 548*. The Supreme Court stepped in early and defined an associated-in-fact enterprise as "an ongoing organization" whose "various associates function as a continuing unit." *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. Though this is not a stringent standard, an associated-in-fact enterprise "must have three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient **[**66]** to permit these associates to pursue the enterprise's purpose." *Boyle v. United States, 556 U.S. 938, 129 S. Ct. 2237, 2244-45, 173 L. Ed. 2d 1265 (2009)*.

HN29[] An enterprise is not wholly defined by its system of governance or one particular structure. In fact, liability is "not limited to those with a formal position in the enterprise," but "some part in directing **[*1033]** the enterprise's affairs is required." *Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)*. Direction need not come down through a "hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc." *Boyle, 129 S. Ct. at 2245*. Moreover, "[m]embers of the group need not have fixed roles; different members may perform different roles at different times." *Id.* And "[t]he group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." *Id.* Finally, "[w]hile the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity **[**67]** punctuated by quiescence." *Id.*

i. Common Purpose

First, **HN30**[] an associated-in-fact must have a common purpose. Plaintiffs allege that Defendants "agreed to utilize the flawed Ingenix Database for their UCR determinations in an effort to depress the prices paid for ONS by the conspiring healthcare companies." *SAC* ¶ 289; *see also* RICO Case Stmt. at 120-24. In other words, Defendants controlled and manipulated the Ingenix database in order to pay less to providers and subscribers. WellPoint Defendants' posit that this is ordinary business outside the reach of RICO, but provide no additional argument as to why manipulating the UCR database is an ordinary business practice. *See Mot.* 19:8-17. To the contrary, Plaintiffs' submit the following allegations, which, if true, establish a common purpose: "the Insurer Conspirators regularly and intentionally excluded certain data points representing higher charges before submitting their data to Ingenix, with the intention and consequence of depressing the resulting UCRs and thus enabling them to under-reimburse for ONS;" and that Ingenix "aggregate[d] and manipulate[d] the data and create[d] False UCR schedules that [were] sold to the same health insurers **[**68]** that provided the data in the first place." *SAC* ¶¶ 74,

76. This common purpose was in WellPoint Defendants' individual interest because as the UCRs went down, WellPoint Defendants paid less and kept more. *Id.* ¶ 298. Defendant Ingenix also profited from the alleged enterprise by "enhancing its ability to earn licensing fees through the sale of the Ingenix Database, including other Ingenix products which used WellPoint and United Health data." *Id.* ¶ 295. Plaintiffs have adequately pleaded that the common purpose of the alleged enterprise was to "reduc[e] the price paid for ONS, and increas[e] the profits of the Enterprise participants and the Insurer Conspirators." *Id.* ¶ 292.

ii. Relationship Among Enterprise Members

Plaintiffs have also sufficiently pleaded the relationship among the members of the purported enterprise. ***HN31***[] It is clear that a "hierarchical structure or a 'chain of command'" is not required in order for a RICO relationship to be present. *Boyle, 129 S. Ct. at 2245*. And, "[m]embers of the group need not have fixed roles." *Id.* However, "allegations that 'several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates" are **[**69]** not enough to show membership in an enterprise. *Id. at 2245 n.4*. Here, the allegations plausibly establish that the Defendants and conspirators agreed to depress UCRs, and that they would do so collectively. *See SAC* ¶ 12 ("WellPoint and **[*1034]** other health insurance companies agreed to manipulate the rates used to reimburse members for ONS."); ¶ 19 ("WellPoint, Inc. controls the actions of the other WellPoint entities, including those which contribute data to the Ingenix Databases."); ¶ 289 ("WellPoint and UnitedHealth knowingly participated in the formation and maintenance of, purchased and utilized the Ingenix Database"). Together, WellPoint Defendants and conspirators contributed "nearly 60%" of the information in Ingenix, which they could not do acting individually. *Id.* ¶ 73. Finally, [d]ecision making within the Enterprise...was consensual...and [t]he members of the Enterprise functioned as a continuous unit." *Id.* ¶ 294. Plaintiffs allegations plausibly show that WellPoint Defendants and conspirators operated together to depress UCRs.

iii. Longevity

WellPoint Defendants do not contest the longevity factor and the Court finds Plaintiffs' assertion that the enterprise began in 1998 sufficient **[**70]** to survive this *Rule 12(b)(6)* motion. *Id.* ¶ 288; *see also Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007)*, *cert. denied*, *552 U.S. 985, 128 S. Ct. 464, 169 L. Ed. 2d 325 (2007)* (finding the longevity requirement was met by "[a]n almost two-year time span"); *United States v. Cerna, No. CR 08-0730 (WHA), 2010 U.S. Dist. LEXIS 35085 , 2010 WL 1459444, at *2 (N.D. Cal. April 9, 2010)* (finding sufficient longevity in complaint alleging that an enterprise existed "since at least the mid-1990's, and continuing up through and including the present" (internal citations omitted)).

Plaintiffs' allegations of the enterprise's common purpose, the relationship between the members and the longevity of the enterprise plausibly show the existence of an associated-in-fact enterprise. The next question is whether WellPoint Defendants participated in the associated-in-fact enterprise's conduct.

b. WellPoint Defendants' "Conduct"

WellPoint Defendants also seek dismissal of Plaintiffs' RICO claims because of "Plaintiffs fail[ure] to allege any facts indicating that WellPoint directed the affairs of the alleged Enterprise." *Mot.* 21:1-2. The Court agrees.

HN32[] Liability for participating in the "conduct" of a RICO enterprise extends only to those who "have some part in **[**71]** directing [the enterprise's] affairs." *Reves, 507 U.S. at 179*. As it is used here, "directing" has a different meaning than commonly understood. More is required than "simply being involved," *Walter v. Drayson, 538 F.3d 1244, 1249 (9th Cir. 2008)*, but a defendant need not be in-charge or have "significant control over or within [the] enterprise," *Reves, 507 U.S. at 179 n.4*.

In this case, Plaintiffs allege that WellPoint and UnitedHealth "knowingly participated in the formation and maintenance" of the Ingenix Database. *SAC* ¶ 289. This is as specific as Plaintiffs get with respect to WellPoint Defendants' RICO conduct. Elsewhere in the complaint are allegations similar to the following: "WellPoint and UnitedHealth participated [in] and conducted the affairs of the enterprise not only by submitting false and incomplete data to Ingenix, but by being involved in decision making regarding the database and by utilizing the flawed data for [the] illicit purpose of determining UCR[s]." *Id.* ¶ 301. The submission of its own data does not plausibly show that WellPoint controlled the other members in the associated-in-fact enterprise. In fact, all it really establishes is that WellPoint was acting **[**72]** on its own when submitting data to the Ingenix database. And, the existence of a business relationship between WellPoint, Ingenix, and the Insurance **[*1035]** Defendants without more does not show that WellPoint conducted the enterprise. *See* Goren v. New Vision Intern., Inc., 156 F.3d 721, 727-28 (7th Cir. 1998) (holding that an established business relationship between the defendants and the enterprise was insufficient to state a claim that the defendants directed the affairs of the alleged fraudulent marketing enterprise). Finally, Plaintiffs' conclusory statement that "WellPoint and UnitedHealth . . . [were] involved in decision making regarding the database" does suggest RICO conduct, but it is too general to satisfy *Twombly's* pleading instructions. *See* Kearney v. Foley and Lardner, CV 05-2112 (LSP), 2011 U.S. Dist. LEXIS 32130, 2011 WL 1119020, at *6 (S.D. Cal. Mar. 28, 2011) (dismissing a RICO claim where the Plaintiff failed to allege facts showing that the defendant law firm's legal services constituted participation in the management of an alleged enterprise). Without more, Plaintiffs have failed to adequately allege that WellPoint Defendants were involved in the "conduct" of the enterprise.

c. Pattern

WellPoint **[**73]** Defendants do not challenge Plaintiffs' allegations with respect to RICO's "pattern" requirement. ***HN33***[] A "pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after 1970 and the last of which occurred within 10 years after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The Court finds that Plaintiffs adequately allege a "pattern" by stating that the enterprise began around 1998 and that the "racketeering activity is related because it involves the same fraudulent scheme, enterprise, common persons, common out-of-network claim practices, common results impacting upon common victims and is continuous because it occurred over several years." *SAC* ¶ 312; *see also* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (establishing a pattern requires showing that the racketeering acts "are related" and "amount to or pose the threat of continued criminal activity").

UHG Defendants, however, do challenge Plaintiffs' allegations of a pattern of conduct as it relates exclusively to them. *See UHG Mot.* 2:4-6. More specifically, UHG Defendants argue that Plaintiffs have not adequately **[**74]** pleaded predicate acts related to UHG or Ingenix, and therefore, they have not adequately pleaded a pattern of predicate acts. *Id.* UHG Defendants are correct. ***HN34***[] Where RICO is asserted against multiple defendants, a plaintiff must allege at least two predicate acts by *each* defendant. *See* United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987), *cert. denied*, *486 U.S. 1022, 108 S. Ct. 1995, 108 S. Ct. 1996, 100 L. Ed. 2d 227 (1988)*; Keel v. Schwarzenegger, CV 08-7591 RMT (VBK), 2009 U.S. Dist. LEXIS 43999, 2009 WL 1444644, at *6 (C.D. Cal. May 19, 2009). As discussed below, the basis of Plaintiffs' mail and wire fraud RICO claims in the Complaint is WellPoint Defendants' practice of making false and misleading statements related to ONS reimbursement. *See, e.g., SAC* ¶ 78. Moreover, the basis of Plaintiffs' embezzlement RICO claims is that WellPoint Defendants took funds from the individual plans and kept it for themselves. *See id.* ¶ 319 ("WellPoint benefited from the conversion of assets from its ERISA plans" and "WellPoint improperly withheld such funds and maintained them as part of its own assets for WellPoint's own benefit"). Nowhere, however, do Plaintiffs link WellPoint Defendants' RICO conduct to UHG Defendants' RICO conduct. There is no mention that UHG Defendants' **[**75]** had a role in crafting the false or misleading statements, or any other involvement, and there is no mention that UHG Defendants' had access to the **[*1036]** health plans' funds, let alone that they converted those funds to their own use. As a result, Plaintiffs have failed to allege at least two acts of the UHG Defendants that qualify as RICO predicate acts.

2. Racketeering Activity

Finally, ***HN35***[] to state a claim under RICO, a plaintiff must allege that the conduct complained of qualifies as racketeering activity. Racketeering activity is defined in RICO by reference to certain predicate acts. *See* 18 U.S.C. § 1961. Included predicate acts are, among others, mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, and embezzlement from pension and welfare funds under 18 U.S.C. § 664. *See* § 1961(1)(B). Plaintiffs' RICO causes of action are based on each of the mentioned predicate acts.

a. Mail and Wire Fraud (Claim 6)

HN36[] To state a claim for mail and wire fraud, a Plaintiff must plead, in addition to the other elements of a RICO claim, "(1) a scheme or artifice devised with (2) specific intent to defraud and (3) use of the United States mail or interstate telephone wires in furtherance thereof." **[**76]** *Orr v. Bank of America, 285 F.3d 764, 782 (9th Cir. 2002)*. *HN37*[] Although RICO itself is not subject to *Federal Rule of Civil Procedure 9(b)*'s heightened pleading standards, predicate acts alleging fraud must be pleaded with particularity. *See* *Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004)*. At a minimum, this requires that the complaint must "state the time, place and specific content of the false representation as well as the identities of the parties to the misrepresentation." *Id.* The plaintiff must also set forth more than neutral facts necessary to identify the transaction; he must explain why the statement complained of was false or misleading. *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (superseded by statute on other grounds). In the context of a fraud suit involving multiple defendants, a plaintiff must also "identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme." *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)*. Although the complaint need not identify false statements made by each and every individual, "*Rule 9(b)* does not allow a complaint to merely lump multiple defendants together but **[**77]** requires plaintiffs to . . . inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Bruhl v. Price WaterhouseCoopers Intern., CV 03-23044, 2007 U.S. Dist. LEXIS 21885, 2007 WL 997362, at *3 (S.D. Fla. Mar. 27, 2007)*.

Aside from the RICO elements discussed above, Plaintiffs have adequately pleaded the elements of a RICO mail and wire fraud predicate act, but have failed to adequately plead the minimal degree of reliance for such predicate acts.

i. Subscriber Plaintiffs

The form and substance of the allegations of mail and wire fraud predicate acts for each Plaintiff are similar and the Court will not go through them individually. To illustrate, however, the Court notes that J.B.W. alleges that after submitting a claim to Anthem Blue Cross Life and Health Insurance Company, WellPoint Defendants sent, through the mail, an Explanation of Benefits indicating that J.B.W. would be responsible for the amount in excess of the "reasonable and customary" charges. *See* RICO Case Statement 15:5-15. That Explanation of Benefits was dated January 26, 2009 and was false or misleading because the reimbursed amount was less than the actual "reasonable and customary" rates. [7] *See* ***[*1037]*** *id.;* ***[**78]*** *see also SAC* ¶ 78. J.B.W. and the other Plaintiffs listed above, state the time, place and content of the fraudulent statements and how they were misled. Moreover, the Complaint alleges that the Defendants had the express purpose—specific intent—of depressing ONS payments. *See SAC* ¶ 289; *see also* *Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2007)* ("the factual circumstances of the fraud itself [must be pleaded] with particularity, [but] the state of mind—or scienter—of the defendants may be alleged generally").

While Plaintiffs Cooper, Seigle-Epstein, and the Samsells have not pleaded the elements **[**79]** of mail fraud as a predicate act with the same degree of particularity as J.B.W., their pleadings are nevertheless sufficient. The only dates alleged by these Plaintiffs are dates of medical treatments and not the time of any specific false or misleading statements by a particular defendant. *See* RICO Case Statement 20-23. Despite these omissions, the allegations that each sought medical treatment on a particular date and then received false or misleading reimbursement information from WellPoint Defendants is more than enough to notify Defendants of the time and place of the alleged fraud. *See* *Cal. Pharmacy Mgmt., LLC v. Zenith Ins. Co., 669 F. Supp. 2d 1152, 1160 (C.D. Cal. 2009)* ("factual specificity as to the time and place of the over 800 alleged objections lodged by Defendants" was unnecessary for plaintiff's claim to survive a *Rule 9(b)* inquiry because "defendants, as the alleged authors of the communications in question, [we]re well aware of their time and place"); *Gonzales v. Lloyds TSB Bank, PLC, 532 F. Supp. 2d 1200, 1211-12 (C.D. Cal. 2006)* (omission of specific dates not fatal where fraud occurred over an

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[7] In their Opposition to Defendants' Motion to Dismiss, Plaintiffs argue that even if the statements in the explanation of benefits and other mailed documents were not false or misleading themselves, they still satisfy wire or mail fraud because they were part of the larger fraudulent scheme to depress prices. *See Opp'n.* 25:9-26:10. The Complaint, however, only alleges that WellPoint Defendants sent subscribers and providers "materially false and misleading" explanations of benefits or other statements. *See SAC* ¶¶ 305-09. The Court will not read into the Complaint what is not there.

extended period of time). Allegations that a Plaintiff "underwent **[**80]** surgery" on "June 29, 2006," sought reimbursement, and received explanations in the mail as to the "reasonable and customary charge" for the services are enough to inform Defendants of the particular date and time of their own false or misleading statements. *See* RICO Case Statement 20-21 (allegations regarding Plaintiff Cooper). As a result, the Subscriber Plaintiffs have pleaded, with particularity, the elements of mail and wire fraud as predicate acts under RICO.

ii. Provider Plaintiffs

Similarly, all of the Provider Plaintiffs have stated, with particularity, the time, place and content of WellPoint Defendants' false or misleading statements. Again, the Court will not explain each Provider Plaintiffs' allegations and why they are sufficient, but will use one to demonstrate the sufficiency of the mail and wire fraud predicate act claims. Dr. Henry provided covered medical services on March 27, 2009 and submitted his claim to WellPoint by electronic wire. *See* RICO Case Statement 34. On June 17, 2009, Dr. Henry received a letter in response, stating that "[t]his is the amount in excess of the allowed expense for a non-participating provider. The Health Plan is not responsible for any **[**81]** amounts in excess of this allowed expense." *Id.* According to Provider Plaintiffs, the statement that the reimbursed amount was the actual "allowed expense" is false. *See SAC* ¶ 78. For the same reasons as above, the Provider Plaintiffs' mail and wire fraud predicate act **[*1038]** allegations state the time, place and content of the false or misleading statements and survive a *Rule 12(b)(6)* challenge. [8]

iii. Mail and Wire Fraud Reliance

Nevertheless, the Complaint does not contain proper allegations that anyone relied on and was injured by the racketeering activity. *See* *Hemi Group, LLC v. City of New York, ___ U.S. ___, 130 S. Ct. 983, 989, 175 L. Ed. 2d 943 (2010)* (holding ***HN38***[] to state a claim under RICO "the plaintiff is required to show that a RICO predicate offense 'not **[**82]** only was a 'but for' cause of his injury, but was the proximate cause as well'"). Plaintiffs cite to the Supreme Court's decision in *Bridge v. Phoenix Bond & Indem. Co.*, and state that they "are not required to show any reliance for RICO injury purposes." *Opp'n* 28:9-23. Plaintiffs' misunderstand the Supreme Court's holding on RICO reliance in that case. ***HN39***[] The Supreme Court did not say that there is no requirement to plead any reliance, but only that "first-party" reliance is not required. *See* *Bridge, 553 U.S. 639, 659, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*. In fact, the Supreme Court went on to hold that, "[o]f course, none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations." *Id.* (emphasis in original).

Apparently realizing that the allegations are insufficient, Plaintiffs ask this Court to "infer" reliance—something it cannot do without some facts to support an inference. *See Opp'n* 28:12. Having failed to allege reliance in any form, these RICO claims are insufficiently pleaded.

b. Embezzlement (Claim 7)

Although Plaintiffs have stated a claim for embezzlement **[**83]** as a predicate RICO act, the RICO claim still fails for the reasons stated above. WellPoint Defendants' only argument against Plaintiffs' embezzlement-based RICO claim is that "embezzlement is the act of fraudulently converting *another person's* property, and Plaintiffs' allegations fail to show how WellPoint converted anyone's assets." *Mot.* 28:5-6.

Section 664 of Title 18 of the United States Code reads:

> ***HN40***[] "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

[8] The other Provider Plaintiffs provide similarly detailed factual allegations of the alleged false or misleading statements. *See* RICO Case Statement 27-114. Further, the Association Plaintiffs also assert RICO claims, but neither the WellPoint nor UHG Defendants' make any argument as to why the RICO mail and wire fraud predicate act allegations are insufficient as to them. Thus, the Court need not consider that issue in this Order.

18 U.S.C. § 664. The statute does not read as restrictively as Defendants' suggest and the case cited by Defendants cuts against them. In *United States v. Andreen*, **HN41**[] the Ninth Circuit recognized that embezzlement traditionally encompassed "the fraudulent appropriation of the property of another." 628 F.2d 1236, 1241 (9th Cir. 1980). The court went on, however, to say that embezzlement under 18 U.S.C. § 664 **[**84]** "goes beyond traditional [embezzlement] concepts . . . and imposes liability for an intentional breach of special fiduciary duties imposed by other regulatory statutes or governing instruments." *Id.*

[*1039] In this case, Plaintiffs have alleged breach of fiduciary duties imposed by ERISA. *See SAC* ¶ 383 (Third Claim for Relief). To the extent that ERISA Plaintiffs are asserting claims under RICO with embezzlement as the predicate acts, the Defendants' motion is DENIED. It must be noted, however, that Plaintiffs have not provided any response to Defendants' argument with respect to the Plaintiffs not asserting ERISA breach of fiduciary duty claims. Without opposition, the Court grants Defendants' motion related to the embezzlement-based RICO claims asserted by the non-ERISA Plaintiffs.

3. RICO Conspiracy (Claim 8)

HN42[] Conspiring to violate RICO is a separate offense under 18 U.S.C. § 1962(d). Defendants insist that there is no plausible allegation that WellPoint Defendants and others agreed to conduct a criminal enterprise through a pattern of racketeering activities. *Mot.* 29:23-27. More specifically, Defendants argue that "for the same reason that their antitrust conspiracy claim fails," their RICO **[**85]** conspiracy claim fails. *Id.* 29:10-13. As the Court has already found that Plaintiffs have plausibly alleged an agreement to fix prices, Defendants' argument linking the two must fail.

In sum, the Court GRANTS WITH LEAVE TO AMEND Defendants' motions to dismiss based on Plaintiffs' failure to adequately allege RICO conduct, a RICO pattern as to UHG Defendants, and the minimal degree of reliance necessary for a mail or wire fraud predicate act.

C. ERISA Claims

1. Claim for Plan Benefits under 29 U.S.C. §1132(a)(1)(B) (Claim 2)[9]

HN43[] The Employee Retirement Income Security Act ("ERISA") was enacted primarily to "protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting . . . of financial and other information" and to establish "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). To meet those goals, Congress empowered participants, beneficiaries, and fiduciaries of qualified ERISA benefit plans, along with the Secretary of Labor, to sue for, *inter alia*, benefits owed. *See* 29 U.S.C. § 1132(a).

The **[**86]** ERISA Plaintiffs (Roberts, Cooper, Rivera-Giusti, Henry, Schwendig, Peck, Pariser, Kavali, the North Peninsula Surgical Center L.P., and members of the Association Plaintiffs (collectively, "ERISA Plaintiffs")) assert claims against WellPoint for failure to provide benefits under 29 U.S.C. § 1132(a)(1)(B). *See SAC* ¶¶ 376-82. Defendants argue that Plaintiffs' § 1132(a)(1)(B) claims should be dismissed because Plaintiffs fail to allege facts that: (1) Defendants are "administrators" under ERISA; (2) demonstrate the plan provisions at issue; (3) Plaintiffs exhausted their administrative remedies; and (4) the Provider Plaintiffs have ERISA standing. *See Mot.* 31:8-37:15. The Court addresses each of the Defendant's arguments separately.

a. Whether WellPoint can be sued as an Insurer

Defendants argue that claims for benefits under 29 U.S.C. § 1132(a)(1)(B) may only be brought against "the plan itself" or "plan administrators in their official capacities" and that Plaintiffs fail to adequately allege that WellPoint is either a plan administrator or the plan itself. Since the pending motions were filed, however, **HN44**[] the Ninth Circuit ruled that claims **[*1040]** for benefits under 29 U.S.C. § 1132(a)(1)(B) **[**87]** can be asserted against "an entity other than the plan itself or the plan administrator." Cyr v. Reliance Standard Life Ins. Co., 642 F.3d 1202,

[9] The parties also refer to this as ERISA §502(a)(1)(B).

1204 (9th Cir. 2011) (en banc). The *Cyr* ruling "expands the set of defendants who may be properly sued under § 1132(a)(1)(B) to include the insurer" and overrules Ford v. MCI Commc'ns Health & Welfare Plan, 399 F.3d 1076 (9th Cir. 2005), a case on which WellPoint relies. *See* Forest Ambulatory Surgical Assocs. v. United Healthcare Ins. Co., No. CV 10-04911 (EJD), 2011 U.S. Dist. LEXIS 75433, 2011 WL 2748724, at *6 (N.D. Cal. July 13, 2011). Because WellPoint is an insurer and falls within the class of potential defendants in a § 1132(a)(1)(B) case, Defendants' argument fails. The Court notes, however, that the WellPoint Defendants are entitled to raise the *Cyr* case at the appropriate time in the future.

b. Plan Provisions at Issue

Defendants also assert that "[a] plaintiff who brings a claim for benefits under ERISA must identify a specific plan term that confers the benefit in question" and that Plaintiffs have failed to do so. *See Mot.* 33:18-20 (*citing* Steelman v. Prudential Ins. Co. of Am., No. CV 06-2746, 2007 U.S. Dist. LEXIS 30149, 2007 WL 1080656, at *7 (E.D. Cal. Apr. 4, 2007)). Plaintiffs sufficiently **[**88]** identify specific plan terms promising medical reimbursement benefits for ONS at the lesser of the billed charged or the UCR, benefits which were denied by Defendants. *See SAC* ¶¶ 9-10 ("Plaintiffs, pay higher premiums in exchange for the flexibility and right to obtain out-of-network benefits" and "WellPoint, promise[s] to reimburse for out-of-network services at a percentage of the lesser of either (i) the actual amount of their medical bills or (ii) the usual, customary and reasonable rate."); *SAC* ¶ 69 ("However, the Insurer Conspirators actually reimburse their members . . . [and] healthcare providers, at a rate that is much lower than the UCR for the services rendered."); *SAC* ¶ 181 ("Although WellPoint healthcare plans represent that ONS will be reimbursed based on UCR determinations, WellPoint does not base its determinations on the usual, reasonable, and customary rates . . . . Instead, WellPoint employs ONS Benefit Reductions to reimburse ONS based on an undisclosed percentage of extremely low and unrepresentative Medicare rates.").

The cases cited by Defendant challenging Plaintiffs' ERISA claim are distinguishable. In Midwest Special Surgery, No. CV 09-646, 2010 U.S. Dist. LEXIS 16403, 2010 WL 716105 (E.D. Mo. Feb. 24, 2010), **[**89]** the court found that the plaintiff failed to allege a specific plan term conferring a benefit when the complaint sought general "reimbursement for medical services provided to Defendants' plan participants under numerous health plans which qualify as employee welfare benefit plans as defined by ERISA, *29 U.S.C. § 1002*." 2010 U.S. Dist. LEXIS 16403, 2010 WL 716105, at *2. In McDonough v. Horizon Blue Cross Blue Shield of N.J. Inc., No. CV 09-571 (SRC), 2009 U.S. Dist. LEXIS 93642, 2009 WL 3242136 (D.N.J. Oct. 7, 2009), the court dismissed the plaintiff's ERISA claim containing the conclusory allegation that the defendant relied on a "flawed database" "that cannot satisfy the contractual definition of UCR." 2009 U.S. Dist. LEXIS 93642, 2009 WL 3242136, at *2 (quotations omitted). Unlike the plaintiffs in *Midwest Special Surgery* and *McDonough*, Plaintiffs have identified specific plan terms conferring reimbursement benefits and have alleged sufficient facts demonstrating how Defendants deprived Plaintiffs of full UCR medical benefits by supplying Ingenix with flawed and "scrub[bed]" data. *See SAC* ¶ 10, 122. As a result, the Court rejects Defendants' argument and notes that the allegations in the Second Amended Complaint **[*1041]** go well beyond the general allegations in *Midwest Special* ***[**90]*** *Surgery* and *McDonough.*

c. Exhaustion of Administrative Remedies

WellPoint Defendants also seek dismissal of Plaintiffs' ERISA claim for benefits because they failed to exhaust administrative remedies and failed to adequately allege that it would have been futile to do so. *See Mot.* 35:5-8. ***HN45***[] As a general rule, a plaintiff must exhaust administrative remedies under the relevant benefit plan prior to bringing suit under § 1132(a)(1)(B). *See* Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50 F.3d 1478, 1483 (9th Cir. 1995). "[F]ederal courts have the authority to enforce the exhaustion requirement in suits under ERISA, and that as a matter of sound policy they should usually do so." Amato v. Bernard, 618 F.2d 559, 568 (9th Cir. 1980). However, the demonstrated futility of administrative appeals constitutes "an exception[] to the prudential exhaustion doctrine." Noren v. Jefferson Pilot Financial Ins. Co., 378 Fed. Appx. 696, 698 (9th Cir. 2010). A plaintiff can demonstrate futility by pointing to a similarly situated plaintiff who exhausted administrative remedies to no avail. *See In re Managed Care Litig., 595 F. Supp. 2d 1349, 1353-54 (S.D. Fla. 2009)* (finding class plaintiffs **[**91]** demonstrated the futility of administrative appeals because another plaintiff had unsuccessfully exhausted administrative remedies). The Court notes, however, that "bare assertions of futility" are not enough to invoke the futility exception, Diaz v. United Agric. Emp. Welfare Benefit Plan & Trust, 50 F.3d 1478, 1485 (9th Cir. 1995), and that "a Plan's refusal to pay does not, by itself, show futility." *Foster v. Blue Shield of Cal., No. CV 05-03324 (DDP), 2009 U.S. Dist. LEXIS 46619, 2009 WL 1586039, at *5 (C.D. Cal. June 3, 2009)*. In this case, the Court finds that Plaintiffs have alleged enough facts demonstrating that Plaintiffs' administrative appeals would be futile.

Defendants claim that two ERISA Subscriber Plaintiffs (Cooper and Rivera-Giusti) and four ERISA Provider Plaintiffs (Henry, Pariser, Kavali, and NPSC) are bared from filing ERISA claims because they have failed to exhaust administrative remedies. *Mot.* 35:5-8. Plaintiffs, on the other hand, claim that seeking any administrative remedy would be futile based on the experience of at least one Subscriber Plaintiff. *SAC* ¶¶ 271-83. Plaintiffs allege in detail the experiences of Subscriber X, who was under reimbursed for ONS surgery based on flawed Ingenix **[**92]** UCR data, who appealed the denial of benefits to both her employer and WellPoint multiple times, who requested additional information regarding WellPoint's calculation of UCR, and who was ultimately denied reconsideration of her benefits. *Id.* Plaintiffs conclude from Subscriber X's experience that "it is clear that the pursuit of an administrative appeal to WellPoint of its UCR determinations would be futile." *Id.* at ¶ 283. Plaintiffs also contend that Provider Plaintiffs' administrative appeals would be futile. For example, they allege that Provider Plaintiff Dr. Peck appealed a UCR determination in writing and by phone and Defendant denied his appeal stating the "decision is final and all levels of [its] appeal process have been exhausted." *Id.* at ¶ 237.

The Court finds that the Complaint alleges enough information demonstrating futility for both the Subscriber and the Provider Plaintiffs. *See In re Managed Care Litig., 595 F. Supp. 2d 1349, 1353-54 (S.D. Fla. 2009)* (finding that a plaintiff's appeal to WellPoint, denial of the appeal, and lack of further instruction from WellPoint to file an additional appeal was "sufficient to satisfy the exhaustion of administrative **[*1042]** remedies under **[**93]** ERISA" and therefore "any attempts to file additional appeals by any of the Class Plaintiffs would indeed be futile"). In *In re Managed Care Litigation*, a class of dentists who provided ONS to WellPoint subscribers sued WellPoint for ONS underpayment using data from a flawed Ingenix database. *Id. at 1350*. The *In re Managed Care Litigation* court found that the exhaustion of administrative remedies by one party demonstrated futility for the other class plaintiffs. *Id. at 1354*. And, as noted by the *In re Managed Care Litigation Court*, this is not WellPoint's last chance to challenge Plaintiffs' futility allegations: "if further discovery reveals that [Plaintiff] failed to follow proper administrative appeals procedures under the plan, the remaining Plaintiffs' excuse for not filing such appeals will fail on a motion for summary judgment." *Id.* Likewise, if Defendants can demonstrate that either the Subscriber or Provider Plaintiffs failed to adequately allege futility or follow proper procedures for exhaustion of administrative appeals, Defendants may challenge this later in the litigation.

d. Whether Provider Plaintiffs have ERISA Standing

HN46[] "A health care provider with an allegedly valid **[**94]** assignment has the same standing [as the beneficiary]" and may bring suit under ERISA. *Davidowitz v. Delta Dental Plan, Inc., 946 F.2d 1476, 1477 (9th Cir. 1991)*. Defendants argue that the Provider Plaintiffs have not alleged sufficient facts demonstrating valid assignments from the Subscriber Plaintiffs. *Mot.* 36:15-19. The Court disagrees. Plaintiffs allege specific facts regarding the assignment of benefits from beneficiaries to the Provider Plaintiffs: "To facilitate direct payment from insurers, Dr. Henry's patients sign a form assigning their health benefits to him before treatment." *SAC* ¶ 215. Furthermore, Plaintiffs contend that "Dr. Peck, like other Class Members, obtained assignments from his patients, through which he was paid directly by WellPoint for providing healthcare to its insureds." *SAC* ¶ 232. The alleged facts, when taken as true, demonstrate that the Provider Plaintiffs received valid assignments from beneficiaries.

WellPoint Defendants also argue Provider Plaintiffs lack standing because they have not suffered injuries in fact as evidenced by their failure to bill patients for alleged under-payments by WellPoint. *Mot.* 36:25-37:9. However, ***HN47***[] healthcare providers with **[**95]** valid assignments are not required to bill the patient when seeking a claim against a defendant. *See Simon v. Value Behavior Health, Inc., 208 F.3d 1073, 1081 (9th Cir. 2000)*. Defendants rely on two cases to support their contention that billing a patient for an insurance company's under-payment is required for a Provider Plaintiff to suffer injury in fact, but these cases do not directly apply. *See Mot.* 37:10-15 (*citing American Med. Ass'n v. United Healthcare Corp., No. CV 00-2800, 2007 U.S. Dist. LEXIS 44196, 2007 WL 1771498 (S.D.N.Y. June 18, 2007)*; *Owen v. Regence Bluecross Blueshield of Utah, 388 F. Supp. 2d 1318 (D. Utah 2005))*. In *American Medical Association*, the court found that provider plaintiffs suffered no injury in fact when the provider "expressly excused the patient from paying the remainder of the claim" through writing off an underpayment and excusing a fellow physician from being billed. *American Med. Ass'n, 2007 U.S. Dist. LEXIS 44196, 2007 WL 1771498, at *18-19, n.18*. In *Owen*, the court held that a *subscriber* lacked standing because she did not suffer an injury in fact when there was no evidence that the ONS provider attempted to collect payment from her. *Owen, 388 F. Supp. 2d at 1326*. Here, Plaintiffs' alleged assignments **[**96]** are sufficient to withstand dismissal **[*1043]** under *Rule 12(b)(6)*, but this in no way precludes a challenge to the assignments later as the facts develop.

Based on the foregoing, the Court DENIES Defendants' Motion to Dismiss Plaintiffs ERISA *§ 1132(a)(1)(B)* claim.

2. Breach of Fiduciary Duties under ERISA § 1132(a)(2) (Claim 3)[10]

In addition to the ERISA claim for benefits, Plaintiffs also assert claims for breach of fiduciary duties under *29 U.S.C. § 1132(a)(2)*. *See SAC* ¶¶ 383-87.

a. Relief for the Individual v. Relief for the Plan

HN48[] *Section 1132(a)(2)* authorizes plan participants to bring suit for relief under *section 1109*, which provides:

> ***HN49***[] Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting form each such breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including **[**97]** removal of such fiduciary.

29 U.S.C. § 1109. ***HN50***[] The fiduciary relationship is one with the plan as a whole, and individual beneficiaries bringing a breach of fiduciary duty claim must do so for the benefit of the plan—not to recover solely for individual injuries. *See* *LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 254, 256, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008)* (*29 U.S.C. § 1109* "does not provide a remedies for individual injuries distinct from plan injuries"); *Wise v. Verizon Communs, Inc., 600 F.3d 1180, 1189* ("The claim for fiduciary breach gives a remedy for injuries to the ERISA plan as a whole, but not for injuries suffered by individual participants."). To survive a *Rule 12(b)(6)* motion to dismiss, a plaintiff must allege in the complaint that "the fiduciary injured the benefit plan or otherwise jeopardized the entire plan or put at risk plan assets." *Wise, 600 F.3d at 1189*. But, after *Twombly*, merely alleging that an ERISA breach of fiduciary duty claim "is brought on behalf of, and for the benefit of, the plan and all its participants" is not enough. *Id.* (affirming the district court's dismissal of a breach of fiduciary duty claim because plaintiff failed to plead **[**98]** a "plan-wide injury" or that any member other than plaintiff was injured).

As an initial matter, Defendants do not contest their status as fiduciaries. Moreover, Plaintiffs more than adequately plead their fiduciary breach claim. While Plaintiffs do make the bald assertion that the claim is brought "on behalf of plaintiffs and their plans," *see SAC* ¶ 383 (Third Claim for Relief heading), they make up for it elsewhere. Plaintiffs allege a systematic effort by WellPoint Defendants to conceal the depressed UCR and ONS benefits and to knowingly using the depressed rates in Ingenix to compute those benefits. *See id.* ¶¶ 178, 383-85. These actions allegedly injure all plan subscribers by forcing them to pay more for ONS medical services than they would have if a correct UCR was applied. *See id.* ¶ 78. In addition, Defendants' conduct injures all ONS plan providers because they lose patients who cannot pay the inflated out-of-pocket costs, thereby reducing ONS benefits to plan subscribers seeking them, and because providers are often "unable to collect the balance of their market-based fee for services." *See id.* ¶ 80. These theories clearly show harm to more than just the **[*1044]** individuals bringing **[**99]** suit, and while they are novel they are not conclusory. *See* *Spinedex Physical Therapy USA, Inc. v. United Healthcare of Arizona, 661 F. Supp. 2d 1076, 1092 (D. Ariz. 2009)*. Finally, although Plaintiffs seek monetary relief for their individual breach of fiduciary duties claims, they also seek injunctive relief which would "inure to the benefit" of the plan and not only the individual Plaintiffs. *See* *Warth v. Seldin, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*.

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[10] The parties also refer to this as *ERISA §502(a)(2)*.

b. Duplicative Claims

Furthermore, WellPoint Defendants contend that Plaintiffs' *§ 1132(a)(2)* breach of fiduciary duty claim should be dismissed because it is "duplicative of the *1132(a)(1)(B)* claim for benefits." *Mot.* 38:8-9. There is no Ninth Circuit case law on point and WellPoint Defendants turn to a Third Circuit case for the proposition that "[a] claim for breach of fiduciary duty is actually a claim for benefits where the resolution of the claim rests upon an interpretation and application of an ERISA-regulated plan rather than upon an interpretation and application of ERISA." *Id.* 38:9-12 (*quoting* *Harrow v. Prudential Ins. Co., 279 F.3d 244, 254 (3d. Cir. 2002)*. WellPoint's argument fails for three reasons.

First, **[**100]** Plaintiffs' claim that WellPoint Defendants breached their fiduciary duties of "loyalty and prudence" by, among others, failing to disclose information about the UCRs. *See SAC* ¶ 385. WellPoint Defendants provide no argument as to why this duty hinges upon the individual plans rather than ERISA itself. Second, Defendant's reliance on Third Circuit law is incomplete. Another case from within the Third Circuit allows plaintiffs to bring *§ 1132(a)(1)(B)* claims for benefits and *§ 1132(a)(2)* claims for breach of fiduciary duties in the alternative, even if the claims are "essentially...for benefits." *See* *Bamgbose v. Delta-T Group, Inc., 638 F. Supp. 2d 432, 442 (E.D. Pa. 2009)*. Third, WellPoint Defendants' argument that Plaintiffs' claim for benefits under *§ 1132(a)(1)(B)* should be dismissed negates the current duplicity argument. Plaintiffs have adequately stated a claim for a breach of fiduciary duties under *§ 1132(a)(2)*.

The Court DENIES Defendants' Motion to Dismiss Plaintiffs' ERISA *§ 1132(a)(2)* claim.

3. Breach of Fiduciary Duties under ERISA § 1132(a)(3) (Claim 4)[11]

WellPoint Defendants also challenge Plaintiffs' *§ 1132(a)(3)* claim **[**101]** on the grounds that they are not "plan administrators" and that a cause of action seeking redress for a breach of fiduciary duty is only proper if no other *§ 1132* cause of action is applicable. *See Mot.* 38:8-9. For the same reasons that the Court rejected WellPoint Defendants' "plan administrator" argument under *§ 1132(a)(1)(B)*, the Court rejects the "plan administrator" argument here. *See* *Cyr, 642 F.3d at 1204-06* (***HN51***[] "*[Section 1132(a)(3)]* makes no mention at all of which parties may be proper defendants," and there is "no reason to read a limitation into *§ 1132(a)(1)(B)* that the Supreme Court did not perceive in *§ 1132(a)(3)*" (*citing* *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 246, 120 S.Ct. 2180, 147 L. Ed. 2d 187 (2000))*.

WellPoint Defendants' generalized assertion that this *§ 1132(a)(3)* claim is only proper if no other *§ 1132* cause of action exists is correct, but their argument comes too early in the litigation. ***HN52***[] The Supreme Court has termed an ERISA **[*1045]** breach of fiduciary duty cause of action as a "catchall" provision or a "safety net, offering appropriate equitable relief for injuries caused by violations that *[§ 1132]* **[**102]** does not elsewhere adequately remedy." *Varity Corp. v. Howe, 516 U.S. 489, 515, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)*. The Ninth Circuit similarly held that "when relief is available under *§ 1132(a)(1)*, courts will not allow relief under *§ 1132(a)(3)* catch-all provision." *Johnson v. Buckley, 356 F.3d 1067, 1077-78 (9th Cir. 2004)* (*quoting* *Varity, 516 U.S. at 515*). Because WellPoint is an insurer and falls within the scope of defendants that can be sued under *§ 1132(a)(3)*, complete dismissal of Plaintiffs' *§ 1132(a)(3)* claim is inappropriate at this stage. *Rule 12(b)(6)* tests only the sufficiency of the pleaded claims, not necessarily the actual availability of relief. *See* *Ehrman, 2007 U.S. Dist. LEXIS 35124, 2007 WL 1288465, at *4*; *see also* *Fed. R. Civ. P. 8* (allowing parties to plead in the alternative).

Defendants' Motion to Dismiss Plaintiffs' ERISA *§ 1132(a)(3)* claim is DENIED.

4. Failure to Provide Accurate Evidences of Coverage and Summary Plan Descriptions under *§ 1132(c)* (Claim 5)[12]

[11] The parties also refer to this as *ERISA §502(a)(3)*.

[12] The parties also refer to this as *ERISA §502(c)*.

HN53[] While an insurer can properly be sued under § 1132(a)(1)(B) and § 1132(a)(3), "only the plan administrator can be held liable for failing to comply with [§ 1132(c)]." Vaught v. Scottsdale Healthcare Corp. Health Plan, 546 F.3d 620, 633 (9th Cir. 2008); **[**103]** 29 U.S.C. § 1132(c) ("[a]*dministrator's* refusal to supply requested information."). ERISA specifically defines an "administrator" as: "(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe." *29 U.S.C. § 1002(16)(A)*. Here, WellPoint Defendants are not properly alleged as "administrators" under § 1132(c).

Plaintiffs do not state in the Complaint that the WellPoint Defendants are designated by the operative instruments as ERISA-defined plan administrators. In fact, all that Plaintiffs have alleged is that the WellPoint Defendants assumed "the role of 'Plan Administrator' as that term is defined in ERISA" or, alternatively, that the WellPoint Defendants have "acted as the '*de facto*' Plan Administrator" by evaluating claims, interpreting and applying plan terms, and making reimbursement determinations. *See SAC* ¶¶ 175-76. These allegations are insufficient to state a claim under 29 U.S.C. § 1132(c). **[**104]** HN54[] With few exceptions, courts in this circuit have consistently concluded that liability cannot attach to a third party insurer that assumes administrative responsibilities under the *de facto* administrator theory. *See* Griffith v. Sun Life Assur. Co. of Canada, 143 Fed. Appx. 8, 10 (9th Cir. 2005) (unpublished) (finding no *de facto* administrator where an insurance company "handled all aspects of enrollment, claim processing, and other tasks an administrator typically is responsible for"); Turnipseed v. Educ. Mgmt. LLC's Employee Disability Plan, No. CV 09-03811 (MHP), 2010 U.S. Dist. LEXIS 2660, 2010 WL 140384, at *5 (N.D. Cal. Jan. 13, 2010) ("*Ford* effectively closed the door on *de facto* administrator theory"); Larson v. Providence Health Plan, CV 08-929 (JO), 2009 U.S. Dist. LEXIS 19038, 2009 WL 562815, at *5 (D. Or. March 2, 2009). The Ninth Circuit has all but slammed the door **[*1046]** on the *de facto* administrator theory advanced by Plaintiffs in this case and it is not alone. *See* Ford, 399 F.3d at 1081-82; *see also* Brown v. J.B. Hunt Transp. Servs., Inc., 586 F.3d 1079 (8th Cir. 2009); Mondry v. Am. Family Mut. Ins. Co., 557 F.3d 781 (7th Cir. 2009); Gore v. El Paso Energy Corp. Long Term Disability Plan, 477 F.3d 833 (6th Cir. 2007).

Plaintiffs' **[**105]** allegations that WellPoint Defendants acted as *de facto* administrators are thorough and non-conclusory. Those allegations, however, do not defeat the fact that a *de facto* administrator is not liable as an actual administrator under ERISA. As a result, Plaintiffs have not stated a claim for WellPoint Defendants' alleged failure to provide accurate Evidences of Coverage and Summary Plan Descriptions under 29 U.S.C. § 1132(c), and their § 1132(c) claim is DISMISSED WITHOUT LEAVE TO AMEND.

D. Breach of Contract (Claim 9)

WellPoint Defendants seek dismissal of Plaintiffs' Ninth Claim for relief for breach of contract because the Complaint "fails to identify (i) the contracts and the contractual provisions that allegedly were breached and (ii) the conduct that allegedly breached them." *Mot.* 41:23-26.

HN55[] A plaintiff who sues on a written contract is not required to attach a copy of the contract to the complaint, but its existence and how it was breached must be identified. *See* Securimetrics, Inc. v. Hartford Cas. Ins. Co., CV 05-0917 (CW), 2005 U.S. Dist. LEXIS 44893, 2005 WL 1712008, at *5-6 (N.D. Cal. July 21, 2005) ("The forms appended to the Federal Rules of Civil Procedure note that 'plaintiff may set forth the contract **[**106]** verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect.'") (*citing* Fed. R. Civ. P. 84, Official Form 3, 12); *see also* 2 Moore's Federal Practice, § 10.05[4] (Matthew Bender 3d ed.). Plaintiffs' breach of contract allegations are sufficient to defeat WellPoint Defendants' motion.

Paragraph 328 of the Complaint asserts that "[t]he Agreements are uniform contracts that utilize the same definitions across different health plans." *SAC* ¶ 328. In the very next paragraph, those definitions are fleshed out. For example, the Agreements promise that for ONSs, "the maximum covered expense for services provided by a non-PPO provider or other healthcare provider will always be the lesser of the billed charge or[,] for a physician, the customary and reasonable charge." *Id.* ¶ 329. And, the customary and reasonable charge is defined as "a charge which falls within the common range of fees billed by a majority of physicians for a procedure in a given geographic region." *Id.* Those are the terms that WellPoint Defendants allegedly breached by paying the intentionally depressed Ingenix UCRs rather than objective "customary and reasonable charges." *See,* ***[**107]*** *e.g., id.* ¶ 335.

If Plaintiffs' allegations are factually incorrect, WellPoint Defendants can prove that later in the litigation. At this stage, however, the question is not whether Plaintiffs' are correct, but rather whether they have pleaded a plausible claim. The Court answers that question in the affirmative and DENIES WellPoint Defendants' motion to dismiss Plaintiffs' breach of contract claims. [13]

E. Implied Covenant of Good Faith and Fair Dealing (Claim 10)

Related to the breach of contract claim is the claim that Defendants' breached implied **[*1047]** covenants of good faith and fair dealing. *See SAC* ¶¶ 438-47. WellPoint Defendants' argument that Plaintiffs have failed to state an implied covenant claim is confusing and inconsistent. In their Motion, WellPoint Defendants maintain that the "breach of the implied covenant of good faith and fair dealing claim fails under the *applicable state law.*" *Mot.* 43:14-20 (emphasis added). The motion then perfunctorily explains why the laws **[**108]** of California, Virginia, New York and Georgia prohibit Plaintiffs' claim. *See Mot.* 43:23-44:10. As the Court would expect, Plaintiffs oppose Defendants' motion on the grounds Defendants presented. *See Opp'n.* 44:20-45:12. In the Reply, however, Defendants' curiously insist that Plaintiffs' argument "is besides the point" because it is not state law, but "*[f]ederal case law* [that] requires Plaintiffs to identify the specific policy provisions from which the covenant allegedly arises." *Reply* 21:10-14 (emphasis in original). The Court will not address arguments made for the first time in reply and because the state law issues have not been briefed, the Court DENIES the motion to dismiss Plaintiffs' implied covenant of good faith and fair dealing claim.

F. California Unfair Competition and False Advertising Claims (Claim 11)

In the eleventh claim for relief, a single subscriber plaintiff, six provider plaintiffs and five association plaintiffs assert claims against WellPoint under each of the three prongs (fraudulent, unfair, and unlawful) of California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200* ("UCL"), and under California's False Advertising Law, *Cal. Bus. & Prof. Code § 17500* **[**109]** ("FAL").

1. Unfair Competition

HN56[] The UCL prohibits "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," as well as any act prohibited by California's false advertising statute. *See Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981, 985 (9th Cir. 2005)* (*quoting Cal. Bus. & Prof. Code § 17200*). An "unlawful" business act under *§ 17200* is any business practice that is prohibited by law, whether "civil or criminal, statutory or judicially made . . . , federal, state or local." *McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 1474, 49 Cal. Rptr. 3d 227 (2006)* (citations omitted). A business act is "unfair" under *§ 17200* "if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *See id. at 1473*. Finally, a "fraudulent" business practice under *§ 17200* is "one which is likely to deceive the public," and "may be based on representations to the public which are untrue, and also those which may be accurate on some level, but will nonetheless tend to mislead or deceive." *See id. at 1471*. ***HN57***[] UCL claims **[**110]** based on fraud are subject to the heightened pleading requirements of *Rule 9(b)*. *See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124-25 (9th Cir. 2009)*. Plaintiffs must plead "the who, what, when, where, and how of the alleged fraudulent conduct" and explain "why [a] statement or omission complained of was false and misleading." *In re Actimmune Mktg. Litig., 2009 U.S. Dist. LEXIS 103408, 2009 WL 3740648, at *13 (N.D. Cal. Nov. 6, 2009)*.

In addition, ***HN58***[] Plaintiffs must specifically allege that the fraudulent conduct caused them injury. *See In re Tobacco II Cases, 46 Cal. 4th 298, 327, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*. This is really an issue of a plaintiff's standing to assert a UCL or FAL claim and requires a "twofold showing: he or she must demonstrate **[*1048]** injury in fact and a loss of money or property caused by unfair competition." *Peterson v. Cellco P'ship, 164*

[13] The Parties do not address the extent to which state law differs with respect to the breach of contract claim. Because WellPoint Defendants do not move to dismiss on those grounds, the Court does not address them.

Cal. App. 4th 1583, 1590, 80 Cal. Rptr. 3d 316 (2008). In cases of fraud, the fraudulent conduct must be an "immediate cause" of injury and that, but-for the fraudulent statements, "the plaintiffs in all reasonable probability would not have engaged in the injury-producing conduct." In re Tobacco II, 46 Cal. 4th at 326.

In this case, Plaintiffs' claims sound in fraud, **[**111]** requiring them to be pleaded with particularity. This Plaintiffs do not do. All that Plaintiffs assert are conclusory allegations that do not plausibly show reliance. For example, the Complaint states: "Plaintiffs each relied upon WellPoint to reimburse them the appropriate amount for their services in compliance with WellPoint's legal and contractual obligations." *See SAC* ¶ 449. Nowhere, however, does the complaint allege that any statement about the ONS and UCRs induced reliance.

It should be noted that Plaintiffs are generally correct in their assertion that "where . . . a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." *Opp'n* 46:11-16 (*quoting* In re Tobacco II, 46 Cal. 4th at 328). Notwithstanding that assertion, Plaintiffs wholly fail to allege a long-term advertising campaign. In fact, the closest they get is in paragraph 460 where they state that "WellPoint has disseminated, and continue[s] to disseminate advertising, and other materials to potential customers, their insured and healthcare providers, which they **[**112]** know or should reasonably know is false and misleading." *SAC* ¶ 460. Even if they had adequately pleaded a long-term advertising campaign, it, standing alone, would be insufficient to plead the degree of reliance required in federal court by Rule 9(b). *See* In re Actimmune Marketing Litigation, No. CV 08-2376, 2009 U.S. Dist. LEXIS 103408, 2009 WL 3740648, at *13 (N.D. Cal. Nov. 6, 2009) ("*Tobacco II* cannot rescue plaintiffs' claims under the UCL fraudulent prong" because "the circumstances of the fraud must be stated with particularity"); *see also* Kearns, 567 F.3d at 1126 (citing Rule 9(b) and affirming dismissal because Plaintiff failed to identify "what the television advertisements or other sales material specifically stated . . . when [plaintiff] was exposed to them . . . which ones he found material . . . [and] which sales material he relied upon in making his decision to buy").

That said Plaintiffs' separate claim that "they would not even have purchased had they been adequately informed of [the plans'] true cost," is sufficient to plead the reliance element of a UCL claim, but the earlier UCL pleading shortcomings are fatal as Plaintiffs do not specifically identify what they relied on before purchasing the **[**113]** plans, rather than after. *See SAC* ¶ 463; Kwikset Corp. v. Superior Court (Benson), 51 Cal. 4th 310, 246 P.3d 877, 120 Cal. Rptr. 3d 741 (Cal. 2010). Without alleging a fraudulent UCL claim with the degree of specificity required by Rule 9(b), the suggestion that Plaintiffs would "not even have purchased" the insurance is an unfounded conclusion. Thus, Plaintiffs' have failed to state a fraud-based UCL claim.

Plaintiffs' failure to plead a fraud-based UCL claim does not necessarily sink their unfair or unlawful UCL claims, however. As discussed, ***HN59***[] an "unlawful" business act under § 17200 is any business practice that is prohibited by law, whether "civil or criminal, statutory or judicially made . . . , federal, state or local." McKell, 142 Cal. App. 4th at 1474. **[*1049]** A plaintiff can establish that a business practice was "unfair" by showing that such conduct "threatens an incipient *violation of an* ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Byars v. SCME Mortgage Bankers, Inc., 109 Cal. App. 4th 1134, 1147, 135 Cal. Rptr. 2d 796 (2003) (emphasis added). Because Plaintiffs **[**114]** have adequately stated a claim under the Sherman Act, Plaintiffs have also stated a claim under the UCL's unfair and unlawful prongs.

Thus, the Court GRANTS Defendants' motion to dismiss Plaintiffs' fraud-based UCL claim WITH LEAVE TO AMEND, but DENIES Defendants' motion as to Plaintiffs' unfair or unlawful UCL claim.

2. False Advertising

HN60[] California's false advertising statute makes it unlawful for a business to disseminate any statement "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *See* Cal. Bus. & Prof. Code § 17500. "The law encompasses not just false statements but those statements which may be accurate on some level, but will nonetheless tend to mislead or deceive." Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l Inc., 421 F.3d 981, 985 (9th Cir. 2005) (internal quotations omitted). ***HN61***[] "District courts in California have consistently held . . . that claims under California's FAL are grounded in fraud." *Yumul v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 2010 WL 3359663, at *3 (C.D. Cal. May 24, 2010)*. Accordingly, the pleading requirements of *Rule 9(b)* apply. *See id.*

Plaintiffs' **[**115]** FAL claim is based on the same allegedly untrue or misleading concerning ONS and UCRs as the UCL claim. For the same reasons set forth above, the claim fails to plead with particularity how Plaintiffs were injured as a result of WellPoint Defendants' untrue or misleading statements. The Court GRANTS the motions to dismiss Plaintiffs' FAL claim WITH LEAVE TO AMEND.

G. *New York General Business Law § 349* (Claim 12)

HN62[] *New York's General Business Law § 349* provides a private right of action to any person injured by a business' deceptive act or practice. *See* *Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.3d 47, 51 (2d Cir. 1992)*. A plaintiff must prove three elements to recover under *§ 349*: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611, 709 N.Y.S.2d 892 (N.Y. 2000)*. Furthermore, where there is a simultaneous claim for breach of contract, a plaintiff must plead losses "independent of the loss caused by [the] alleged breach of contract." *Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009)*.

WellPoint Defendants do not **[**116]** contest the first two elements but state that the *§ 349* fails because "when conclusory allegations of 'unfair' or 'deceptive' conduct are properly disregarded, [the] claim boils down" to a breach of contract claim. *Mot.* 46:24-47:4. Defendants' overlook the other injuries alleged by Plaintiffs. For example, Plaintiffs allege injuries such as having to "forego such ONS entirely to avoid" the added expense of faulty UCRs. *See SAC* ¶ 350. Moreover, ***HN63***[] courts interpreting New York law have found denial of insurance benefits to be actionable under *§ 349*. *See, e.g.,* **[*1050]** *Kurschner v. Massachusetts Cas. Ins. Co., No. CV 08-0011, 2009 U.S. Dist. LEXIS 16623, 2009 WL 537504, at *4-5 (E.D.N.Y. Mar. 3, 2009)*; *Binder v. Nat'l Life of Vt., No. CV 02-6411 GEL, 2003 U.S. Dist. LEXIS 8431 , 2003 WL 21180417, at *6 (S.D.N.Y. May 20, 2003)* ("[t]he allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability may be said to fall within the parameters of" *§ 349*). As a result, WellPoint Defendants' motion to dismiss Plaintiffs' *N.Y. Gen. Bus. Law § 349* claim is DENIED.

UHG Defendants' separate motion to dismiss the *§ 349* claim, however, is not denied part-in-parcel with WellPoint Defendants' motion. Pertaining **[**117]** to the *§ 349* claim specifically, UHG Defendants argue that Plaintiffs do not "allege that Ingenix or UHG made any statements to Plaintiffs, let alone any materially false statements that caused them injury, as required by [*N.Y. Gen. Bus. Law] § 349*." *UHG Mot.* 6:22-23. ***HN64***[] The Court recognizes that *§ 349* "imposes liability for material omissions on co-conspirators," *Opp'n* 49:7-8 (*citing* *Batas v. Prudential Ins. Co., 281 A.D.2d 260, 724 N.Y.S.2d 3, 5 (N.Y. App. Div. 2001)*, but Plaintiffs' *§ 349* claim fails to even mention UHG Defendants and expressly disavows any "rel[iance] upon the conspiracy allegations" made earlier in the Complaint. *SAC* ¶ 466. Plaintiffs have thus failed to state a *N.Y. Gen. Bus. Law § 349* claim against UHG Defendants, and UHG Defendants motion to dismiss this claim is GRANTED WITH LEAVE TO AMEND.

E. California's Cartwright Act Claim (Claim 13)

1. The Cartwright Act claim by ERISA Plaintiffs

Those Plaintiffs whose claims are based on ERISA plans cannot assert claims under California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720, et seq.* ***HN65***[] The Cartwright Act was designed to promote free competition, and it, like other antitrust laws, is "about **[**118]** the protection of competition, not competitors." *See* *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 783, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (2010)*. Individual damage awards are "a tool by which these precompetitive purposes are carried out," even though the main purpose of the law is to protect the public. *Id.* In this case, Plaintiffs Roberts, Henry, Schwendig, Peck, Pariser and Kavali complain about WellPoint Defendants' conduct related to qualified ERISA plans. *See SAC* ¶¶ 377, 379. ***HN66***[] ERISA, however, preempts state law causes of action and a plaintiff cannot "obtain relief by dressing up an ERISA benefits claim in the garb of" state law. *See* *Cleghorn v. Blue Shield of California, 408 F.3d 1222, 1225 (9th Cir. 2005)* (citation omitted).

Although the Cartwright Act focuses primarily on anticompetitive conduct while ERISA focuses on benefit plans, it is the nature of the relief sought in this case that is determinative for preemption purposes. **HN67**[] ERISA provides that "a civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan." *29 U.S.C. § 502(a)*. Plaintiffs have done just that in their ERISA claims for relief, *see SAC* ¶¶ 381, 387, 389, **[**119]** but also seek the same relief under the Cartwright Act, *see id.* ¶ 479. The Supreme Court has ruled out Plaintiffs' alternative bases for recovery. **HN68**[] Even state law claims that do not "duplicate ERISA remedies" are preempted because "Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the *ERISA § 502(a)* remedies were permitted." *Aetna Health Inc. v. Davila, 542 U.S. 200, 216, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)*; *see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 107 S. Ct. 1549, 95 L. Ed. 2d 39* ***[*1051]*** *(1987)* ("[P]olicy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."); *Elliot v. Fortis Benefits Ins. Co., 337 F.3d 1138, 1147 (9th Cir. 2003)* (holding that state claims that "seek[] non-ERISA damages for what are essential claim processing causes of action[]" are preempted). Plaintiffs' allegations that the subscribers "paid more for ONS services" and that providers "received less for providing **[**120]** ONS services" are claims for benefits under ERISA plans that are preempted by federal law. *SAC* ¶ 479. WellPoint Defendants motion to dismiss the ERISA Plaintiffs' Cartwright Act claim is GRANTED WITH LEAVE TO AMEND.

2. The Cartwright Act Claim by non-ERISA Plaintiffs

Defendants seek dismissal of the non-ERISA Plaintiffs' Cartwright Act claim "for the same three reasons Plaintiffs' Sherman Act claim should be dismissed." *Mot.* 47:23-24; *see also UHG Mot.* 7:9-18. WellPoint Defendants base that argument on the Ninth Circuit's holding that analysis under the Cartwright Act "mirrors analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act." *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. For the reasons stated above, the non-ERISA Plaintiffs' have adequately pleaded a Sherman Act violation, and they have also adequately pleaded a Cartwright Act violation. In this respect, Defendants' motion is DENIED.

IV. Conclusion

The Court GRANTS in part and DENIES in part Defendants' Motions to Dismiss as follows:

1.) GRANTS Defendants' Motion to Dismiss for Plaintiffs' lack of standing to assert claims for non-Ingenix ONS Benefits

2.) DENIES **[**121]** Defendants' Motion to Dismiss for lack of standing for all other claims

3.) DENIES Defendants' Motion to Dismiss Plaintiffs' Sherman Act claims

4.) GRANTS WellPoint Defendants and UHG Defendants Motions to Dismiss Plaintiffs' RICO claims

5.) DENIES Defendants' Motion to Dismiss Plaintiffs' ERISA *§ 1132(a)(1)(B)*, *§ 1132(a)(2)*, and *§ 1132(a)(3)* claims.

6.) GRANTS Defendants' Motion to Dismiss Plaintiffs' ERISA *§ 1132(c)* claim.

7.) DENIES Defendants' Motion to Dismiss Plaintiffs' Breach of Contract claims

8.) DENIES Defendants' Motion to Dismiss Plaintiffs' Implied Covenant of Good Faith and Fair Dealing claims

9.) GRANTS Defendants' Motion to Dismiss Plaintiffs' fraud-based California Unfair Competition and False Advertising claims

10.) DENIES Defendants' Motion to Dismiss Plaintiffs' unfair and unlawful California Unfair Competition claims

11.) DENIES WellPoint Defendants' Motion to Dismiss Plaintiffs' *N.Y. Gen. Bus. Law § 349* claim

12.) GRANTS UHG Defendants' Motion to Dismiss Plaintiffs' *N.Y. Gen. Bus. Law § 349* claim

13.) DENIES WellPoint Defendants' Motion to Dismiss Plaintiffs' California **[*1052]** Cartwright Act claim for Non-ERISA Plaintiffs

14.) GRANTS WellPoint Defendants' Motion to Dismiss Plaintiffs' **[**122]** California Cartwright Act claim for ERISA Plaintiffs

All dismissed claims are dismissed WITH LEAVE TO AMEND, except for Plaintiffs' ERISA *§ 1132(c)* claim, which is dismissed WITHOUT LEAVE TO AMEND. Plaintiffs must file a Third Amended Complaint within **60 days** of the date of this Order. This Order renders the Motion for Partial Stay of Discovery Limited to Non-Ingenix Issues Pending Resolution of Defendants' Motion to Dismiss MOOT. *See* Dkt. #147.

IT IS SO ORDERED.

End of Document

RealPage, Inc. v. Yardi Sys.

United States District Court for the Central District of California, Western Division

August 11, 2011, Decided; August 11, 2011, Filed

Case No. CV 11-00690 ODW (JEMx)

Reporter
2011 U.S. Dist. LEXIS 90095 *; 2011 WL 3565112

RealPage, Inc., Counter-Claimant, v. Yardi Systems, Inc., Counter-Defendant.

Subsequent History: Motion granted by, Motion denied by, in part, Objection overruled by *Yardi Sys. v. RealPage, Inc., 2011 U.S. Dist. LEXIS 164790 (C.D. Cal., Sept. 6, 2011)*

Motion granted by, in part, Motion denied by, in part, Claim dismissed by *RealPage, Inc. v. Yardi Sys., 852 F. Supp. 2d 1215, 2012 U.S. Dist. LEXIS 17281 (C.D. Cal., Feb. 13, 2012)*

Core Terms

intentional interference, software, alleges, cloud, prospective economic advantage, antitrust, host, tying arrangement, fails, bid, motion to dismiss, computing, interfere, economic relations, antitrust claim, instant motion, trade secret, Counterclaim, disruption, argues

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Judges: HON. OTIS D. WRIGHT, II, UNITED STATES DISTRICT JUDGE.

Opinion by: OTIS D. WRIGHT, II

Opinion

ORDER **GRANTING IN PART** AND **DENYING IN PART** COUNTER-DEFENDANT'S MOTION DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) [40] [Filed 06/16/11]

I. INTRODUCTION

Pending before the Court is Counter-Defendant Yardi Systems, Inc.'s ("Yardi") Motion to Dismiss Counter-Claimant RealPage, Inc.'s ("RealPage") First Amended Counterclaim ("FACC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. No. 40.) RealPage filed an Opposition **[*2]** to the instant Motion, to which Yardi filed a Reply. (Dkt.

Nos. 44, 51.) Having carefully considered the papers filed in support of and in opposition to the instant Motion, the Court deems the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. For the following reasons, Yardi's Motion to Dismiss is **GRANTED in PART** and **DENIED in PART.**

II. FACTUAL BACKGROUND

RealPage and Yardi are competitors in the real property management and accounting business. (FACC ¶¶ 1, 2.) Perhaps Yardi's greatest success has been its popular Voyager software — a computer program used to integrate property management functions and accounting. (FACC ¶¶ 2, 39.) Voyager can be installed on a computer — known as the "on-premises" approach — or clients can remotely access their version of the program stored on Yardi's servers via the Internet — known as the Application Service Provider ("ASP") approach. (*Id.*) RealPage, on the other hand, markets a version of cloud computing it calls Software-as-a-Service (the "SaaS"), whereby it offers "vertically-integrated" systems and support designed specifically to address the needs of multifamily real estate owners and property managers throughout **[*3]** the United States. (FACC ¶ 3.) The SaaS allows RealPage clients to aggregate applications from multiple software providers into a single system, which is stored on RealPage's servers and can be remotely accessed by the client via the Internet. (FACC ¶ 4.) Both the ASP approach and SaaS require clients to pay an additional fee for the service. (FACC ¶¶ 2, 4.) RealPage claims the greatest benefit of the SaaS is that it involves only a single version of software code accessed by all clients, thus requiring developers of third-party applications to maintain only one version of their code and causing the cost of ownership to be reduced. (FACC ¶ 5.) Yardi's ASP approach requires a different code stream for each client resulting in higher-end costs. (*Id.*)

RealPage alleges that rather than innovate and invest in a superior cloud system, Yardi sought to impede and sabotage the growth of the SaaS in an effort to stay competitive with, and not lose business to, RealPage. (FACC ¶ 12.) One way in which Yardi allegedly sought to impede and sabotage RealPage was by and through Joe Hendrix ("Hendrix"), an employee of a significant client of both Yardi and RealPage ("Client X"). (FACC ¶ 30.) While at **[*4]** Client X, Hendrix moved the company's data center to the SaaS. (FACC ¶¶ 29, 30.) Recognizing Client X would no longer have need for his services after its IT department was outsourced to RealPage, Hendrix interviewed for and was hired as the Chief Information Officer at RealPage. (FACC ¶ 30.) Per Client X's request, Hendrix was permitted to wind down his responsibilities with Client X while also working for RealPage, but he was subject to the provisions of a Mutual Confidentiality Agreement. (FACC ¶¶ 30, 31.) This agreement indicated that Hendrix was forbidden to disclose any propriety information regarding RealPage's business model, strategy, or current and prospective clients for two year from the date of the contract. (FACC ¶ 31.)

RealPage further alleges that, at this same time and with Yardi's knowledge, Hendrix was acting as a mole for Yardi. (FACC ¶ 32.) As such, Hendrix provided Yardi with: (a) RealPage data center and disaster recovery architecture; (b) RealPage technology used to monitor and improve the operation of third-party applications; (c) RealPage process methods for change, problem, and release management; (d) detailed and proprietary descriptions of the SaaS; and **[*5]** (e) the confidential details of RealPage's bids for large Yardi clients. (FACC ¶¶ 32, 33.) Furthermore, after participating in sales calls, strategy discussion, and receiving information regarding RealPage hardware and software, Hendrix abruptly announced he had accepted a position with Yardi to expand its Texas operations. (FACC ¶ 32.) Then, within three weeks of Hendrix departure from RealPage, Yardi began offering a vertically-integrated service called Yardi Cloud Services, allegedly modeled on the SaaS. (FACC ¶ 34.)

RealPage also claims Yardi initiated a campaign to force its Voyager clients, through threats and intimidation, into anti-competitive exclusionary contracts, the terms of which allegedly stated that unless clients agreed not to use the SaaS, they would face termination of their licencing agreements. (FACC ¶ 39.) Moreover, because Voyager is a critical back-office application without a suitable alternative program, businesses faced high switching costs if they were to terminate their license agreements with Yardi and change platforms. (*Id.*) Examples of this misconduct was allegedly manifested in relation to five RealPage clients ("Clients 1-5," respectively).

Client 1, **[*6]** a large property management firm and user of Voyager, entered into a Letter Agreement for Interim Services with RealPage (the "Letter Agreement"). (FACC ¶ 42.) The Letter Agreement indicated, among other things, that Client 1's affiliate would continue to support any Yardi applications until RealPage and Client 1 entered into an additional agreement, called the Cloud Service Agreement, at a later date. (Reply, Exh. 1 at 2, 6.) RealPage alleges that Yardi would not modify its licensing agreement to allow Client 1 to use Voyager on the SaaS; rather it "advised Client 1 that it could not continue with the Letter Agreement for Interim Services or any future contemplated agreements with RealPage." (*Id.*) Subsequently, Client 1 announced that it could not use the SaaS, and RealPage was deprived of over $100,000 annually. (*Id.*)

Client 2, a top ten property management firm and user of Voyager, moved to RealPage's SaaS for most of its IT needs, including the hosting of Voyager. (FACC ¶ 43.) Although Yardi had initially refused to bid for Client 2's third party hosting and outsourcing of related IT services, Hendrix, who had participated in sales calls to Client 2 and acquired substantial confidential **[*7]** information including detailed bid information, strongly encouraged Yardi to recapture Client 2's business. (FACC ¶¶ 43, 44.) Yardi consequently aggressively bid for Client 2's business. [1] (*Id.*) Additionally, Clients 2-A and 2-B, both customers of Client 2, were affected by Yardi's campaign against RealPage in that Yardi would not allow RealPage to implement Client 2-A's software interface, nor would Yardi allow RealPage to support Client 2-B's upgraded software. (FACC ¶ 46.)

Client 3, another multifamily and commercial real estate owner, agreed to move its data center to the SaaS. (FACC ¶ 47.) During the migration, however, Yardi allegedly demanded that Client 3 not use the SaaS, nor associate itself with RealPage. (*Id.*) Subsequently, Client 3 decided not to use the SaaS to host its Voyager software and RealPage lost the revenue it would have generated managing that application. (*Id.*)

RealPage also alleges Yardi repeatedly interfered with RealPage's subsidiary consulting company, EverGreen, and EverGreen's relationships with its existing and prospective consulting **[*8]** clients. (FACC ¶ 48.) One such instance occurred when EverGreen was in the process of negotiating a consulting contract with Client 4. (*Id.*) Negotiations were supposedly interrupted, however, when Yardi told Client 4 that it would not work with EverGreen, and Client 4 — not wanting to "be a casualty in" a strained relationship between the two companies — decided not to enter into the consulting contract. (*Id.*)

Finally, RealPage alleges Yardi interfered with Client 5's ability to transition from Voyager to RealPage's SaaS property management software, OneSite. (FACC ¶ 49.) Yardi allegedly accomplished this by changing its practice of allowing transitioning clients to maintain read-only access to historical data on Voyager, and supposedly intending to cut off Client 5's access in the future. (*Id.*)

In response to Yardi's January 24, 2011 Complaint, RealPage filed a Counterclaim on March 28, 2011, followed by the FACC on May 18, 2011. The FACC proceeds on six claims: (1) misappropriation of trade secrets; (2) violation of *Section 1* of the Sherman Antitrust Act; (3) violation of the California Cartwright Act; (4) intentional interference with a contract; (5) intentional interference with **[*9]** a prospective economic advantage; and (6) unfair competition in violation of the *California Business and Professions Code section 17200*, also known as the Unfair Competition Law ("UCL"). Subsequently, Yardi filed the instant Motion to Dismiss on June 16, 2011.

III. LEGAL STANDARD

"To survive a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*, a complaint generally must satisfy only the minimal notice pleading requirements of *Rule 8(a)(2)*." *Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003)*. *Rule 8(a)(2)* requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. For a complaint to sufficiently state a claim, its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Dismissal under *Rule 12(b)(6)* can be based on "the lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696,*

[1] The FACC does not indicate whether Yardi was successful at recapturing Client 2's business or if Client 2 remained with RealPage.

699 (9th Cir. 1990). Mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Id.* **[*10]** Rather, to overcome a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement of relief." *Id.* (internal citation and quotation marks omitted).

When considering a 12(b)(6) motion, a court is generally limited to considering material within the pleadings and must construe "[a]ll factual allegations set forth in the complaint . . . as true and . . . in the light most favorable to [the plaintiff]." *See* *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)* (citing *Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996))*. A court is not, however, "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. **[*11]** [2]

IV. DISCUSSION

Yardi argues that five of RealPage's counterclaims fail to state any claim upon which relief can be granted. [3] First, Yardi contends RealPage's antitrust claims under the Sherman Antitrust Act and the California Cartwright Act fail to: (a) properly allege *per se* tying, (b) define the relevant market affected by Yardi's alleged conduct, (c) allege market power, (d) allege harm to competition, and (e) identify any agreement in restraint of trade. Second, Yardi argues RealPage's claim for intentional interference with a contract does not allege an actual breach or disruption of any contract between RealPage and a third party. Third, Yardi contends that the claims for intentional interference with a prospective economic advantage **[*12]** and unfair competition fail to the extent they rely on RealPage's flawed antitrust and contractual interference claims. The Court addresses each argument in turn.

A. REALPAGE'S ANTITRUST CLAIMS

RealPage brings two claims under federal and state antitrust statutes: (1) *15 U.S.C. § 1* (" § 1"), or the Sherman Antitrust Act; and (2) the California Cartwright Act — *section 16727 of the California Business and Professions Code*. [4] While *§ 1* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ," the Supreme Court has narrowed its definition to only prohibit unreasonable restraints of trade. *See* *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. In this case, Yardi challenges RealPage's antitrust claims on the ground that RealPage **[*13]** fails to allege either a "rule of reason" or a *per se* tying agreement. (Mot. at 6-7; Reply at 2-3, 6, 12.)

Both *§ 1* and *section 16727* prohibit illegal tying arrangements. *Blough v. Holland Realty, Inc., 574 F.3d 1084, 1088 (9th Cir. 2009)*; *Nicolosi Distrib., Inc. v. BMW of N.A., No. 10-03256, 2011 U.S. Dist. LEXIS 44544, 2011 WL*

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[2] To the extent the Court relies on any documents not attached directly to the FACC, those documents are mentioned in the FACC and are thereby incorporated by reference. Furthermore, "[a] trial court may presume that public records are authentic and trustworthy," *Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir. 1999)*, and, thus, fall within the purview of *Federal Rule of Evidence 201*. *See* *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)*.

[3] Yardi does not bring any argument in the instant Motion against RealPage's first claim for misappropriation of trade secrets. In light of the allegations levied against Yardi for willfully and maliciously misappropriating RealPage's trade secrets by means of Hendrix, (see FACC ¶¶ 51-57), and because Yardi failed to provide any argument to the contrary, this claim survives the Motion to Dismiss.

[4] While the FACC merely states in a head note that RealPage is bringing its third counterclaim under the California Cartwright Act, it does not allege any specific section under the Act. (FACC at 28.) Therefore, the Court is forced to rely upon RealPage's Opposition which makes reference to *section 16727*. (Opp'n at 5.)

1483424, at *2 (N.D. Cal. Apr. 19, 2011). "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier.'" Image Technical Service, Inc. v. Eastman Kodak Co., 903 F.2d 612, 615 (9th Cir. 1990) (quoting Northern Pac. Ry. Co. V. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)); Blough, 574 F.3d at 1088 (a tying arrangement is where a party ties "two products or services together, whereby 'the seller conditions the **[*14]** sale of one product (the tying product) on the buyer's purchase of a second product (the tied product).'") (quoting *Cascade Health Solution v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008))*.

Before the Court attempts to analyze the five different ways Yardi argues RealPage failed to state an antitrust claim, it must first determine if there is a tying arrangement such that Yardi's conduct would be subject the aforementioned antitrust statutes. RealPage asserts that the tying product, Yardi's Voyager software, is tied to Yardi's "anticompetitive exclusionary agreements," which preclude Yardi clients from using Voyager on the SaaS. (FACC ¶ 59.) Based solely upon these criteria, Yardi's Voyager program and its exclusionary licensing agreement appear to fall within bounds of an illegal tying agreement. The Court, however, cannot overlook the full definition of a tied product. As explained above, for an illegal tying arrangement to exist, the sale of the Voyager software must be conditioned upon the purchase of cloud computing, or at least the non-purchase of cloud computing from RealPage. Yet, the facts indicate that Voyager software does not have to be used with *any* cloud computing services. **[*15]** (FACC ¶¶ 2, 39.) Indeed, clients can elect to use the on-premise approach whereby they can install the software on their own computers and manage it themselves. (*Id.*) Thus, because Yardi does not tie the sale of Voyager with a tied product, *i.e.* the purchase of cloud computing or the non-purchase of cloud computing from RealPage, the facts as pleaded do not fit the definition of a tying arrangement. Therefore RealPage fails to allege that Yardi engaged in an illegal tying arrangement. Consequently, RealPage's antitrust claims against Yardi fail and Yardi's Motion is **GRANTED** as to these claims.

B. REALPAGE'S CLAIMS FOR INTENTIONAL INTERFERENCE WITH A CONTRACT AND FOR INTENTIONAL INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE

As an initial matter, the only contract at issue in this case is the Letter Agreement between RealPage and Client 1. Indeed, RealPage does not allege there was a valid contract between it and Clients 2, 2-A, 2-B, 3, 4, 5, or that such a contract was breached by Yardi's actions. RealPage does, however, allege that Yardi interfered with the prospective economic advantage as to all Clients. The Court first addresses the issues as they relate to Client 1.

The elements **[*16]** of an action for intentional interference with a contract are "'(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.'" Hahn v. Diaz-Barba, 194 Cal. App. 4th 1177, 1197, 125 Cal. Rptr. 3d 242 (2011) (quoting Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998)). "A refusal to deal is one means by which a person may induce another to commit a breach of his contract with a third person." Restatement (Second) of Torts § 766 cmt. k (1979). A claim for intentional interference with a prospective economic advantage is comprised of the same elements as intentional interference with a contract in that it requires evidence of an economic relationship with a probability of future economic benefit, but some additional wrongful conduct other than the alleged interference is required. J.A. Savage v. Pacific Gas and Elec. Co., 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305 (Ct. App. 1994); Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003).

The Letter Agreement **[*17]** provides that RealPage will not host the Yardi software, but that an affiliate of Client 1 will provide these hosting services. (Reply, Exh. 1 at 2.) While the Letter Agreement further states that RealPage will begin to host these services upon the execution of an additional agreement called the Cloud Service Agreement, the prospective Cloud Service Agreement never materialized. Thus, although contemplated, RealPage and Client 1 never had an actual agreement whereby RealPage would host any Yardi applications. Indeed, the contract only provides that Client 1's affiliate will host these services. None of Yardi's alleged actions interfere with

Client 1's affiliate's ability to host these services. Consequently, RealPage's claim for intentional interference with a contract fails. Moreover, to the extent that RealPage argues that Yardi's failure to modify the licensing agreement constitutes intentional interference with a contract, in light of the foregoing, this argument also fails. In essence, the prospective Cloud Service Agreement cannot be said to be an actual contract. Rather, it is a prospective economic advantage.

For Yardi to have interfered with RealPage's prospective economic **[*18]** advantage as to Clients 1, 2, 2-A, 2-B, 3, 4, and/or 5, not only must the FACC properly plead the above mentioned elements for this tort, but RealPage must also "allege an act that is wrongful independent of the interference itself." *CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1108 (9th Cir. 2007)*. Here, RealPage alleges Yardi's conduct was independently tortious or unlawful because Yardi restrained trade and competition in violation of the aforementioned ***antitrust law***. (FACC ¶ 79.) Moreover, RealPage also claims Yardi acted wrongfully when it "used RealPage's own trade secrets, obtained unlawfully by Yardi, to unfairly compete against RealPage and to interfere with RealPage's client relationships." (*Id.*)

To the extent RealPage bases Yardi's wrongful conduct upon violation of ***antitrust law***, the Court has already determined those claim to be improperly pleaded. Therefore, the Court finds any reliance upon them to be unavailing. To the extent RealPage RealPage claims Yardi used the proprietary information unlawfully provided to it by Hendrix as to interfere with any prospective economic advantage, it does so only as to Client 2. (FACC ¶ 43.) No such allegations **[*19]** exist as to Clients 1, 2-A, 2-B, 3, 4, and 5. Therefore, the Court need only to look at whether Yardi acted wrongfully in its alleged attempt to interfere with the prospective economic advantage between RealPage and Client 2, and whether RealPage has properly alleged all the elements of this tort against Yardi as to Client 2.

RealPage claims that its prospective economic relationship with Client 2 was damaged when, at Hendrix's encouragement and with Hendrix's possession of proprietary information, Yardi began to bid for Client 2's third-party hosting services. The Court has already acknowledged that RealPage's claim for misappropriation of trade secrets has not been challenged in the context of the instant Motion. Thus, for purposes of the instant Motion, the Court presumes that the FACC properly asserts Yardi acted wrongfully as to Client 2. It is also true that RealPage asserts a valid expectation between it and Client 2, and that Yardi was aware of this expectation and intentionally sought to disrupt or interfere with the relationship. (*See* FACC ¶¶ 43-44, 77-78.) Yet, the FACC falls short of alleging any actual disruption or breach of the prospective economic relationship between **[*20]** RealPage and Client 2.

RealPage only alleges Yardi attempted to interfere with the prospective economic relationship between RealPage and Client 2 by using the unlawful proprietary information to aggressively bid for Client 2's business. The FACC remains vague and ambiguous as to whether Yardi's aggressive bids toward Client 2 had any effect upon the potential economic relationship or if it caused Client 2 to walk away from a potential contract with RealPage. Moreover, the FACC does not allege any damages caused to RealPage by Yardi's actions towards Client 2. Rather, the FACC implies that Yardi's attempts to intimidate Client 2 failed. (*See* FACC ¶ 46). Consequently, RealPage fails to properly plead the final two elements for intentional interference of a prospective economic advantage — actual breach and resulting damage. Accordingly, Yardi's Motion is **GRANTED** as to both intentional interference claims.

C. REALPAGE'S UCL CLAIM

UCL *section 17200*, indicates that a claim may be brought against a party for any "unlawful, unfair, or fraudulent business act or practice . . . ." "An act is 'unlawful' under *section 17200* if it violates an underlying state or federal statute or common law . . **[*21]** . . An act is 'unfair' if the act threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law . . . . A practice is 'fraudulent' if members of the public are likely to be deceived . . . ." *Quintero Family Trust v. OneWest Bank, F.S.B., No. 09-CV-1561-IEG, 2010 U.S. Dist. LEXIS 6618, 2010 WL 392312, at *12 (S.D. Cal. Jan. 27, 2010)*.

Yardi argues that because RealPage's other claim fail, the UCL claim fails to the extent that it relies upon the other claims. RealPage's claim for misappropriation of trade secrets, however, has not been challenged. Therefore, it provides a sufficient foundation for RealPage's UCL claim against Yardi. Consequently, Yardi's Motion is **DENIED** as to this claim.

V. CONCLUSION

For of the foregoing reasons, RealPage's claims against Yardi for misappropriation of trade secrets and violation of the UCL survive Yardi's Motion to Dismiss. Accordingly, Yardi's Motion to Dismiss is **DENIED** as to these claims. As to its antitrust and intentional interference claims, however, RealPage fails to properly state a claim upon which relief can be granted. Accordingly, Yardi's Motion **[*22]** to Dismiss is **GRANTED** as to these claims. If it so chooses, RealPage may amend these claims if it can, in good faith, allege facts to support them. Any amended counterclaim must be filed within thirty (30) days of the date of this Order.

IT IS SO ORDERED.

August 11, 2011

/s/ Otis D. Wright, II

HON. OTIS D. WRIGHT, II

UNITED STATES DISTRICT JUDGE

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In re Wellbutrin XL Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

August 12, 2011, Decided; August 15, 2011, Filed

CIVIL ACTION NO. 08-2433 (Indirect)

Reporter

282 F.R.D. 126 *; 2011 U.S. Dist. LEXIS 90697 **; 2011 WL 3563835

IN RE: WELLBUTRIN XL ANTITRUST LITIGATION

Subsequent History: Summary judgment granted by, in part *In re Wellbutrin XL Antitrust Litig., 2012 U.S. Dist. LEXIS 66312 (E.D. Pa., May 11, 2012)*

Prior History: *In re Wellbutrin XL Antitrust Litig., 2011 U.S. Dist. LEXIS 90075 (E.D. Pa., Aug. 11, 2011)*

Core Terms

generic, purchases, antitrust, hydrochloride, bupropion, branded, overcharge, class member, extended-release, prices, entities, class certification, named plaintiff, plaintiffs', defendants', parties, consumer protection, damages, transactions, indirect, choice of law, substitution, class representative, class period, class-wide, class action, methodology, predominate, intervene, but-for

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Judges: MARY A. McLAUGHLIN, J.

Opinion by: MARY A. McLAUGHLIN

Opinion

[*131] MEMORANDUM

McLaughlin, J.

The plaintiffs are a group of indirect purchasers of Wellbutrin XL, a once-a-day antidepressant, who are suing the producers of Wellbutrin XL (Biovail Corp., Biovail Laboratories, and Biovail Laboratories International (together, "Biovail")), and its distributors (SmithKline Beecham Corp. and GlaxoSmithKline PLC (together, "GSK")), for illegally conspiring to prevent generic versions of Wellbutrin XL from entering the American market. The plaintiffs seek to certify a class of end-purchasers and third-party payors ("TPPs") under the antitrust and/or consumer protection laws of six states.

The defendants contend that the plaintiffs have failed to meet several requirements for class certification under *Federal Rule of Civil Procedure 23*. The defendants' primary argument against certification is that common issues do not predominate over individual issues for antitrust impact and damages. The defendants argue that antitrust impact may not be inferred for TPPs without individualized **[**4]** evidence. The defendants also argue that individual proof will be required for measuring damages because different class members paid different amounts for Wellbutrin XL and its generic equivalents. Class certification, the defendants argue, will also require a choice of law analysis to determine if named plaintiffs have claims under the six states at issue in this case.

The Court concludes that the plaintiffs have demonstrated that common issues will predominate and that the *Rule 23* requirements for class certification have been met. The Court, however, will exclude from the class definition entities that did not purchase generic extended-release buproprion hydrochloride in a class state after it became available. The Court will therefore grant in part and deny in part the plaintiffs' motion.

I. Background and Procedural History

This case is brought by several "employee welfare benefit plans" and "employee benefit plans" [1] and Aetna Health of California (collectively, "indirect purchaser plaintiffs" or "plaintiffs"). On March 26, 2009, the plaintiffs filed their first amended complaint seeking treble damages for the defendants' alleged unlawful exclusion of generic versions of Wellbutrin **[**5]** XL through the filing of sham patent litigation.

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[1] These plans include Plumbers and Pipefitters Local 572 Health and Welfare Fund ("Local 572"), IBEW-NECA Local 505 Health and Welfare Plan ("Local 505"), Painters District Council No. 30 Health and Welfare Fund ("D&C 30"), Mechanical Contractors-United Association Local 119 Health and Welfare Plan ("Local 119"), and Bricklayers and Masons Union Local Union No. 5 Ohio Health and Welfare Fund ("Local Union No. 5")

On July 30, 2009, the Court granted in part and denied in part the defendants' motions to dismiss. At the motion to dismiss stage, the Court concluded that it must address issues of standing prior to class certification. See Wellbutrin XL, 260 F.R.D. 143, 151 (E.D. Pa. 2009). The Court concluded that the named plaintiffs have standing "in those states where the named plaintiffs are located or their members reside or in which the named plaintiffs reimbursed purchases of Wellbutrin XL made by its members." See Wellbutrin XL, 268 F.R.D. 539, 541 (E.D. Pa. 2010).

The Court's formulation of standing was intended to encompass the full scope of the plaintiffs' standing under Article III of the Constitution and prudential limitations. See **[**6]** Wellbutrin XL, 260 F.R.D. at 152. By the terms of the decision, the Court did not purport to address whether the named plaintiffs would have claims under choice-of-law principles. See id. at 155 n.5 ("[T]he issue of . . . standing to assert a particular claim **[*132]** . . . does not depend on choice of law or on class certification.").

The Court subsequently denied Aetna Inc.'s motion to intervene on behalf of the entire proposed class, but allowed the subsidiary Aetna Health of California Inc. ("Aetna") to intervene for California claims. See In re Wellbutrin XL Antitrust Litig., 268 F.R.D. 539, 547 (E.D. Pa. 2010) (denying Aetna, Inc.'s motion to intervene on behalf of the entire proposed class); Sept. 21, 2010 Order (Docket No. 200) (granting Aetna Health of California Inc.'s motion to substitute as a class representative for California claims).

On December 22, 2010, the Court granted the plaintiffs leave to amend their complaint to assert a claim under New York's Donnelly Act in light of the Supreme Court decision, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010). See In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 682 (E.D. Pa. 2010). The plaintiffs **[**7]** submitted a second amended complaint on January 7, 2011.

The plaintiffs' complaint alleges that the defendants conducted a four-part scheme to delay the entry of generic equivalents of Wellbutrin XL into the market, primarily by misusing patent litigation. Specifically, the plaintiffs allege that the defendants (1) filed three sham patent litigations, (2) filed a sham listing with the FDA's Approved Drug Products with Therapeutic Equivalence Evaluation (the "Orange Book") (3) filed a baseless FDA citizen petition and suit against the FDA, and (4) formed agreements with potential generic competitors. The plaintiffs contend that the effect of these activities was to delay the market entry of cheaper, generic alternatives to Wellbutrin XL. The plaintiffs contend that this scheme caused 300 mg generic extended-release bupropion hydrochloride to enter the market in December, 2006 instead of in November, 2005 and that the scheme prevented entry of 150 mg generic extended-release bupropion hydrochloride until May, 2008.

The plaintiffs have successfully pled antitrust claims arising under the laws of California, New York, Nevada, Tennessee and Wisconsin, and consumer protection claims arising **[**8]** under the laws of California and Florida. See Wellbutrin XL, 260 F.R.D. at 168; Wellbutrin XL, 756 F. Supp. 2d at 682. [2]

The plaintiffs argue that class members have been injured by the defendants' alleged exclusionary conduct in two ways. First, the plaintiffs argue that they overpaid for each purchase of generic extended-release bupropion hydrochloride. According to the plaintiffs' expert, prices for generic drugs decrease rapidly after they enter the market. The plaintiffs argue that each actual generic purchase would have cost less if generics had entered the market earlier. The Court will refer to this theory as the "generic overcharge theory."

Second, the plaintiffs assert that TPPs were overcharged if they purchased Wellbutrin XL prior to generic **[**9]** entry. The TPPs theory of impact for purchases of branded Wellbutrin XL is that TPP class members paid an illegal overcharge when they purchased Wellbutrin XL because they would have substituted some branded purchases for cheaper generics, but for the alleged exclusionary conduct. The Court will refer to this theory as the

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[2] The statutes are often referred to as "Illinois Brick-repealers." In Illinois Brick, the Supreme Court prohibited federal antitrust suits by indirect purchasers. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). Following Illinois Brick, a number of states passed "Illinois Brick repealers," which established the right of an indirect purchaser to bring an antitrust claim under state law. See Wellbutrin XL, 756 F. Supp. 2d at 676 n.1.

"branded overcharge theory." Under this theory, the plaintiffs include both entities that purchased generic Wellbutrin XL and entities that did not purchase generic Wellbutrin XL after it became available. [3]

On September 30, 2010, the Honorable Lawrence F. Stengel denied class certification **[*133]** in a case that alleged unlawful delay of generic entry for another bupropion product, Wellbutrin SR. Judge Stengel expressed several concerns regarding whether antitrust impact could be proven with common **[**10]** evidence, particularly for individuals who would continue to purchase branded drugs after generic entry (so-called "brand loyalists") and individuals who paid the same co-pay for branded and generic drugs (so-called "flat co-payers"). See *Wellbutrin SR, 2010 U.S. Dist. LEXIS 105646, *85-87 (E.D. Pa. Sept. 30, 2010)*. [4]

In response to the Wellbutrin SR class certification decision, on October 28, 2010, the indirect purchasers submitted an amended class definition in this case to address some of Judge Stengel's concerns. See Docket No. 217. The plaintiffs' revised class definition purported to exclude all end-payors that did not purchase generic XL (thereby eliminating so-called "brand loyalists") as well as "flat co-payers." This revision, however, had the effect of excluding several named TPP plaintiffs that had not made generic extended-release bupropion hydrochloride purchases in class states. On November 30, 2010, **[**11]** the plaintiffs then submitted a "corrected" revised class definition to reincorporate TPPs whether or not they had purchased generic extended-release bupropion hydrochloride. See Docket No. 226. The current proposed class is:

> All persons or entities who purchased an AB-rated generic bioequivalent of Wellbutrin XL ("generic XL") at any time during the "Class Period" (hereafter defined) and all entities that purchased 150 mg or 300 mg Wellbutrin XL before an AB-rated generic bioequivalent was available for such dosages, and resided or had their place of business, or purchased the drug in California, Florida, Nevada, New York, Tennessee and Wisconsin. For purposes of the Class definition, persons and entities purchased Wellbutrin XL or generic XL if they paid some or all of the retail purchase price.
> Excluded from the Class are "flat co-payers" meaning natural persons whose only purchases of generic XL were made pursuant to contracts with third party payers ("TPP") whereby the amount paid by the natural person for generic XL was the same regardless of the retail purchase price.
>
> The Class Period begins November 14, 2005 and ends on the earlier of the date of judgement or the date (to be determined) **[**12]** when the price of generic XL reached or reaches "steady state," i.e. the price was no longer higher than it would have been on that date but for the delayed availability of generic XL caused by Defendants' alleged illegal conduct.

Pls.' Second Am. Compl. ¶ 184 (Docket No. 249). The plaintiffs' counsel notified the Court that they intended the class period to end on April 29, 2011. See Notes of Testimony, Class Certification Hr'g, April 29, 2011 ("N.T.") at 13 (Docket No. 317).

The Court held a day-long evidentiary hearing on the plaintiffs' motion for class certification on April 29, 2011. The plaintiffs presented the testimony of Professor Meredith Rosenthal and the defendants presented the testimony of Dr. Andrew Joskow. [5] On May 27, 2011, the Court held oral argument on the plaintiffs' motion. The parties then submitted two rounds of supplemental briefing to address choice of law and other issues.

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[3] The plaintiffs have excluded individual purchasers from the "branded overcharge theory" to avoid problems with showing impact to individuals who continue to purchase branded Wellbutrin XL after generic entry or individuals who are subject to the same co-pay for either branded or generic drugs. See *Wellbutrin SR, 2010 U.S. Dist. LEXIS 105646, at *85-87 (E.D. Pa. Sept. 30, 2010)*.

[4] The Court notes that it does not disagree with the Wellbutrin SR court's denial of class certification. The plaintiffs in Wellbutrin SR failed to demonstrate that class-wide evidence was available to show antitrust impact for a substantial portion of the proposed class.

[5] Both experts are highly qualified. Professor Meredith Rosenthal has a Ph.D. in health policy from Harvard University and she is Professor of Health Economics and Policy at the Harvard School of Public Health. Dr. Andrew Joskow has a Ph.D. in economics

A related law suit has been filed by direct purchasers of Wellbutrin XL for violations of federal ***antitrust law***. The Court granted in part and denied in part the plaintiff's motion for class certification. See *In re Wellbutrin XL Antitrust Litigation, No. 08-2431 (direct)* (Docket Nos. 368, 369).

[*134] II. Choice of Law Analysis

After the Court's decisions on the motion to dismiss, Aetna's motion to intervene, and the addition of New York as a potential class state, there were six states under which the named plaintiffs potentially had claims. These were states where the named plaintiffs either had their principal place of business or paid for purchases at pharmacies in the state. Aetna had been explicitly allowed to intervene to represent California so California was the only state for which Aetna was, at that point, a class representative. The states and potential class representatives were:

State	**Entity**
Florida	Local 505
Nevada	Painters No. 30
New York	Local 505
Wisconsin	Painters No. 30
California	Aetna
Tennessee	Local 572

The defendants contend that at the class **[**14]** certification stage, the Court must do a choice of law analysis to decide if the named plaintiff designated to represent a certain state has a claim under that state's law and can be a class representative. The defendants argue that the law of the location of the named plaintiff should govern with the result that the only two states with class representatives who have principal places of business in those states are California (Aetna) and Tennessee (Local 572). The plaintiffs contend that the location of the pharmacy where the prescriptions were filled should control and the law of that state should govern. [6] That would lead to six states with class representatives except that the designated class representatives for Wisconsin and New York did not make any generic purchases in that state and under the Court's analysis below, they do not have a claim. In that situation, the plaintiffs seek to have Aetna represent not just California but also Wisconsin and New York where Aetna has paid for purchases of generic drugs.

Although the parties do discuss this issue as choice of law and, therefore, the Court will conduct such an analysis, another way to frame the issue is whether an out-of-state plaintiff would have a claim under the law of the particular state under consideration. To put it another way, could Aetna state a claim under New York law for purchases it made in New York even though it is a resident of California?

The Court, exercising diversity jurisdiction, must apply the choice of law rules of Pennsylvania, the forum in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. The first step in a choice of law analysis under Pennsylvania law is to determine whether an actual or true conflict exists between the laws of the competing states. If no conflict exists, further analysis is unnecessary. If there is a conflict, the court must conduct a choice of law analysis using **[**16]** Pennsylvania choice of law principles.

In deciding whether there is a true conflict, the Court must determine whether there is a conflict between the substance of the laws of each respective potential forum. Here, for TPPs, the potentially applicable laws that have been proposed are that of the TPP's home state, and the states in which it and its members purchased Wellbutrin XL. Conflicts may exist between and among the laws of the relevant states for a given TPP. For example, the home

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from Yale University. He was the chief **[**13]** economist for the Antitrust Division of the Department of Justice. He is now Senior Vice President at National Economic Research Associates, Inc.

[6] The parties have not argued that the law of the location of the defendants' conduct (e.g., where the defendants filed patent suits) should apply. The parties have also not **[**15]** addressed the location of individual consumers because no individual consumers are named plaintiffs. In considering the law to apply to TPPs, however, the Court also considers the law to apply to individual consumers. For both groups, the Court concludes that the law of the place of purchase applies.

state of Local 505 (Alabama) does not recognize the plaintiffs' claims whereas the states in which Local 505 purchased Wellbutrin XL (New York and Florida) could provide a basis for recovery on these allegations.

In a putative class action in which the plaintiffs assert that a TPP should be able to bring claims under the laws of the location of purchase, and those claims are not cognizable **[*135]** under the laws of the TPP's home state, there will be actual conflicts between the antitrust and consumer protection laws of the relevant states. The Court, therefore, finds that there is an actual or true conflict here and will apply Pennsylvania's choice of law principles to this matter. [7]

Pennsylvania applies a "flexible rule which permits analysis of the policies and interests underlying the particular issue before the court" and directs courts to apply the law of the state with the "most interest in the problem." *Hammersmith v. TIG Ins. Co., 480 F.3d 220, 227 (3d Cir. 2007)* (quoting *Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 805-06 (Pa. 1964))*. The Court must consider each state's contacts as set forth in the Restatement (Second) of Conflict of Laws as well as a qualitative appraisal of the relevant states' policies. *Id. at 231*.

The Supreme Court has observed that "antitrust violations are essentially tortious acts . . . ." *Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 547, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (quotations omitted). For actions that sound in tort, the Restatement directs courts to consider the following contacts: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and **[**18]** (d) the place where the relationship, if any, between the parties is centered." *Rest. 2d Conflicts § 145(2)*. See also *Griffith, 203 A.2d at 802*. *Section 158(2) of the Restatement* notes that "[t]he applicable law will usually be the local law of the state where the injury occurred." *Rest. 2d Conflicts § 158(2)*.

The parties dispute where the alleged injury occurs for TPPs. The plaintiffs argue that the injury occurs at the point of sale because the pharmacy is paid in part by the insurer, much like a credit card transaction. The defendants counter that a TPP may have little or no direct connection with the place of purchase because it may use an intermediate payment agent or pharmacy benefits manager ("PBM"). The defendants also argue that none of the alleged exclusionary conduct is alleged to have taken place in New York, Nevada, Florida, or Tennessee.

The home state of a TPP undeniably has a strong interest in transactions that affect the TPP. The place of purchase likewise is a significant contact in this calculation. The place of purchase is where the relationship between the parties is centered; it is where the transaction with the alleged overcharge actually occurs. A place-of-purchase **[**19]** rule protects justified expectations because an in-state transaction will be governed by the antitrust laws and/or consumer protection laws of that state and not by the chance location of the TPP's principal place of business, the location of the TPP's PBM, or an individual purchaser's residence. This approach will also provide consistent results because all purchases within a state will be treated uniformly.

At oral argument, the Court discussed a hypothetical tourist visiting New York to see a Broadway Show who fills a prescription at a pharmacy in New York. See Tr. at 34. For that pharmaceutical purchase, as well as the tourist's purchase of theater tickets, rental of a hotel room, purchase of souvenirs, etc., that tourist is a consumer in New York. The tourist's insurance company likewise is a consumer in New York when it contributes to the payment for pharmaceuticals in New York. The Court of Appeals of New York, for example, has recognized that its consumer protection laws do not depend on the residency of the parties but rather on the location of the transactions. See *Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314, 325, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002)* ("[O]ur General Business Law analysis does not turn on **[**20]** the residency of the parties. . . . [The intent of the statute] is to protect consumers in their transactions that take place in New York State. . . . [The statute was not] intended to function as a per se bar to out-of-state plaintiffs' claims of deceptive acts leading to transactions within the state.").

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[7] When one considers Aetna, **[**17]** however, there may not be a true conflict because Aetna's home state of California does provide a potential basis for recovery.

The statutory language of the laws at issue here contain no prohibitions that would indicate **[*136]** that a state has a policy of only covering transactions that involve in-state citizens, rather than in-state transactions. See *Wellbutrin XL, 260 F.R.D. at 158-167* (discussing, among others, *Cal. Bus. & Prof. Code §§ 16700, et seq.*, *Cal. Bus. & Prof. Code § 17200*, *Fla. Stat. §§ 501.201, et seq.*, *Nev. Rev. Stat. § 598A.060, et seq.*, *N.Y. Gen. Bus. Law §§ 340, et seq.*, *Tenn. Code. Ann. §§47-25-101, et seq.*, *Wis. Stat. §§ 133.01-133.18*).

The defendants cite a Florida District Court of Appeals case for the proposition that Florida's consumer protection statute bars claims by out-of-state consumers. See *Coastal Physician Servs. of Broward County v. Ortiz, 764 So. 2d 7, 8 (Fla. Dist. Ct. App. 1999)* (stating that "non-Florida residents cannot make claims under . . . the Deceptive and Unfair Trade **[**21]** Practices Act"). Other Florida cases have reached the opposite conclusion. See *Millennium Communs. & Fulfillment, Inc. v. Office of the Attorney Gen., 761 So. 2d 1256, 1260-61 (Fla. Dist. Ct. App. 2000)* (holding that the FDUTPA does apply to commercial transactions involving non-resident consumers); *Renaissance Cruises Inc. v. Glassman, 738 So. 2d 436, 437-440 (Fla. Dist. Ct. App. 1999)* (affirming trial court's class certification that applied the FDUTPA to a class that included many non-Florida residents).

This Court has previously held that "[t]he FDUTPA contains no language that would deny relief to either non-Florida residents, or limit its reach to only in-state plaintiffs or Florida businesses." *Wellbutrin XL, 260 F.R.D. at 162*. The Court in Flonase reached a similar conclusion. See *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 537-38 (E.D. Pa. 2010)*.

The defendants also argue that TPPs do not have detailed transaction-level records in the ordinary course of business. Class notice, the defendants argue, is more effective if the reader can quickly determine whether one is a member of the class. The defendants explain that TPPs will need to obtain records from their PBMs **[**22]** to learn where pharmacy transactions occurred. This consideration, however, does not factor heavily in the ease of the application of the law to be applied, but rather addresses a party's own burden to determine if it has a claim. [8]

Upon review of the relevant state policies and contacts, the Court finds that the weight of the relevant factors in this case favors applying the law of the place of purchase to govern the transaction. The Court will therefore limit the class definition to include only purchases made within the respective states for each class state.

III. Rule 23 Analysis

To certify a class under *Federal Rule of Civil Procedure Rule 23*, a court must find that the action satisfies all four requirements of *Rule 23(a)* and at least one provision of *Rule 23(b)*. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The plaintiffs seek certification under *Rule 23(b)(3)*. *Rule 23(b)(3)* requires the court to find that questions of law or fact common to class members **[**24]** predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

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[8] Case law applying other states' choice of law rules go both ways on this issue. In In re Relafen, the United States District Court for the District of Massachusetts concluded that the more significant contact in an indirect purchaser antitrust case is the location of the sales to end payor plaintiffs. See *In re Relafen Antitrust Litig., 221 F.R.D. 260, 277-78 (D. Mass. 2004)* ("[T]he Court considers the more significant contact in this context to be the location of the injury — that is, the location of the sales to the end payor plaintiffs.").

In K-Dur, Special Master Orlofsky, applying New Jersey's government interest analysis, concluded that individual plaintiffs' claims are governed by their state of residence and TPP's claims are governed by their principal places of business. See *In re K-Dur Antitrust Litig., No. 1419, 2008 U.S. Dist. LEXIS 113310, 2008 WL 2660783, at *5 (D.N.J. Mar. 19, 2008)*. See also *In re Rezulin Prods. Liab. Litig., 392 F. Supp. 2d 597, 611 n.85 (S.D.N.Y. 2005)* **[**23]** (concluding that the TPP's loss occurred in its home state). In In re Lorazepam & Clorazepate, the United States District Court for the District of Columbia concluded that Illinois' ***antitrust law*** applied for the TPP's reimbursements for purchases made in other states. *In re Lorazepam & Clorazepate Antitrust Litig., 295 F. Supp. 2d 30, 50 (D.D.C. 2003)* (applying Illinois law to an Illinois TPP's payments for purchases subscribers made in other states).

[*137] A proper analysis under *Rule 23* requires "rigorous" consideration of all the evidence and arguments offered by the parties. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)*. A court must "consider carefully all relevant evidence and make a definitive determination that the requirements of *Rule 23* have been met before certifying a class." *Id. at 320*. Factual determinations necessary for *Rule 23* findings must be made by a preponderance of the evidence. Id. The court must resolve factual or legal disputes relevant to class certification, even if they overlap with the merits. "[W]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands." *Id. at 323*. A determination that an expert's opinion is persuasive on a *Rule 23* requirement does not preclude a different view at the merits stage of the case. *Id. at 324*.

A. *Rule 23(a)*

1. Numerosity

Rule 23(a)(1) requires a finding that the class is so numerous **[**25]** that joinder of all class members is impracticable. Although there is no precise number for establishing numerosity, classes that exceed forty or more class members generally satisfy this prerequisite. See *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met."). This requirement is easily met in this case because the plaintiffs seek to certify a class of hundreds of thousands of consumer class members and thousands of TPP class members. See, e.g., *Sheet Metal Workers Local 441 Health & Welfare Plan v. Glaxosmithkline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646, at *20-21 (E.D. Pa. Sept. 30, 2010)* ("Wellbutrin SR").

2. Commonality

Rule 23(a)(2) requires that there must be questions of law or fact common to the class. To satisfy the commonality requirement, the class's claims must depend upon a common contention. *Wal-Mart Stores, Inc. v. Dukes, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 389 (2011)*. The common contention must be capable of class-wide resolution. *Id. at 390*. **[**26]** A contention is capable of class-wide resolution if determination of its truth or falsity will resolve a central issue to the validity of the claims "in one stroke." Id. A single common question is sufficient. *Id. at 395*.

The Court finds that commonality requirement is met here. The plaintiffs allege that the defendants engaged in a scheme to delay the entry of less expensive generic versions of Wellbutrin XL into the market. The plaintiffs contend that this scheme caused 300 mg bupropion hydrochloride to enter the market in December, 2006 instead of in November, 2005 and that the scheme limited entry of 150 mg generic Wellbutrin until May, 2008. Each class member's claims depend on whether or not the defendants unlawfully engaged in anticompetitive behavior to limit the entry of generic competitors in violation of each state's respective antitrust and/or consumer protection laws. See, e.g., *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004)* (certifying settlement class) ("[P]roof of liability for DuPont's conduct under *§ 2* of the Sherman Act and the Delaware Consumer Fraud statute depends on evidence which is common to the class members . . . ."). Although this **[**27]** action is brought under the law of six different states, proof of the essential elements of these statutes will also require common proof. The antitrust laws and consumer protection laws for these six states do not differ in material respects. See *Wellbutrin XL, 260 F.R.D. at 158-68* (discussing plaintiffs' remaining claims).

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. The typicality requirement ensures that the class representatives' interests are aligned with those of the absent class **[*138]** members, so that the representatives work to benefit the class as a whole. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 311 (3d Cir. 1998)*. "The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)* (citing 7A Charles A. Wright, et al., Federal Practice and Procedure § 1764).

If the representative's claims and those of the absent class members arise from the same course of conduct and are based on the same legal theories, the class satisfies typicality, regardless of factual differences underlying **[**28]** the individual claims. *Baby Neal v. Casey, 43 F.3d at 57-58*. The Court finds that the typicality requirement is met here because the representatives' claims arise from the same course of conduct and are based on the same legal theories. See, e.g., *Wellbutrin SR, 2010 U.S. Dist. LEXIS 105646, at *22-23 (E.D. Pa. Sept. 30, 2010)* ("[T]he typicality requirement is met because GSK's alleged conduct gives rise to all of their claims.").

4. Adequacy of Representation

Rule 23(a)(4) requires that the proposed class representative will fairly and adequately protect the interests of the class. The United States Court of Appeals for the Third Circuit has held that adequacy of representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class. *New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007)*.

The Court finds that the first prong is satisfied. Counsel for the plaintiffs are well-qualified to represent the proposed class in this case. They have extensive experience in similar class actions involving **[**29]** delayed generic competition. See, e.g., *In re Warfarin Sodium Antitrust Litigation, 391 F.3d 516 (3d Cir. 2004)*. The plaintiffs' counsel also have vigorously and capably prosecuted this action.

The absence-of-conflict requirement "seeks to uncover conflicts of interest between named parties and the class they seek to represent." *Warfarin Sodium, 391 F.3d at 532* (internal quotation marks omitted). This requirement is not defeated merely "because of a potential conflict of interest that may not become actual." *Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 680 (7th Cir. 2009)*.

The defendants contest the absence-of-conflict requirement in two ways. First, the defendants argue that no named plaintiff is an adequate representative for Florida, Nevada, New York, or Wisconsin because no named plaintiff, other than Aetna, made generic purchases in these states and Aetna was allowed to intervene only as a potential class representative for California. Second, the defendants argue that the plaintiffs have antagonistic interests to some absent class members because of the pending suit regarding the quality of one generic manufacturer's version of 300 mg bupropion hydrochloride. See *In re Budeprion XL Mktg. & Sales Litig., MDL No. 2107, 2010 U.S. Dist. LEXIS 51980 (E.D. Pa. May 26, 2010)* **[**30]** (Schiller, J.) (denying defendants' motion to dismiss).

As to the first argument, the Court agrees, as explained below in the antitrust impact section, that a plaintiff that did not make generic purchases in a class state cannot demonstrate antitrust impact with common evidence and, therefore, cannot be a class representative. But the Court will allow Aetna to be substituted as a representative states in which the current named plaintiff did not make an in-state generic purchase. [9]

The defendants argue that the Court permitted Aetna to intervene only for claims under the laws of California and that decision **[*139]** is the law of the case. "The doctrine of the law of the case dictates that when a court decides upon **[**31]** a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation." *Deisler v. McCormack Aggregates, Co., 54 F.3d 1074, 1086 (3d Cir. 1995)* (internal quotations omitted). If the doctrine of the law of the case does not foreclose intervention, the defendants argue that substitution of Aetna would be prejudicial.

The Court is not persuaded that the law of the case doctrine forecloses Aetna from representing claims in the other class states. This issue was not directly decided previously. The Court's reasoning in granting Aetna's motion was that it would not be unfair for the plaintiffs to pursue claims that have already been subject to discovery. See Sept. 21, 2010 Order at 2 (Docket No. 200) ("Although the Court was unwilling to allow Aetna to intervene to assert a

[9] This substitution applies to New York, Wisconsin, and Nevada. The defendants note that Painters No. 30's Nevada purchase was actually transacted in Illinois. The defendants also argue that Local 505 made purchases in Florida through a mail order facility. Defs.' Opp'n at 38-41; Pls.' Supp. Reply at 11-13 n.8, 11. Although Local 505's generic mail order purchases appear to the Court to be a Florida transaction, Aetna's purchases are also sufficient to state a claim under Florida law.

wide swath of new claims, the intervention requested herein applies only to claims the plaintiffs and defendants have already been litigating.").

Courts may allow class counsel to identify new class representatives who meet *Rule 23(a)* requirements. See Manual for Complex Litigation (Fourth) § 21.26 ("[C]ourts generally allow class counsel time to make reasonable efforts to recruit and **[**32]** identify a new representative who meets the *Rule 23(a)* requirements. The Court may permit intervention by a new representative or may simply designate that person as a class representative in the order granting class certification.").

The defendants oppose this substitution and cite *In re Flash Memory Antitrust Litig., No. 07-86, 2010 U.S. Dist. LEXIS 59491, 2010 WL 2332081, at *17 (N.D. Cal. June 9, 2010)*. In Flash Memory, the plaintiffs proposed substituting nine new plaintiffs in place of the twelve currently-named plaintiffs. Id. Aetna's requested substitution would not cause the prejudice of the substitution in Flash Memory. Aetna is a single entity that has already been actively involved in this case as a named plaintiff. Aetna has also produced discovery for each of the six proposed class states.

As to the second argument of the defendants, the Court finds that the Budeprion XL litigation does not create a conflict that would defeat class certification because these two law suits address different, compatible issues. Absent class members who are pursuing damages from allegedly inferior extended-release bupropion hydrochloride would still benefit as much as any other class member from an adjudication that **[**33]** they are entitled to overcharge damages for the purchases that they did make.

The Court is satisfied that the named plaintiffs, as modified to allow Aetna to represent states in which other named plaintiffs have not purchased bupropion hydrochloride, will adequately represent the interests of absent class members.

B. *Rule 23(b)*

Once the requirements of *Rule 23(a)* are satisfied, a plaintiff must also satisfy one of the three criteria in *Rule 23(b)*. The plaintiff seeks to have this class certified under *Rule 23(b)(3)*. *Rule 23(b)(3)* requires the court to find (1) that questions of law or fact common to class members predominate over any questions affecting only individual members and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. These are often referred to as the predominance and superiority requirements. The Court addresses each requirement in turn.

1. Predominance

To establish predominance, the plaintiffs must show by a preponderance of the evidence that the elements of their claims can be proven by evidence common to all in their class. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008)*. **[**34]** "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id. at 311* (quoting *Newton, 259 F.3d at 172*). The elements of the plaintiff's claims are (1) a violation of the state antitrust laws and/or state consumer protection laws, (2) individual injury, and (3) measurable damages. See *id. at 311*. The Court will address whether the plaintiff has shown that its claims can be proven with common evidence **[*140]** for each of these three elements. The primary issue of contention is whether the plaintiffs can demonstrate antitrust impact to all putative class members, particularly TPPs who did not purchase generic extended-release bupropion hydrochloride after it became available.

a. Violation of State Antitrust and Consumer Protection Laws

The plaintiffs have successfully pled antitrust claims arising under the laws of California, New York, Nevada, Tennessee and Wisconsin, and consumer protection claims arising under the laws of California and Florida. See *Wellbutrin XL, 260 F.R.D. at 168*; *Wellbutrin XL, 756 F. Supp. 2d at 682*.

Proof of antitrust violations and consumer protection laws in this case involve predominantly common **[**35]** issues. If each class member pursued its claims individually, the class member would have to prove the same antitrust and consumer protection violations using the same documents, witnesses, and other evidence. The issues of relevant market, monopoly power, and exclusionary conduct can be proven using common, class-wide evidence because such issues focus on the defendants' conduct rather than individual class members. See *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004)* (noting that liability for anticompetitive conduct focuses on the defendants' actions, not the conduct of individual class members).

b. Antitrust Impact

The plaintiffs must also demonstrate that antitrust impact, also known as individual injury or antitrust injury, can be proven with common evidence. [10] "[T]o prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." *Hydrogen Peroxide, 552 F.3d at 311*. The Court of Appeals has observed that antitrust impact often is critically important for the purpose of evaluating the predominance requirement because it is an element of the claim that may call for individual, as opposed to common, **[**36]** proof. Id.

At the class certification stage, a plaintiff's burden is not to prove the element of antitrust impact. The plaintiff must instead demonstrate that the element of antitrust impact is "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id. at 311-12*. The district court must conduct a "rigorous" assessment of the available evidence and the method or methods by which the plaintiff proposes to use the evidence to prove impact at trial. *Id. at 312*.

The Court will first discuss whether the plaintiffs have shown that antitrust impact can be demonstrated for purchasers of generic extended-release bupropion hydrochloride ("the generic overcharge"). Second, the court considers **[**37]** whether antitrust impact can be demonstrated for entities who purchased Wellbutrin XL (the "branded overcharge"). This group includes both entities that did and did not purchase generic extended-release bupropion hydrochloride after it became available. Third, the Court briefly considers direct-to-consumer advertising, which the defendants argue will prevent class-wide treatment. Fourth, the Court discusses whether the plaintiffs must show that an illegal overcharge is "passed through" to the end purchasers.

(1) Impact to Generic Purchasers

The Court first turns to the plaintiffs' theory of generic overcharge. The Court must address whether common evidence can demonstrate that generic prices in the but-for world would have been lower than they were in the real-world. Professor Rosenthal proposes to use the "yardstick" methodology to demonstrate that the prices of generic extended-release bupropion hydrochloride in the real world were higher for actual purchases than they would have been, but for the defendants' alleged exclusionary conduct. Professor Rosenthal concludes that **[*141]** class members suffered an overcharge for each generic purchase because prices for generic extended-release bupropion **[**38]** hydrochloride quickly decrease after market entry. If extended-release bupropion hydrochloride had entered the market sooner, prices would have been correspondingly lower for every purchase. N.T. at 68-69.

Professor Rosenthal relies on empirical data from IMS Health for actual transactions of extended-release bupropion hydrochloride and then "backcasts" the data to the "but for" generic entry date. N.T. at 45. The methodology examines what actually happened after generic entry to conclude that prices for generics would have been lower if they had entered the market sooner. Professor Rosenthal supports this conclusion with data showing a rapid erosion in generic prices after market entry. See N.T. at 46 ("I construct my yardsticks by . . . in effect, rolling back in time the actual marketing events. . . . I observed . . . the price erosion was also rapid after that first six-month period. So, the price discount for the generic was initially, approximately 15 percent. And, in my data that goes to 40 percent price discount, again relative to the pre-launch brand price. So, both substitution and price effects were fairly dramatic.").

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[10] As an initial matter, the Court notes the difference between antitrust impact and the calculation of damages. "In antitrust and securities fraud class actions, '[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury).'" *Hydrogen Peroxide, 552 F.3d at 311* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. 2001))*.

The defendants' expert Dr. Joskow criticizes the plaintiffs' **[**39]** methodology for generic overcharge by noting that some entities paid lower prices in the actual world than Professor Rosenthal's average "but for" price for the same time period. For example, named plaintiff D&C 30 made generic purchases in Florida that were below Professor Rosenthal's average "but for" generic price. Professor Rosenthal explained, however, that this example fails to show that D&C was not impacted. Dr. Joskow's analysis of specific transactions drew conclusions based on contemporaneous prices. These comparisons did not account for the fact that if the generic entered the market a year and a half earlier, earlier entry would have affected contemporaneous prices. D&C's actual generic purchase price, though lower than the "but for" average, would likely have been even lower because of the downward trend in generic prices over time. See N.T. at 58. The Court concludes that class-wide evidence is available to show antitrust impact in the form of a generic overcharge.

(2) Impact to Purchasers of Wellbutrin XL

(a) Entities That Did Not Purchase Generics

The plaintiffs assert that TPPs suffered antitrust impact for purchases of Wellbutrin XL even if they did not purchase generic **[**40]** extended-release bupropion hydrochloride after it became available because of the high substitution rate from branded drugs to generic drugs. The plaintiffs argue that in a but-for world, each TPP would have converted some branded purchases to generic extended-release bupropion hydrochloride and thereby incurred antitrust injury. The defendants counter that there is no way to differentiate which TPPs would continue to make only branded purchases even after generics entered the market and thereby suffer no impact.

Professor Rosenthal relies on a probability analysis to conclude that TPPs suffered antitrust impact without considering generic purchases. She calculates the likelihood that any potential class member would have no generic claims based on the average generic substitution rate of 86% for the 300 mg dosage. See Rosenthal Reb. Decl. ¶ 23. Professor Rosenthal notes that "most third party payors will have large numbers of claims for either the brand or generic Wellbutrin XL during the class period. . . ." Id. But even for a TPP with only 10 claims for Wellbutrin XL 300 mg tablets during the period prior to generic entry, Professor Rosenthal calculates the probability that the TPP **[**41]** would have no generic claims in the but-for world as 3 in one billion. Professor Rosenthal opines that "even if a potential Class member presents with only one Wellbutrin XL claim during the first year of the Class Period . . . it is still more likely than not that such a claim would have been switched to a generic." Id.

The defendants argue that Professor Rosenthal mistakenly assumes that each purchase is an independent event. Dr. Joskow argues that each individual prescription is not necessarily an independent event because people often fill multiple prescriptions at a **[*142]** time and TPPs may be subject to formularies that prefer certain branded versions. For example, named plaintiff Local 505's members made 13 consecutive purchases of branded Wellbutrin XL in the two year period after generic entry, during which time it made no corresponding purchases of generic. See Defs.' Hr'g Ex. 3.

The example of Local 505 demonstrates the influence of formularies or preferred drug lists on individuals' purchasing behavior. Professor Rosenthal testified that Local 505 contracted with Blue Cross Blue Shield of Alabama for pharmacy benefits. Blue Cross Blue Shield of Alabama has preferred drug lists, **[**42]** and it did not remove Wellbutrin XL from its preferred drug lists until the entry of 150 mg generic extended-release bupropion hydrochloride in 2008. N.T. at 64-65. Local 505's members correspondingly continued to purchase branded Wellbutrin XL for nearly two years after initial generic entry.

The experience of Local 505 suggests that there may be significant individual issues for class members regarding whether an individual TPP suffered antitrust impact if it did not actually purchase generics. Professor Rosenthal conceded that many TPPs had very few purchases in the six class states, and that such purchases are not fully independent. N.T. 85, 90, 94. These admissions undermine the reliability of her method to demonstrate antitrust impact for TPPs without showing that the TPP purchased extended-release bupropion hydrochloride.

The Court is not persuaded that the plaintiffs have shown by a preponderance of the evidence that antitrust impact under a given state's law can be demonstrated for every TPP class member without showing that the TPP purchased generics in that state after generics became available. In this case, it is unclear how many TPPs made small purchases of Wellbutrin XL **[**43]** in class states without making any generic purchases. The example of Local 505 suggests that individual issues, such as formulary preference or brand loyalty, may impact whether a particular TPP would have switched from branded Wellbutrin XL to generic extended-release bupropion hydrochloride in the but-for world, if a TPP did not actually purchase any generics. The Court concludes that the plaintiffs have failed to demonstrate that antitrust impact can be shown with common evidence without showing that the TPP purchased generic extended-release bupropion hydrochloride after it became available.

(b) Entities That Did Purchase Generics

For entities that did purchase extended-release bupropion hydrochloride in a class state after it became available, it is a reasonable inference that these entities would have purchased extended-release bupropion hydrochloride in the "but for world," absent the alleged exclusionary conduct. Professor Rosenthal presented evidence that brand-to-generic switching following generic entry is a demonstrable and recurrent phenomenon. Professor Rosenthal used IMS market data and data from GSK to conclude that the substitution from generic was "rapid." N.T. at 44. **[**44]** The price discount between branded and generic is approximately 15% off-brand after generic entry. As more generic competitors enter the market, the discount increases. N.T. at 47.

The defendants' expert, Dr. Joskow, argued that TPPs were not necessarily overcharged when they purchased branded drugs instead of generics. He cites the example that Aetna, immediately after generics came on to the market, actually paid more for generics than for branded for several transactions. The defendants explain that upon generic entry, rebates from the branded manufacturer to TPPs largely disappear. Joskow Decl. ¶¶ 79-80. For payors like Aetna, this can cause the net cost of a generic drug to exceed the net cost of the branded drug for a period of time.

Professor Rosenthal rebutted this argument by explaining that Dr. Joskow's analysis inappropriately compared contemporaneous transactions to conclude that the price of generics were higher than the price of branded Wellbutrin XL. Professor Rosenthal noted that if generics had entered the market earlier, the price of generics would have already decreased. To demonstrate overcharge, Professor Rosenthal explained, one must compare **[*143]** the but-for generic **[**45]** price to the actual branded price. N.T. at 47.

The Court concludes that the plaintiffs have shown class-wide evidence is available to demonstrate that the price of generic extended-release bupropion hydrochloride would have been lower than Wellbutrin XL absent the defendants' anticompetitive conduct. Because the court limits the availability of the branded overcharge theory to entities that purchased generic Wellbutrin XL in a class state, the plaintiff has also shown that the class members would have substituted at least some generic extended-release bupropion hydrochloride for Wellbutrin XL during the class period. Cf. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)* (certifying settlement class) ("Notably, TPPs . . . suffered direct economic harm when . . . they paid supracompetitive prices for Coumadin instead of purchasing lower-priced generic warfarin sodium.").

(3) Direct-to-Consumer Advertising

The defendants argue that there are many individuals who purchased Wellbutrin XL due to GSK's advertising campaign who would not have purchased it in the "but for world" because GSK would not have continued its advertising campaign after generic entry. Professor **[**46]** Rosenthal credibly testified that she had not seen any evidence of an effect for direct-to-consumer advertising in this case. N.T. at 37. Professor Rosenthal's damage methodology, discussed below, is also designed to account for any decreased volume associated with the defendants' promotional activities. See Rosenthal Reb. Decl. ¶ 42 ("I calculated a yardstick reflecting the actual market volume trend in the actual world after actual generic launch, thus capturing any decrease in sales due to the cessation of promotional spending by Defendants."). The Court is persuaded that the possible effect of direct-to-consumer advertising is insufficient to bar class certification.

(4) Pass Through

The parties dispute whether the plaintiffs must demonstrate that an illegal overcharge has been "passed through" to indirect purchasers, rather than simply showing that the price actually paid for either branded or generic Wellbutrin

XL was higher than the price the plaintiffs would have paid for generic Wellbutrin XL. Prior cases that addressed delayed generic entry for indirect purchasers have not required an analysis of whether an overcharge has been "passed through" because other techniques are available **[**47]** to demonstrate overcharge to indirect purchasers. See, e.g., *In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 344 (E.D. Mich. 2001)* ("[A]n indirect purchaser must estimate only the 'but for' price that it should have paid, which is a far less exacting exercise than apportioning the overcharge throughout the entire chain of distribution.") (quoting Roger D. Blair & Jeffrey L. Harrison, Reexamining the Role of *Illinois Brick* in Modern Antitrust Analysis, *68 Geo. Wash. L. Rev. 1, 29 (1999)*).

Professor Rosenthal presented evidence that the pricing structure in the pharmaceutical industry is based on formulaic markups. See Rosenthal Reb. Decl. ¶¶ 27-32; N.T. 41-42. Generic overcharges, Professor Rosenthal notes, can also be demonstrated as the difference in generic list prices. See id. ¶ 33 ("[G]eneric pricing overcharges . . . for direct and indirect purchases would be caused by a single mechanism: differences between generic list prices . . . in the actual and but-for scenarios."). See also N.T. at 106. This case is distinguishable from component cases that may involve much more complicated questions about the effect that a supracompetitive component had on the final purchase price **[**48]** for an end user. Cf. *In re Flash Memory Antitrust Litig., No. 07-0086, 2010 U.S. Dist. LEXIS 59491, *44 (N.D. Cal. March 31, 2010)*; *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 502 (N.D. Cal. 2008)*.

The Court concludes that Professor Rosenthal has set forth a viable method to demonstrate antitrust impact for generic and branded overcharges. See *In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 344 (E.D. Mich. 2001)* (concluding pass-through variations are not necessary to demonstrate antitrust impact). Cf. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)* ("[I]t [is] well recognized that a purchaser in a market where competition has **[*144]** been wrongfully restrained has suffered an antitrust injury, and in this case, TPPs are such purchasers.").

The plaintiffs have demonstrated that antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members for generic overcharges. Professor Rosenthal has presented class-wide evidence to demonstrate the existence of both a generic and branded overcharge.

c. Measurable Damages

At the class certification stage, the plaintiffs are not required to prove **[**49]** damages by calculating specific damages figures for each member of the class, but rather they must show that a reliable method is available to prove damages on a class-wide basis. See *In re Neurontin Antitrust Litig., MDL No. 1479, 2011 U.S. Dist. LEXIS 7453, at *40 (D.N.J. Jan. 25, 2011)*; *Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 303 (5th Cir. 2003)* (noting that antitrust plaintiffs must provide a "just and reasonable estimate of the damage based on relevant data.").

The plaintiffs' proposed methodology for calculating damages relies on the use of "yardsticks" as discussed above. The plaintiffs' expert, Professor Rosenthal, explains that this methodology uses actual prices and quantities from the market to derive "yardsticks" to simulate the prices and quantities that would have occurred but for the anticompetitive activity. These prices and quantities are used to estimate the total and average overcharge damages to the class. See Rosenthal Supp. Dec. ¶ 14.

This methodology was criticized in the Wellbutrin SR decision because it relies on average pricing data. See *Wellbutrin SR, 2010 U.S. Dist. LEXIS 105646, at *101-102 (E.D. Pa. Sept. 30, 2010)* ("Just because an average price was **[**50]** increased or decreased by the alleged foreclosure does not mean that all members of the proposed class paid supra-competitive prices or that any damage for an individual end-payor could be calculated in a formulaic way by common proof.").

Dr. Joskow likewise suggested that the use of average yardsticks may gloss over meaningful differences, and a yardstick should be developed for each class member. The plaintiffs counter that the defendants' expert recognizes that it is "possible" to use averages and sampling to assess claims and that the defendants' approach is impractical. Aetna alone paid 138,000 extended release bupropion hydrochloride claims in California during the class period. Under Dr. Joskow's approach, to assess impact for just Aetna's claims under California law would require analysis of each of the 138,000 transactions. The plaintiffs note that Dr. Joskow acknowledged that "there may be ways to do it within each individual class member that doesn't require you to do it 138,000 times . . . ." Pls.' Reply at 21.

The Court agrees that the use of averages may not always be appropriate, particularly in indirect purchaser actions. See generally ABA Section of ***Antitrust Law***, Econometrics: **[**51]** Legal, Practical, and Technical Issues 220 (2005). In this case, however, Professor Rosenthal has demonstrated that after generics became available, the actual prices for generic extended-release bupropion hydrochloride were higher than the corresponding prices would have been in the but-for world and that "but-for" generic prices would be lower than branded prices. N.T. at 60-61; 69-71. The use of averages in this case does not mask meaningful variations in overcharges, and it provides a reliable method to provide a reasonable estimate of the damages based on relevant purchase data. The Court concludes that the plaintiffs have set forth a satisfactory methodology to estimate class-wide damages resulting from the alleged generic overcharges.

2. Superiority

The Court considers whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. This "requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication." *In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998)*. It **[*145]** **[**52]** is meant to ensure that resolution by class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision without sacrificing procedural fairness or bringing about other undesirable results." *Amchem, 521 U.S. at 615* (quoting Advisory Committee's Note on *Fed. R. Civ. P. 23*).

The Court finds that the superiority requirement is met here. Although the plaintiffs wish to proceed under the laws of six different states, the Court concludes that variations among the laws at issue here do not "present the types of insuperable obstacles which render class action litigation unmanageable." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 529 (3d Cir. 2004)*. Individual treatment of each class members' claims would require duplicative, expensive litigation, which would come at enormous expense to the parties and judicial economy. Class resolution would also avoid problems of inconsistent resolution.

IV. Conclusion

The Court concludes that the plaintiffs have satisfied their burden to certify a class of indirect purchasers of generic extended-release bupropion hydrochloride under the antitrust laws of California, Nevada, New York, Tennessee, and Wisconsin, **[**53]** and the consumer protection laws of California and Florida.

An appropriate order will follow separately.

ORDER

AND NOW, this 12th day of August, 2011, upon consideration of the Indirect Purchaser Plaintiffs' Motion for Class Certification (Docket No. 109), the opposition, reply, sur-reply, supplemental opposition, supplemental reply, the accompanying expert declarations, supplemental choice of law briefs, the hearing on April 29, 2011, oral argument on May 27, 2011, and for the reasons stated in a memorandum of today's date, IT IS HEREBY ORDERED that the motion is GRANTED IN PART AND DENIED IN PART. IT IS FURTHER ORDERED that:

1. The following indirect purchaser litigation class is hereby certified pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)*:

(1) All persons or entities who purchased an AB-rated generic bioequivalent of Wellbutrin XL ("generic XL") at any time during the "Class Period" (hereafter defined) in California, Florida, Nevada, New York, Tennessee and Wisconsin; and

(2) All entities that purchased 150 mg or 300 mg Wellbutrin XL before an AB-rated generic bioequivalent was available for such dosages AND purchased generic XL in the same state after generic XL became **[**54]** available in California, Florida, Nevada, New York, Tennessee and Wisconsin.

For purposes of the Class definition, persons and entities purchased Wellbutrin XL or generic XL if they paid some or all of the retail purchase price.

Excluded from the Class are "flat co-payers" meaning natural persons whose only purchases of generic XL were made pursuant to contracts with third party payers ("TPP") whereby the amount paid by the natural person for generic XL was the same regardless of the retail purchase price.

The Class Period begins November 14, 2005 and ends on April 29, 2011.

2. Class claims, issues, and defenses are those incorporated into the Court's memorandum of today's date as well as the affirmative defenses raised in the defendants' answers. See Docket Nos. 266, 268.

3. The following entities are hereby appointed as class representatives for claims under the following states' laws:

State	Entity
California	Aetna
Florida	Local 505 and Aetna
Nevada	Aetna
New York	Aetna
Tennessee	Local 572
Wisconsin	Aetna

[*146] 4. The following firms are hereby appointed as co-lead counsel to the indirect purchaser class:

Lowey Dannenberg Cohen & Hart, P.C.
Richard Cohen, Esquire
Peter D. St. Phillip, Jr., Esquire

Wexler Wallace **[**55]** LLP
Kenneth A. Wexler, Esquire
Amber M. Nesbitt, Esquire
Branstetter, Stranch, & Jennings
Jim G. Stranch, Esquire
Joe P. Leniski, Esquire

5. Within 30 days of the date of this Order, the parties shall submit an agreed upon proposed notice program and forms of notice to class members. If the parties are unable to agree as to the proposed notice program and/or forms of notice, they shall submit separate proposals.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. McLAUGHLIN, J.

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Silicon Econs., Inc. v. Fin. Accounting Found.

United States District Court for the District of Delaware

August 17, 2011, Decided; August 18, 2011, Filed

CIVIL ACTION NO. 11-163

Reporter
2011 U.S. Dist. LEXIS 92322 *

SILICON ECONOMICS. INC., Plaintiff, v. FINANCIAL ACCOUNTING FOUNDATION, and FINANCIAL ACCOUNTING STANDARDS BOARD, Defendants.

Prior History: *Silicon Econ., Inc. v. Fin. Accounting Found. & Fin. Accounting Stds. Bd., 2010 U.S. Dist. LEXIS 130989 (N.D. Cal., Nov. 24, 2010)*

Core Terms

Invention, allegations, motion to dismiss, Website, factual allegations, ownership interest, commerce, accounting standards, anti trust law, patent, challenged conduct, injury-in-fact, antitrust, comments, concrete, contends, license, parties, amend, declaratory relief, antitrust claim, reputation, pleadings, facial

Counsel: **[*1]** For Silicon Economics Inc., a California Corporation, Plaintiff: Sean T. O'Kelly, LEAD ATTORNEY, O'Kelly & Ernst, LLC, Wilmington, DE; Perry J. Narancic, PRO HAC VICE.

For Financial Accounting Foundation, Defendant: Richard L. Horwitz, LEAD ATTORNEY, Jonathan A. Choa, Potter Anderson & Corroon, LLP, Wilmington, DE; Garrard R. Beeney, Gary A. Greene, Yvonne S. Quinn, PRO HAC VICE.

For Financial Accounting Standards Board, Defendant: Richard L. Horwitz, LEAD ATTORNEY, Jonathan A. Choa, Potter Anderson & Corroon, LLP, Wilmington, DE.

Judges: Michael M. Baylson, United States District Judge.

Opinion by: Michael M. Baylson

Opinion

MEMORANDUM ON MOTION TO DISMISS

Baylson, J.

Silicon Economics, Inc. ("SEI") filed this action seeking damages and clarification of its ownership interest in its invention, "EarningsPower Accounting." which is the subject of U.S. Patent 7,620,573 (the "Invention"). SEI claims that the Financial Accounting Foundation ("FAF") and the Financial Accounting Standards Board ("FASB." collectively with FAF, "Defendants"), have unlawfully claimed a royalty-free license in the Invention and refuse to release any ownership interest in the Invention. SEI claims violations of federal ***antitrust law*** and California's **[*2]** Unfair Competition Law. SEI also seeks declaratory relief under California law.

Defendants have moved to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(1)* for lack of standing and under *Rule 12(b)(6)* for insufficient pleading of each claim. (Mot. to Dismiss, ECF No. 18.) After careful consideration of Defendants' Motion and the parties' briefing and oral argument on August 11. 2011, the Court will grant Defendants' Motion, allowing SEI leave to amend the Complaint.

I. Factual and Procedural History

According to the Complaint in this matter, FASB is "the principal organization in the private sector for establishing standards of financial accounting which govern the preparation of financial statements by public companies in the United States." (Compl., ECF No. 1 ¶ 9.) FAF is a private, non-governmental. non-profit foundation that governs FASB. (Id. ¶ 4.)

SEI alleges that FASB "has at least 90% of the market for establishing and decreeing financial accounting standards in the United States," and the remainder of the market consists of individuals, academics, government bodies, corporations, and accounting firms that articulate accounting standards, as well as the International Accounting **[*3]** Standards Board. (Id. ¶ 10.)

SEI is one of these other participants and is attempting to establish more effective accounting standards in direct competition with FASB. (Id. ¶ 13.) To that end. SEI developed the Invention, an equation that "improv[es] the accuracy of net income measurement and embraces mark-to-market accounting of asset and liability values [to] yield[] accurate and current balance sheets." (Id. ¶ 19.) SEI contends the Invention resolves the fundamental accounting problem, i.e. either the balance sheet or the income sheet can be accurate and useful, but not both. (Id. ¶¶ 14. 19.)

Pertinent to this litigation, on July 6. 2006. FASB requested public comments "concerning the most basic objects for financial reporting and how to accomplish such objects." (Id. ¶ 20.) FASB's invitation also staled that "all comments received by the FASB are considered public information. Those comments will be posted to the FASB's website and will be included in the project's public record." (Id. ¶ 21.) SEI provided comments, including briefing on the Invention. (Id. ¶ 22.) SEI then participated in a roundtable discussion and SEI's founder, Joel Jameson ("Jameson"), privately met with the FASB **[*4]** regarding the Invention. (Id.)

Several months later. Jameson became aware of certain terms and conditions on FASB's website, namely:

> "Any information or material you transmit . . . by . . . sending an e-mail . . . including information such as personal data, comments and suggestions (whether in response to a specific query or otherwise) will be treated as non-confidential and non-proprietary . . . . Unless we agree in writing in advance, anything you transmit, whether electronically or in hard copy may be used by the FAF/FASB and its affiliates for any purpose. including. but not limited to. reproduction. disclosure, transmission, publication, broadcast and posting. This means that the FAF/FASB may use the ideas, concepts, know-how or techniques you transmit . . . ."

(Id. ¶ 23) (the "Website Terms"). Unaware of the Website Terms prior to submitting his comments in July 2006. Jameson contacted FASB to clarify and confirm FASB did not claim any ownership interest in the Invention. (Id. ¶ 24.) After receiving no response for more than two years. Jameson again contacted FASB through legal counsel. (Id. ¶ 25.) In response, FASB "claimed that it ha[s] a royally-free ownership interest in the **[*5]** SEI Invention . . . and categorically refused to release any such interest." (Id.)

After another few months passed, SEI filed suit in California federal court, but the complaint was dismissed for lack of personal jurisdiction over Defendants. (Id. ¶ 26); see *Silicon Econ., Inc. v. Fin. Accounting Found., No. 10-1939, 2010 U.S. Dist. LEXIS 130989, 2010 WL 4942468, at *7 (N.D. Cal. Nov. 24, 2010)*. During the course of that litigation, however, counsel for Defendants expressly disavowed a license to practice the Invention or any claim or ownership interest therein, and affirmed Defendants have no intention of claiming any ownership interest. (Compl. ¶ 27.) "Despite these admissions. [Defendants have] refused to release [their] purported ownership claims in the [Invention]." (Id.)

Still seeking clarity, SEI filed the instant Complaint asserting claims for restraint of trade and monopolization in violation of the Sherman Act, *15 U.S.C. §§ 1*, *2*; a claim for declaratory relief under California law; and a claim for unfair competition under California law. (Compl. ¶¶ 28-44.) On April 29, 2011, Defendants filed the instant Motion to Dismiss Plaintiff's Complaint With Prejudice for lack of jurisdiction and for failure to state **[*6]** a claim upon which relief can be granted. SEI also filed a Motion for a Preliminary Injunction (Mot., ECF No. 6). but agreed the Court should first rule on Defendants' Motion to Dismiss (Order. ECF No. 16).

II. Jurisdiction and Standard of Review

A. Jurisdiction

The Court has jurisdiction over SEI's antitrust claims pursuant to *28 U.S.C. §§ 1331* and *1337*, and supplemental jurisdiction over its California law claims under *28 U.S.C. § 1367(a)*. SEI contends venue is proper pursuant to *15 U.S.C. § 22*. Defendants have not objected to venue in this District.

B. Standard of Review

A *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction presents either a facial attack or a factual attack. *CNA v. United States, 535 F.3d 132, 139 (3d Cir. 2008)*; see *Fed. R. Civ. P. 12(b)(1)*. A facial attack concerns an alleged pleading deficiency, whereas a factual attack concerns the actual failure of a plaintiff's claim to comport factually with the jurisdictional prerequisites. *CNA, 535 F.3d at 139*.

On a facial attack, the Court must consider the allegations of the complaint as true. *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)*. In contrast, there are three important **[*7]** consequences of a factual attack: (1) there is no presumption of truthfulness; (2) the plaintiff bears the burden of proving subject matter jurisdiction: and (3) the Court has authority to make factual findings on the issue, and can look beyond the pleadings to do so. *CNA, 535 F.3d at 145*. Defendants appear to be making a facial attack against SEI's complaint. In their Opening Brief, Defendants assume the veracity of SEI's allegations and challenge the sufficiency of those allegations. (Opening Br., ECF No. 19 at 7-9); see also *Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286. 292 (3d Cir. 2005)* (evaluating sufficiency of plaintiff's factual allegations in complaint on standing challenge).

As for Defendants' Motion pursuant to *Rule 12(b)(6)*, the court must accept as true all well-pleaded factual allegations and must construe them in the light most favorable to the non-moving party. *Phillips v. County of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*.

According to the Third Circuit, *Twombly v. Bell Atlantic Corp., 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, establish a three-pronged approach for evaluating the sufficiency of pleadings in all civil actions: first, **[*8]** the court must identify the elements the plaintiff must plead to state a claim; second, the court asks whether the complaint sets forth factual allegations or conclusory statements; third, if the complaint sets forth factual allegations, the court must assume their veracity and draw reasonable inferences in favor of the non-moving party, but then must determine whether the factual allegations plausibly give rise to an entitlement to relief. See *Santiago v. Warminster Twp., 629 F.3d 121, 130 & n.7 (3d Cir. 2010)*; see *Iqbal 129 S. Ct. at 1950, 1953*. For the second step, the court should separate the factual and legal elements of the claims, must accept the well-pleaded facts as true, and may disregard any legal conclusions. *Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009)*.

The plaintiff's complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)*. The complaint must state factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible. Id. This does not impose a probability requirement, but instead calls for enough facts **[*9]** to raise a reasonable expectation that discovery will reveal evidence of the necessary elements. Id. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to reasonably infer that the defendant is liable for the misconduct alleged. *Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187. 190 (3d Cir. 2009)*.

"[J]udging the sufficiency of a pleading is a context-dependent exercise. Some claims require more factual explication than others to state a plausible claim for relief." *UPMC, 627 F.3d at 98* (reversing district court's application of heightened scrutiny in antitrust context) (citation omitted).

Accordingly, the Court considers the factual allegations in SEI's complaint as true for all purposes of Defendants' Motion.

III. Discussion

Defendants argue the Court should dismiss SEI's Complaint because SEI lacks standing under Article III and has failed to sufficiently plead its claims for relief. Defendants also argue the Court should decline to exercise supplemental jurisdiction over SEI's state law claims if the Court dismisses SEI's federal claims.

A. Standing

Defendants contend that SEI has failed to establish an actual case or controversy exists **[*10]** in this matter because it cannot satisfy the "injury-in-fact" and "fairly traceable" elements of constitutional standing. As such, they argue the Court lacks jurisdiction over this case. SEI opposes Defendants' Motion and argues its claims are justiciable because Defendants' refusal to release its claimed ownership interest in SEI's patent has created uncertainty regarding SEI's ownership interest. In reply, Defendants contend any alleged harm is only theoretical because they have not made any use of the Invention and that SEI has failed to sufficiently allege any harm. The Court agrees with Defendants.

In its Opposition, SEI conflates Defendants' Article III and California declaratory relief arguments, but California law regarding declaratory relief is inapposite to the question of Article III standing. Article III of the Constitution limits the exercise of federal judicial power to adjudication of actual cases or controversies. *Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 137 (3d Cir. 2009)*. This limitation is enforced through several justiciability doctrines, including, standing, mootness. ripeness, the political-question doctrine, and the prohibition on advisory opinions. **[*11]** Id.

Perhaps the most important of these doctrines is standing. Id. The "irreducible constitutional minimum" of Article III standing consists of three elements: (1) the plaintiff must have suffered a concrete, particularized injury-in-fact, which must be actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the Court: and (3) the plaintiff must also establish that a favorable decision would likely redress the alleged injury. *Id. at 137-38*. Defendants argue SEI has failed to establish the first two elements.

SEI, as the party invoking federal jurisdiction, bears the burden of establishing these elements. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Each element must be supported in the same way as any other matter on which SEI bears the burden of proof, i.e. "with the manner and degree of evidence required at the successive stages of the litigation." Id. On a motion to dismiss, allegations may suffice because they are assumed true. Id. Thus, to state an injury-in-fact sufficient to survive a motion to dismiss, SEI must **[*12]** sufficiently plead that it has suffered some concrete harm because of Defendants' conduct. See *N.J. Physicians, Inc. v. President of the United States, 653 F.3d 234, No. 10-4600, 2011 U.S. App. LEXIS 15899, 2011 WL 3366340, at *3 (3d Cir. Aug. 3, 2011)* (noting "standing cannot be inferred argumentatively from averments in the pleadings bu rather must affirmatively appear in the record") (quotations omitted).

To satisfy the injury-in-fact element, the plaintiff must have suffered a palpable and distinct harm that affects the plaintiff in a personal and individual way. 2011 U.S. App. LEXIS 15899, [WL] at *3; Toll Bros., 555 F.3d at 138. In an action for declaratory relief, the plaintiff need not suffer the full harm expected, so long as there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment. Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 193-94 (3d Cir. 2004); St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands, 218 F.3d 232, 240 (3d Cir. 2000).

The injury must be concrete and particularized, and actual or imminent. Lujan, 504 U.S. at 564 n.2; N.J. Physicians, 2011 U.S. App. LEXIS 15899, 2011 WL 3366340, at *3 (stating plaintiff must sufficiently allege **[*13]** both elements to establish standing). Intentions, without concrete plans, do not support a finding of actual or imminent injury. Lujan, 504 U.S. at 564 n.2 If there is no actual injury, the injury must be at least imminent. Id. Although an elastic concept, it cannot be stretched beyond its purpose which is to ensure the alleged injury is not too speculative but is "certainly impending." Id. Allegations of injury are insufficient when the plaintiff alleges injury at some future time and the acts necessary to make the injury happen are at least partly within the plaintiff's control. Id. Nonetheless, "[i]njury-in-fact is not Mount Everest." Danvers, 432 F.3d at 294. The contours of the requirement, though not precisely defined, are very generous, requiring only allegations of some specific, identifiable trifle of injury. Id. (citing Bowman v. Wilson, 672 F.2d 1145, 1151 (3d Cir. 1982)).

In its Complaint. SEI alleges Defendants have created uncertainty regarding SEI's exclusive rights in the Invention, which has harmed SEI's reputation and goodwill. (Compl. ¶ 32.) SEI raises two other alleged injuries in its Opposition – SEI's dispute with Defendants has impeded its ability to seek financing **[*14]** and has had "substantial and immediate impact on the business of SEI" – but "[i]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." (Opp'n at 5, 7); see Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 181 (3d Cir. 1988) (quotations omitted).

Injury to reputation, including commercial reputation, may constitute a cognizable injury-in-fact for Article III standing. See Foretich v. United States, 351 F.3d 1198, 1211, 359 U.S. App. D.C. 54 (D.C. Cir. 2003) (citing Meese v. Keene, 481 U.S. 465, 473-77, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987)); GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352. 366 (D. Del. 1975). As for the alleged "uncertainty," the Court finds a decision from the Eastern District of Virginia instructive on the issue.

In *Robishaw Engineering, Inc. v. United States*, a patent-holder, who was negotiating a license agreement with the United States Army, filed suit against the United States claiming that the Army's assertion of a royalty-free license put a cloud on the patent and diminished its market value. 891 F. Supp. 1134, 1137 (E.D. Va. 1995). Judge Ellis acknowledged that patents represent legal rights, namely the right to exclude parties other **[*15]** than the government. Id. at 1149. He also recognized the "simple truism that the value of any legal right depends on the likelihood of successfully enforcing it." Id. Thus, any cloud or uncertainty regarding enforceability diminishes the property's market value, and any party who seeks a judicial declaration to eliminate that uncertainty can point to the diminution in value as an injury-in-fact. Id. But if that uncertainty is always deemed sufficient, standing would become a meaningless requirement. Id.

To exclude the possibility of rendering standing meaningless, Judge Ellis determined that standing requires the cloud or uncertainty to consist of a sufficiently immediate, definite, and concrete threat to the legal right at issue. Id. Thus, the question is whether the defendant has taken definite and concrete steps to assert a claim or has at least threatened to assert a claim adverse to the plaintiff's interests. Id. at 1150. In Robishaw, the Army took no firm position, only suggesting that it may have a royalty-free license. Id. Therefore, Judge Ellis concluded the plaintiff had failed to sufficiently allege an injury-in-fact based on a cloud on its patent. Id. SEI has similarly failed **[*16]** to sufficiently allege an injury in fact.

As for the alleged harm to reputation and goodwill, SEI offers only bald assertions of injury. SEI has not offered any factual allegations on which it bases its contention it has suffered harm to reputation or goodwill. Failing to meet its burden of alleging standing at this stage of the litigation, the Court will dismiss SEI's Complaint without prejudice to SEI amending its Complaint.[1]

B. Antitrust Claims

Defendants offer two arguments in favor of dismissal of SEI's antitrust claims. First. they contend they are not engaged in trade or commerce and, therefore, **[*18]** the Sherman Act does not apply to them. Defendants also argue SEI has failed to sufficiently plead a relevant product market because no market exists; it has not sufficiently pled an antitrust injury because Defendants and SEI do not compete; Defendants maintain a monopoly through the Securities and Exchange Commission ("SEC") not any anti-competitive conduct in violation of *§ 2*: and Defendants have engaged in unilateral conduct, not any combination in violation of *§ 1*.

In response, SEI focuses on establishing that Defendants' non-profit status is not dispositive of the trade or commerce issue. Further. SEI contends there is commerce involved because Defendants allegedly misappropriated SEI's patent and SEI is a commercial entity. As for the substance of the claims, SEI argues it sufficiently pled antitrust injuries of reduced innovation and excluded competition. As for the relevant market. SEI argues the Court must also consider potential markets, and SEI could potentially compete with Defendants. For its *§ 2* claim, SEI contends Defendants are unlawfully maintaining their monopoly by taking SEI's property, and for the § 1 claim. SEI argues the Websitc Terms may form an agreement in **[*19]** restraint of trade and both parties to an agreement need not share anti-competitive intent.

In reply, Defendants argue they are not engaged in trade or commerce because their accounting standards are freely available to anyone in the world and are available without charge and without payment to Defendants, save for sales of bounded volumes and unrelated licensing arrangements. They further contend that the challenged conduct, i.e. adoption of and adherence to the Website Terms, is not motivated by commercial objectives or advantages despite receipt of government funds. In addition, Defendants argue they are not participants in the commercial market for accounting standards and SEI only alleges injuries to itself rather than to competition. Further, Defendants maintain they did not engage in concerted action, but unilaterally adopted the Website Terms.

1. "Trade or Commerce"

The purpose of ***antitrust law*** is to regulate commerce, which entails determining the applicability of antitrust laws by considering the nature of the activity being challenged, not the nature of the organization engaged in the activity. 1B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 260, at 158, 161 (3d ed. **[*20]** 2006); see *Apex*

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[1] The cases SEI relies on do not persuade the Court otherwise. In *Leonard Carder, LLP v. Patten, Faith & Sandford,* the California Court of Appeals found an actual controversy justifying jurisdiction over the claim for state-law declaratory relief. *189 Cal. App. 4th 92, 116 Cal. Rptr. 3d 652, 653 (Cal. Ct. App. 2010)*. Two law firms were disputing the allocation of legal fees from settlement of a class action. *Id. at 654*. The money was held in trust and the defendant claimed it was owed forty percent based on a prior agreement. Id. The plaintiff disputed the existence of the agreement and sent a check for the significantly lower lodestar amount, with a note that the payment was in "final settlement." Id. Before cashing the check, the defendant amended the memo line to reflect the payment **[*17]** was "credit toward final settlement." Id. Unlike in this case, each party had taken a firm position on the amount due the defendant, which created an ongoing controversy warranting declaratory relief. See *id. at 656-57*.

In *Principal Life Insurance Co. v. Robinson,* the Ninth Circuit concluded an actual dispute existed regarding the calculation of rent under a lease agreement. *394 F.3d 665, 668 (9th Cir. 2005)*. The plaintiff had previously attempted to sell its interest in the lease. but the dispute regarding the rent calculation undermined the deal. Id. The Ninth Circuit found this past difficulty suggested the plaintiff would continue to have difficulty, which warranted declaratory relief. *Id. at 672*. SEI, however, has not alleged any such past difficulties or experiences with the Invention, making only conclusory assertions that its title is uncertain and that is has suffered harm to reputation and goodwill. Without more facts, SEI's circumstances are distinguishable from those in *Leonard Carder* and *Principal Life*.

Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15, 495, 60 S. Ct. 982, 84 L. Ed. 1311 (1940); see also United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993) (finding antitrust laws apply to non-profit organizations engaged in commerce). Thus, the threshold issue is whether the antitrust laws even apply to the challenged conduct. Brown Univ., 5 F.3d at 665.

It is axiomatic that antitrust laws regulate only transactions that are commercial in nature. Id. Courts classify a transaction as commercial in nature based on the nature of the challenged conduct in light of the totality of the surrounding circumstances. Id. at 666; see Areeda & Hovenkamp, supra ¶ 262a. at 177 (endorsing objective test which asks whether antitrust defendants are likely to receive direct economic benefit as a result of any reduction in competition in market in which target firms operate). An effect on prices is not essential. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959). The Third Circuit's approach does not encompass restraints that result in incidental economic effects. See Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569. 584 (E.D. Pa. 2004) (Brody, J.).

On a motion to dismiss, **[*21]** the Court should determine whether the challenged conduct is commercial based on the factual allegations in the complaint. See Hamilton Chapter of Alpha Delta Phi. Inc. v. Hamilton Coll., 128 F.3d 59, 66 (2d Cir. 1997). In this case. SEI is challenging Defendants' adoption of and adherence to the Website Terms, particularly the reservation of rights to use any submitted ideas for any purpose, and subsequent refusal to release any ownership interest. (Compl. ¶¶ 20, 27.)[2] SEI alleges that Defendants have unlawfully claimed a proprietary interest for the purpose of excluding SEI as a competitor in the market for establishing accounting standards in the United States. (Id. ¶ 37.) SEI contends Defendants' conduct lessens competition, discourages public comment, discourages innovation, and entrenches Defendants' monopoly. (Id. ¶¶ 38, 40.)

It is important at the outset to define the apparent scope of SEI's antitrust claims against Defendants. SEI is not challenging **[*22]** FASB's conduct in setting standards, which is a more common subject of antitrust review. Instead, SEI is challenging Defendants' Website Terms which apply to voluntary submissions of solicited comments.

Federal courts have experience with the "trade or commerce" issue, particularly in the context of the NCAA's regulation of student athletics. Courts have concluded that when the challenged conduct consists of academic rules or player-eligibility requirements, the conduct is non-commercial in nature. E.g., Smith v. NCAA, 139 F.3d 180, 185-86 (3d Cir. 1998) (holding Sherman Act does not apply to NCAA rules and eligibility requirements that primarily seek to ensure fair competition in collegiate sports, not to provide the NCAA with a commercial advantage), rev'd on other grounds, NCAA v. Smith, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); Pocono Invitational, 317 F. Supp. 2d at 583-84 (concluding rules relating to recruitment at summer camps are like eligibility rules and were enacted in spirit of promoting amateurism in keeping with NCAA's general goals): College Athletic Placement Serv. Inc. v. NCAA, No. 74-1144, 1974 U.S. Dist. LEXIS 7050, 1974 WL 998, at *4-5 (D.N.J. Aug. 22, 1974) (finding NCAA policy against for-profit companies **[*23]** that find athletic scholarships for student-athletes was motivated by intent to ensure academic standards and amateurism, not by anti-competitive motive or intent).

But when the challenged conduct restrains revenue, output, or salaries, the rules are almost always commercial. E.g., NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (finding NCAA's television plan amounted to unlawful horizontal restraint on members' ability to sell television rights to their games because it operated to raise prices and reduce output); Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998) (affirming injunction against NCAA's enforcement of rule that limited salaries of entry-level coaches as unlawful horizontal restraint on trade). The Court finds these cases useful in this case because they suggest a spectrum of conduct to evaluate Defendants' alleged conduct.

Compared to this range of conduct. SEI has not sufficiently alleged that Defendants' conduct is commercial in nature. Considering the totality of circumstances and SEI's allegations, FASB sought voluntary comments from the

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[2] As noted below, Defendants' counsel's unconditional recantation of an ownership interest at oral argument must be given some weight in assessing Plaintiff's allegations, which will presumably be clarified in an amended complaint.

public in an effort to establish and promulgate accounting standards for public companies within the United States, **[*24]** which is FASB's exclusive prerogative.[3] Defendants also adopted the Website Terms to reserve FASB's right to use any submissions for any purpose, including reproduction, disclosure, and publication. SEI's allegations do not suggest conduct that is commercial in nature – there is no sale, no exchange. and no production. Compare, e.g., *Brown Univ., 5 F.3d at 668* (determining financial assistance for students is part and parcel of price-setting process and, thus, is a commercial transaction), with, e.g., *Apex Hosiery, 310 U.S. at 501-02* (concluding labor union strike intended to compel company to accede to demands not trade or commerce despite delaying interstate shipment of goods); *Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Schs., 432 F.2d 650, 654-55, 139 U.S. App. D.C. 217 (D.C. Cir. 1970)* (finding non-profit organization's decision to deny accreditation to for-profit school not commercial absent intent or purpose to affect commercial aspects).

SEI contends FASB's conduct is commercial because SEI itself is a commercial enterprise and Defendants misappropriated its patented Invention. But it is the nature of the conduct that controls, not the nature of the organizations. The alleged conduct enables FASB to solicit voluntary submissions of accounting-standard proposals, and then perform its function of establishing and promulgating those standards without being hamstrung by subsequent intellectual property claims. Any economic consequence is an indirect by-product of these efforts. SEI has not alleged that Defendants derive any economic benefit from the Website Terms – it does not allow them **[*26]** to control production, innovation, or quality by asserting an exclusive right in submitted concepts and it does not permit them to set a price. All the Website Terms appear to do is facilitate FASB's consideration and promulgation of appropriate accounting standards for public companies in the United States. SEI's allegations suggest nothing more.

For the foregoing reasons, the Court concludes that SEI has failed to sufficiently allege that Defendants are subject to antitrust scrutiny because it has failed to allege facts showing the challenged conduct is commercial in nature. The Court will grant SEI leave to amend its complaint to address these deficiencies. The Court reserves decision on certain other legal arguments made by Defendants until SEI has amended its Complaint.

C. California Law Claims

The Court will reserve decision on exercising supplemental jurisdiction until SEI has the opportunity to amend those claims over which the Court has original jurisdiction. The Court will determine at that time whether to exercise supplemental jurisdiction over SEI's California law claims. See *28 U.S.C. § 1367(a)*, *(c)*.

IV. Court's Review of Discussion at Oral Argument

Prior to oral argument, the **[*27]** Court posed questions in a letter to counsel, including whether the parties would agree to expedite the hearing on the declaratory judgment aspect of the case and stay the antitrust claims. Plaintiff's counsel indicated that Plaintiff was interested in such a proposal. Defendants would prefer a decision on the grounds stated in its Motion to Dismiss before entertaining such an agreement.

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[3] The SEC has recognized FASB as the only entity whose work-product can be recognized as "generally accepted" for the purpose of public companies' financial reporting. *Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333, 23,333-34 (May 1, 2003)*; **[*25]** see Sarbanes-Oxley Act of 2002, ***Pub. L. No. 107-204, § 108, 116 Stat. 745, 768-69*** (codified at *15 U.S.C. § 77s*). Congress also ensured FASB would remain independent from the targets of its standards by creating an independent source of funding for FASB so that it no longer had to depend on voluntary contributions or sales of its standards. Donna M. Nagy, Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status, *80 Notre Dame L. Rev. 975, 987-89* (2005); see Sarbanes-Oxley Act § 109 (codified at *15 U.S.C. § 7219*).

After discussing whether Plaintiff sufficiently pleaded its claims, it became obvious to the Court that Plaintiff would welcome the chance to amend the complaint, if only to provide more factual allegations, as now required by *Twombly* and *Iqbal*. The Court indicated it would grant that relief.

The argument contained many good points about the value of standard-setting organizations having an open mind to suggestions and ideas put forward by segments of the industry the organization serves. Defendants assert vigorously that it must have the ability to learn from submissions, such as those made by Plaintiff, and to consider and possibly use them in evolving formulations of industry standards. The Court believes that this is sound public policy and that the antitrust laws were not designed to interfere with **[*28]** such a process.

It also become clear that Plaintiff, as of yet, has not tried to gain commercial value from its patent, but understandably reserved the right to do so in the future.

At the argument, defense counsel unconditionally renounced any ownership interest by Defendants in Plaintiff's Invention. After the argument, the Court indicated it would grant leave to Plaintiff to amend its Complaint. The Court also noted that the positions of the parties should be amenable to a settlement of this dispute, and that a prolonged litigation over such issues as standing, relevant markets, and anti-competitive intent do not seem to be necessary for Defendants to continue their work, and for Plaintiff to, if it so desires. use its patent in a commercial setting. The Court encouraged the parties to work towards a written agreement and, if requested, the undersigned will be available after September 18th to meet with counsel, assuming they have made some progress towards agreement on a written statement and both are desirous of completing the agreement as a means of settling this case.

For the above reasons, Plaintiff is granted leave to file an amended complaint by September 30, 2011.

V. Conclusion

For **[*29]** the foregoing reasons, the Court will **grant** in part and **deny** in part Defendants' Motion to Dismiss. The Court will grant SEI leave to amend its Complaint in conformity with this Memorandum by September 30, 2011.

An appropriate Order will follow.

ORDER

AND NOW, on this 17th day of August, 2011, upon careful consideration of Defendants' Motion to Dismiss (ECF No. 18). the parties' briefing, and oral argument on the Motion, it is hereby ORDERED as follows:

1. Defendants' Motion is GRANTED in part and DENIED in part in accordance with the accompanying Memorandum.
2. Plaintiff Silicon Economics, Inc. is granted leave to file an amended complaint to cure the deficiencies identified in the accompanying Memorandum by September 30, 2011.
3. Defendants shall have twenty-one (21) days from service of an amended complaint to answer, move, or otherwise plead.
4. Plaintiff shall respond to any defense motion or other pleading within twenty-one (21) days of service of such motion or pleading.
5. Defendants shall reply, if at all, within fourteen (14) days of service.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.

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City of New York v. Group Health Inc.

United States Court of Appeals for the Second Circuit

May 4, 2011, Argued; August 18, 2011, Decided

Docket No. 10-2286-cv

Reporter

649 F.3d 151 *; 2011 U.S. App. LEXIS 17116 **; 2011-2 Trade Cas. (CCH) P77,569

CITY OF NEW YORK, Plaintiff-Appellant, --v.-- GROUP HEALTH INCORPORATED, HIP FOUNDATION, INC., and HEALTH INSURANCE PLAN OF GREATER NEW YORK, Defendants-Appellees.

Prior History: [1]** Appeal from a judgment of the United States District Court for the Southern District of New York (Richard J. Sullivan, Judge) granting summary judgment to Defendants-Appellees and dismissing the complaint. The City of New York argues that the district court erred by concluding that the market pled in its antitrust complaint is legally insufficient and by denying the City's motion to amend its complaint. We conclude that summary judgment was appropriate and that it was within the district court's discretion to deny leave to amend. We therefore AFFIRM the judgment of the district court.

City of New York v. Group Health, 2010 U.S. Dist. LEXIS 60196 (S.D.N.Y., May 11, 2010)

Core Terms

district court, merger, relevant market, health benefits, Pricing, employees, antitrust, argues, motion to amend, discovery, insurance provider, plans, insurance plan, providers, coverage, select, amend, premiums, merged, health insurance, summary judgment, interchangeability, municipal, compete

LexisNexis® Headnotes

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

HN1[] **Appellate Review, Standards of Review**

Appellate courts review an award of summary judgment de novo, affirming only if there is no genuine issue as to any material fact, and if the moving party is entitled to a judgment as a matter of law.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN2[] Clayton Act, Claims

To state a claim under § 7 of the Clayton Act, 15 U.S.C.S. § 18, §§ 1 and 2 of the Sherman Act, 15 U.S.C.S. §§ 1-2, and the Donnelly Act, N.Y. Gen. Bus. Law § 340(1), a plaintiff must allege a plausible relevant market in which competition will be impaired. The relevant market must be defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN3[] Regulated Practices, Market Definition

A single purchaser's preferences cannot define a market.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] Standards of Review, Abuse of Discretion

Appellate courts review a district court's denial of a motion to amend under the abuse of discretion standard. A district court abuses its discretion when it bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN5[] Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a)(2) provides that the court should freely give leave to amend the complaint when justice so requires. The rule in the Second Circuit is to allow a party to amend its complaint unless the nonmovant demonstrates prejudice or bad faith.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN6[] Amendment of Pleadings, Leave of Court

Leave to amend may be denied on grounds of futility if the proposed amendment fails to state a legally cognizable claim.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN7[] Amendment of Pleadings, Leave of Court

An amendment may be prejudicial when, among other things, it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay the resolution of the dispute.

Counsel: ALAN H. KLEINMAN, Assistant Corporation Counsel (Michael A. Cardozo, Corporation Counsel of the City of New York, June R. Buch, John R. Low-Beer, Richard J. Costa, Assistant Corporation Counsel, on the brief), New York, N.Y., for Plaintiff-Appellant City of New York.

STEPHEN M. AXINN (Michael L. Keeley, on the brief), Axinn, Veltrop & Harkrider LLP, New York, N.Y., for Defendant-Appellee Group Health Incorporated.

BRUCE H. SCHNEIDER (Derek I.A. Silverman, on the brief), Stroock & Stroock & **[**2]** Lavan LLP, New York, N.Y., for Defendants-Appellees Health Insurance Plan of Greater New York and HIP Foundation, Inc.

Judges: Before: MINER, WALKER, and WESLEY, Circuit Judges.

Opinion by: JOHN M. WALKER, JR.

Opinion

[*153] JOHN M. WALKER, JR., Circuit Judge:

Plaintiff-Appellant City of New York appeals from a judgment of the United States District Court for the Southern District of New York (Richard J. Sullivan, Judge) granting summary judgment to Defendants-Appellees Group Health Incorporated ("GHI"), HIP Foundation, Inc., and Health Insurance Plan of Greater New York (together, "HIP"), and dismissing the City's antitrust complaint without leave to amend.

The City sued health insurance providers GHI and HIP under federal and New York State antitrust laws, seeking to prevent the companies from merging. The district court granted summary judgment to GHI and HIP, holding that the market definition the City alleged as the basis of its claims is legally deficient. It also denied the City's motion to amend its complaint to allege a new market definition. The City challenges these conclusions on appeal.

We agree with the district court that the alleged relevant market is legally deficient, and conclude that its denial of leave **[**3]** to amend was not an abuse of discretion. We therefore AFFIRM the district court's judgment.

BACKGROUND

I. New York City's Health Benefits Program and the Proposed Merger

The City and several related entities obtain health insurance for their employees and their employees' dependents through the City's Health Benefits Program. Approximately 1.2 million individuals are insured through the Program. The City's Office of Labor Relations administers the Program jointly with the Municipal Labor Committee, an association of about 50 unions that represent the employees.

As a result of collective bargaining agreements and municipal law requirements, the City offers its employees several types of health insurance plans. Employees can select coverage through a Health Maintenance Organization ("HMO") plan, a Participating Provider Organization ("PPO") plan, or a Point of Service ("POS") plan.

The City periodically issues Requests for Proposals ("RFPs") inviting insurers to propose plan designs and associated premiums. Insurance providers compete to be selected during each procurement round.

Employees choose among the plans that the City selects. Those who do not receive Medicare benefits can choose among **[**4]** thirteen plans, and Medicare participants can choose among fifteen.

GHI and HIP offer the two least expensive and most popular plans. GHI offers a PPO plan and HIP offers an HMO plan. The majority of City employees and non-Medicare retirees select coverage from **[*154]** GHI's or HIP's plan, with only a small minority choosing the plan with the third largest share of enrollment.

Under municipal law and by agreement between the City and the Municipal Labor Committee, the City pays the entire premium for employees who enroll in either the HIP plan or the GHI plan. Employees who select more expensive coverage from another carrier must pay any excess in the cost of that coverage over the cost of the HIP plan.

In September 2005, GHI and HIP announced their intent to merge and to convert from non-profit to for-profit status. The United States Department of Justice and the New York State Attorney General investigated the antitrust implications of the proposed merger and decided not to challenge it. The New York State Departments of Health and Insurance granted approval for GHI and HIP to combine their operations as an interim step pending approval of an acceptable plan of conversion to a publicly owned **[**5]** company and, thereafter, a formal merger.

II. Procedural History

On November 13, 2006, the City filed this action seeking an injunction to block the merger. The complaint challenges the merger under *§ 7* of the Clayton Act, *15 U.S.C. § 18*, §§ 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2*, and the Donnelly Act, *N.Y. Gen. Bus. L. § 340(1)*, New York's ***antitrust law***. It alleges that because GHI's and HIP's plans cover a vast majority of the employees in the City's Health Benefits Program, the merger of the carriers will substantially reduce competition, and will result in monopolization of the relevant market and an increase in the premiums that the City is required to pay. The complaint defines the relevant market as the "low-cost municipal health benefits market." This market includes only those insurance plans that are inexpensive and that the City selects for inclusion in the Health Benefits Program.[1]

When the City filed its complaint, it moved for a temporary restraining order blocking the merger. Judge Karas, to whom the case was initially assigned, denied the motion. He explained that "there are substantial questions about the market definition analysis that the plaintiff has adopted here. It appears to be focused on what the City is paying for, and not so much on the market of insurance coverage. . . . I think the products . . . are the same, whether they're offered to the City or they're offered to a private large employer."

On December 4, 2009, after several years of discovery, GHI and HIP moved for summary judgment dismissing the City's complaint. They argued (1) that the market the City alleged in its complaint is insufficient as a matter of law because it is based on the City's preferences and ignores the market of insurance providers that compete for the City's business, and (2) that the City could not demonstrate a relevant antitrust injury **[**7]** because any increased premiums would result from GHI's and HIP's conversion to for-profit entities, not from their merger.

On January 20, 2010, nine days before its opposition papers were due, the City **[*155]** sought leave to file a motion to amend its complaint to add alternative market definitions. The City sought to add two alternative markets: (1) all insurance plans the City selected for inclusion in the Health Benefits Program, not only the inexpensive plans; and (2) the market for all commercial medical benefits in downstate New York. The City also sought to base its claim on the "Upward Pricing Pressure" test, which analyzes the effect of a merger on the merged firm's pricing incentives. The City contended that the Upward Pricing Pressure test could establish the anticompetitive effect of the merger without the need to define a relevant market.

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[1] The complaint alleges that this relevant market also includes the health insurance program that the New York City Transit Authority administers. Because the parties did not address this aspect of the alleged market in their briefing before the district court, the district court did not consider **[**6]** it in resolving the summary judgment motions. See *City of New York v. Group Health Inc., No. 06 Civ. 13122 (RJS), 2010 U.S. Dist. LEXIS 60196, 2010 WL 2132246, at *3 n.3 (S.D.N.Y. May 11, 2010)*. The parties do not raise this aspect of the alleged market on appeal.

The district court granted GHI and HIP's summary judgment motion and denied the City's motion to amend. *City of New York v. Group Health Inc., No. 06 Civ. 13122 (RJS), 2010 U.S. Dist. LEXIS 60196, 2010 WL 2132246, at *7 (S.D.N.Y. May 11, 2010)*. It concluded that the market the City alleged in its complaint is legally insufficient because it was defined by the preferences **[**8]** of a single purchaser: the City. *2010 U.S. Dist. LEXIS 60196, [WL] at *4-5*. Judge Sullivan, to whom the case had been reassigned, denied the City's motion to amend on the basis that (1) the City exhibited undue delay because it was on notice of its potentially deficient market definition at least as early as Judge Karas's denial of its request for a temporary restraining order more than three years earlier, and (2) the amendments would prejudice GHI and HIP by forcing them to conduct substantial additional discovery after three and a half years of defending a lawsuit premised on the City's narrow market definition. *2010 U.S. Dist. LEXIS 60196, [WL] at *5-7*.

The City appealed.

DISCUSSION

I. Sufficiency of the Alleged Market

HN1[] We review an award of summary judgment de novo, affirming "only if there is no genuine issue as to any material fact, and if the moving party is entitled to a judgment as a matter of law." *Allianz Ins. Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005)*.

HN2[] To state a claim under § 7 of the Clayton Act, §§ 1 or 2 of the Sherman Act, or New York's Donnelly Act, a plaintiff must allege a plausible relevant market in which competition will be impaired. See, e.g., *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* ("Determination **[**9]** of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition." (internal quotation marks omitted)); *Chapman v. New York State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)* (Sherman Act); *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc., 34 A.D.3d 91, 823 N.Y.S.2d 79, 83 (App. Div. 2006)* (Donnelly Act). The relevant market must be defined "as all products 'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004)* (quoting *E.I. du Pont de Nemours & Co., 351 U.S. 377 at 395, 76 S. Ct. 994, 100 L. Ed. 2d 1264*). "[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, **[**10]** the relevant market is legally insufficient." *Chapman, 546 F.3d at 238* (quoting *Queen City **[*156]** Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997))*.

Here, the district court correctly concluded that the market alleged in the City's complaint is legally insufficient because it is defined by the City's preferences, not according to the rule of reasonable interchangeability and cross-elasticity of demand. The market alleged in the City's complaint ignores the competition existing among insurance providers for the City's business, as well as the health insurance market for other large employers in the region. The City does not allege any factor that would prevent insurance companies other than those it selects for the Health Benefits Program from proposing competitive products should the merged firm raise its premiums to supracompetitive prices.

The arguments the City raises on appeal are unavailing. The City first argues that the insurance plans it approves constitute a unique market because they reflect the City's "sound policy choices." ***HN3***[] A single purchaser's preferences, however, cannot define a market. We faced a similar argument in Hack v. President and Fellows of Yale **[**11]** College, in which the plaintiffs complained that Yale was illegally tying dormitory housing to their education and alleged that Yale, because of its uniqueness, constituted its own market for education. *237 F.3d 81,* 86-87 (2d Cir. 2000), abrogated on other grounds by Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). We rejected this contention, holding that, although Yale is "unique, . . . in a collegiate sense," it does not constitute its own tying market because "there are many institutions of higher learning providing superb educational opportunities." Id. at 86. Here, although the approved insurance plans may have been particularly suitable to the City's needs, the City does not allege any reason why other similar insurance plans are unsuitable or why the numerous insurance providers in the area could not or would not design suitable plans to compete with those that the City selected.

The City next argues that its proposed market is distinct from a "single-purchaser market" because the employees who select their insurance coverage also constitute purchasers. However, the employees choose health coverage only from the plans that the City has already selected for inclusion in the **[**12]** Health Benefits Program. The employees' ability to choose among the plans in the Health Benefits Program does not change the fact that the competition among insurance providers for the business of the City and other large employers would constrain the ability of the merged firm to set its premium above a competitive price. It thus cannot save the City's artificially narrow market definition.

Finally, the City argues that the district court erred in failing to consider its expert report, which, it argues, establishes the harm to competition that would result from the merger. The district court, however, granted summary judgment on the basis that the alleged relevant market is legally insufficient. The City's expert report was thus irrelevant.

II. Denial of the City's Motion to Amend

HN4[] "[W]e review a district court's denial of a motion to amend under the abuse of discretion standard." Gorman v. Consol. Edison Corp., 488 F.3d 586, 592 (2d Cir. 2007). A district court abuses its discretion when it "bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 348 (2d Cir. 2003).

[*157] ***HN5***[] Rule 15(a)(2) of the Federal Rules of Civil Procedure **[**13]** provides that "[t]he court should freely give leave [to amend the complaint] when justice so requires." The rule in our circuit is to allow a party to amend its complaint unless the nonmovant demonstrates prejudice or bad faith. AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 725 (2d Cir. 2010) (citing Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993)).

During the course of briefing on GHI and HIP's summary judgment motion, the City moved to amend its complaint. It sought to add two additional market definitions: first, all insurance providers participating in the City's Health Benefits Program, not just the low-cost providers, and, second, all providers of commercial medical benefits in downstate New York. It also sought to add an alternative basis for its antitrust claims, the Upward Pricing Pressure Test, which, the City explains, "predicts the likely competitive impact of a proposed merger based on how a merger is likely to alter the merged firm's pricing incentives."[2] The City argues that the Upward Pricing Pressure test can be used instead of "the traditional approach of defining relevant markets."

In denying the City's motion to amend, the district court held that the City had exhibited undue delay and that the proposed amendment would prejudice GHI and HIP. City of New York v. Group Health Inc., No. 06 Civ. 13122 (RJS), 2010 U.S. Dist. LEXIS 60196, 2010 WL 2132246, at *5-7 (S.D.N.Y. May 11, 2010). The district court noted that the City was aware of the flaws in its complaint at least since Judge Karas questioned the City's market

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[2] The City explains that the Upward Pricing Pressure **[**14]** test

> measures the effect of two opposing forces resulting from a merger. First, the upward pricing pressure induced by the merger is measured by the diversion ratio, the sales that would otherwise be lost by a price increase, but that get[] recaptured by the diversion of those sales to the larger, merged entity. The second, countervailing downward price pressure is measured by efficiencies that would reduce the merged firm's marginal cost.

definition in denying its motion for a temporary restraining order more than three years earlier. *2010 U.S. Dist. LEXIS 60196, [WL] at *6*. In addition, the district court explained that allowing the amendment would unduly prejudice GHI and HIP by requiring them to conduct substantial additional discovery on a different and much broader market. Id. The district court also rejected **[**15]** the Upward Pricing Pressure Test. It noted that "its research has not revealed a single decision of a federal court adopting this test," which, "[i]n light of the case law's clear requirement that a [p]laintiff allege a particular product market in which competition will be impaired, . . . is hardly surprising." *2010 U.S. Dist. LEXIS 60196, [WL] at *6 n.6*.

The City argues that the district court abused its discretion by misapplying the standards that govern a motion to amend. First, it argues that its addition of the market comprising all insurance providers in the Health Benefits Program does not require an amendment because that market represents only a "slight change" from the market pled in the City's initial complaint. Whether or not the City's addition of a market consisting of all insurance providers in the Health Benefits Program requires a formal amendment, this market suffers from the same legal deficiency as the market in the City's initial complaint. As discussed above, a market limited to the providers participating in the Health Benefits Program is not -- as is required -- defined by the rule of reasonable interchangeability and cross-elasticity of demand. It ignores the market of health insurance **[**16]** providers in downstate New York that compete for the business of the City and other large employers. It **[*158]** thus cannot form the basis of the City's antitrust claims and its addition to the complaint would be futile. See *AEP Energy Servs. Gas Holding Co., 626 F.3d at 726* (***HN6***[] "Leave to amend may be denied on grounds of futility if the proposed amendment fails to state a legally cognizable claim.").

The City next argues that GHI and HIP did not demonstrate undue prejudice because they did not show that the amendment would require them to redo, or discard, discovery already conducted. The need to redo or discard discovery, however, is not the only form of undue prejudice we have recognized. ***HN7***[] An "[a]mendment may be prejudicial when, among other things, it would require the opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay the resolution of the dispute." *AEP Energy Servs. Gas Holding Co., 626 F.3d at 725-26* (internal quotation marks omitted). Here, the City's amendment would, at a minimum, require additional discovery from large employers other than the City in the downstate New York area and from the health insurance providers **[**17]** that compete for their business. It was not clearly erroneous for the district court to conclude that the need to obtain this discovery would delay proceedings and require substantial additional expense.

In addition, as the district court explained, the City waited more than three years to seek an amendment, and did so only after confronted with a motion for summary judgment challenging its market definition. The City argues that it cannot be faulted for the delay because GHI and HIP went along with discovery, also waiting more than three years to challenge the City's market definition. While GHI and HIP could have sought dismissal of the City's complaint earlier in the litigation, their failure to do so does not necessarily mitigate the City's delay. Although the City's delay in seeking amendment may not be evidence of bad faith, we do not think it was an abuse of discretion for the district court to find that this delay, together with the prejudice that would result from the amendment, warranted denial of the City's motion to amend.

Finally, we find no error or abuse of discretion in the district court's rejection of the Upward Pricing Pressure test. As the district court explained, **[**18]** and as we discussed above, the applicable case law requires plaintiffs asserting a claim under the Sherman Act, the Clayton Act, or the Donnelly Act to allege a market in which the challenged merger will impair competition. While the City explains the Upward Pricing Pressure test's usefulness in assessing the impact of a merger, it does not explain how the test can substitute for a definition of the relevant market in the pleadings. Cf. Carl Shapiro, Deputy Ass't Attorney Gen. for Economics, Antitrust Division, U.S. Dep't of Justice, Update from the Antitrust Division, at 15 (Nov. 18, 2010), *http://www.justice.gov/atr/public/speeches/264295.pdf* (recognizing need to define relevant market in any antitrust challenge). Whether or not the Upward Pricing Pressure test -- and its results in this case as explained by the City's expert -- would, as the City argues, be admissible as evidence of impaired competition is not relevant to the adequacy of the pleadings.

As such, we find no abuse of discretion and affirm the district court's denial of the City's motion to amend.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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Doe v. Williams

Superior Court of Maine, Kennebec County

August 18, 2011, Decided

CV-06-113

Reporter
2011 Me. Super. LEXIS 162 *

JOHN DOE et al. v. COL. ROBERT WILLIAMS, et al.[1] In his capacity as Chief of Maine State Police

Prior History: Doe v. Fowle, 2006 Me. Super. LEXIS 241 (Me. Super. Ct., Nov. 16, 2006)

Core Terms

registrants, offenders, plaintiffs', sentenced, registration requirement, registry, sex offender, punitive, verification, convicted, lifetime, fundamental rights, quotations, in-person, appears, summary judgment motion, parties, ex post facto, defendants', provisions, cases, retroactive application, bureau, challenges, register, relieved, factors, privacy, courts, classification

Judges: **[*1]** Michaela Murphy, SUPERIOR COURT JUSTICE.

Opinion by: Michaela Murphy

Opinion

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court is a motion for summary judgment brought on behalf of plaintiffs John Doe I, III, IV, V, VI, VII, VIII, X, XIII, XVI, XVIII, XXIV, and XLIII, represented by the office of Attorney Jim Mitchell, and joined by John Doe XIV, represented by Attorney Walt McKee, and John Doe XIX and XXIII, represented by Attorney Ron Bourget The plaintiffs' motion challenges the constitutionality of 34-A M.R.S. §11201-11256 (2010), Maine's Sex Offender Registration and Notification Act of 1999 (SORNA). The state defendants, represented by Deputy Attorney General Paul Stern, Assistant Attorney General Laura Yustak-Smith, and Assistant Attorney General Ron Lupton object to the motion and have cross-moved for summary judgment upholding the constitutionality of the statute, as amended. In addition to the parties' motions for summary judgment, the court also considers at this time the plaintiffs' motion for attorneys' fees, the state defendants' objection, and the plaintiffs' response.

CASE HISTORY AND BACKGROUND

[1] Colonel Patrick Fleming was the original named defendant, but Colonel Robert Williams has succeeded him in the post of Chief of the State Police. As the party is a defendant in his official, rather than individual, capacity, the court has made the substitution after receiving the new information from the state defendants.

The case was brought originally in 2006, and it has a complex history, both procedurally **[*2]** and substantively. The initial complaint was filed on April 28, 2006 on behalf of John Doe I. His complaint was dismissed by Justice Kirk Studstrup on November 16, 2006, for failure to state a claim for which relief could be granted. On October 12, 2007, the Maine Supreme Court vacated the dismissal in *Doe v. DA, 2007 ME 139, 932 A.2d 552*, and remanded the case to the Superior Court of Kennebec County for "further factual development." *Id*. at *¶ 1, 932 A.2d at 554*. The case was assigned to Justice Nancy Mills on December 29, 2007, and reassigned to the undersigned Justice on April 1, 2008. On July 14, 2008, a temporary restraining order was issued on behalf of five other John Does, who were as of that date among nineteen John Does who had filed complaints in the Kennebec County Superior Court challenging the constitutionality of SORNA. Eventually, cases consolidated in this matter have involved as many as forty-seven John Does. In addition to the John Doe cases, there remain pending approximately four other cases, both civil and criminal, which have been sent for decision along with the John Does to the undersigned Justice at the direction of the Chief Justice of the Superior **[*3]** Court.

In 2008, before the issuance of the temporary restraining orders staying prosecutions of the plaintiffs for failure to register, the case was put on hold due to legislative activity in the spring of that year. LD 446, An Act to Improve the Use of Information Regarding Sex Offenders to Better Ensure Public Safety and Awareness, was passed by both houses of the Maine Legislature. It would have mooted out many, if not all, of the claims pending at that time. It would have relieved between 500 and 600 persons convicted of sex offenses between 1982 and 1992 from having to register under SORNA. When the court and parties became aware of the pending legislation it was agreed by all, in deference to that process, that all pending cases would be informally stayed. However, any hope that the legislation would relieve the court of the obligation to pass on the constitutionality of Maine's SORNA was dashed when Governor Baldacci announced on April 30, 2008, that he would not sign the bill.

The parties commenced discovery, and more plaintiffs joined. The parties and the court soon became aware of an appeal by the State from a decision of the Lewiston District Court (Stanfill, J.), which found **[*4]** Maine's SORNA statute facially unconstitutional as violative of a criminal defendant's right to be free from ex post facto laws. The Court then became aware of Justice Fritszche's decision in *State v. A. L.., 2008 Me. Super LEXIS 164*, along with decisions from other jurisdictions based upon state constitutions, including *Doe v. State of Alaska, 189 P. 3d 999 (Alas. 2008)*. In light of these decisions, and for other considerations, this Court provided limited temporary relief to certain John Does, allowing them to remain off of the registry during the pendency of the legal action. Then, in *State v. Letalien, 2009 ME 130, 985 A.2d 4*, the Maine Supreme Court agreed that certain portions of Maine's SORNA violated the prohibition against ex post facto laws. The Law Court stayed issuance of its mandate for ninety days to give the Maine Legislature an opportunity to address the constitutional violations found in *Letalien*. The Legislature responded by enacting P.L. 2009, Chapter 570 (124th Leg., LD 1822) which was signed into law by Governor Baldacci on March 30, 2010. This legislative response to Letalien is a primary focus of the motions before the court.

After the bill became law, the court **[*5]** conferred with all parties to discuss the course of future proceedings. Eventually, twenty-four of the forty-seven plaintiffs dismissed their complaints.[2] This court further decided that certain of the pending cases should proceed to decision through dispositive cross-motions. A briefing schedule was issued, and the so-called "Mitchell Does" were joined in their arguments by the three other John Does represented by Attorneys Walter McKee and Ron Bourget. Other plaintiffs elected to proceed separately, some of them having joined much later than the plaintiffs at issue here.[3]

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[2] John Does II, IX, XI, XII, XV, XX, XXI, XXII, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV, XXXV, XXXVI, XXXVIII, XXXIX, XL, XLI, and XLII have been dismissed from this action. John Doe XI was previously knows as John Doe, Jr. and originated in York County. John Doe XII was previously known as Richard Rowe I, See Order for Consolidation dated July 22, 2008. John Doe XV was previously known as Richard Rowe II. There remains another "Richard Rowe" case which is actually a criminal matter transferred to Kennebec County from York County on Sept. 10, 2010.

[3] Among the plaintiffs who did not join in this motion **[*6]** for summary judgment, one is a criminal defendant who has filed a motion to dismiss, one is a Rule 80(c) appeal, and one case, that of John Doe XXXVII, is factually distinguishable from the John Does who are the subject of this order.

With respect to all the cases currently handled by the undersigned Justice, including the ones that are not the subject of this order, nearly all[4] are ineligible to come off the SORNA registry in the wake of *Letalien* and the enactment of Chapter 570, with the exception of nine of the Mitchell Does (I, IV, VI, VII, VIII, XIII, XVI, XVIII, XXIV) who press on with their constitutional claims here, despite qualifying for statutory or automatic removal from the registry.

The most recent complaint addressing multiple plaintiffs was the Ninth Amended Complaint, filed by the Mitchell Law Firm on June 29, 2009.[5] The court specifically excused the filing of a tenth amended complaint on behalf of the Mitchell plaintiffs, allowing plaintiffs to argue with respect to the amendments without amending **[*7]** pleadings.

On October 30, 2009, this court dismissed the plaintiffs' claims for damages brought pursuant to *Section 1983* and the Maine Civil Rights Act against all state defendants, finding that the counts had failed to state a claim. By order dated October 14, 2010, the court granted an agreed-upon motion to sever, removing all county and municipal defendants, as well as plaintiff John Doe XXXVII, from this case. The primary purpose of the severance was to allow this court, with the agreement of the parties, to decide the claims advanced by Mitchell Does against the state defendants—including ex post facto arguments that remain unresolved for a number of plaintiffs in the wake of the *Letalien* decision and the corresponding legislative response—in order that the Maine Supreme Court could ultimately address the core constitutional issues generated. Depending on the Law Court's **[*8]** review of this order, it was agreed, the plaintiffs' claims against the other defendants could be narrowed or eliminated.

Of the plaintiffs who have joined in this motion for summary judgment, six—John Doe I, IV, VI, VII, VIII, and XVI—were once on the registry and successfully petitioned for removal pursuant to the statutory amendments. Three, John Doe XIII, XVIII, and XLIII, were never on the registry, having been granted a stay from any litigation to enforce the registration requirements pending the statutory amendments. One, John Doe XXIV, filed his initial registration papers, but was protected by a temporary restraining order from having his information fully processed and displayed on the Internet and other notification sites, and has since successfully petitioned to terminate his registration requirements. Thus, nine of the plaintiffs who have joined in this motion (I, IV, VI, VII, VIII, XIII, XVI, XVIII, XXIV) qualify for statutory or automatic removal from the registry.[6] Six of the plaintiffs who have joined this motion for summary judgment thus remain on the registry: John Doe III, V, X, XIV, XIX and XXIII.[7]

The counts remaining pending before the court from the Ninth Amended Complaint are as follows:

IV: Unconstitutionality of SORNA under the Constitution of the United States;
V: Unconstitutionality of SORNA under the Constitution of Maine;
VIII: Improper use of guilty pleas;
IX: Denial of trial by jury;
X: Violation of the Maine Civil Rights Act ("MCRA"); and

XI: Violation of *42 U.S.C. §1983*.

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[4] It appears that John Doe V will be eligible to petition for termination of his registration requirements in the near future, under the current version of *34-A M.R.S. §11202-A*.

[5] John Doe XLIII was considered to have joined in the Ninth Amended Complaint. John Doe XLIV, represented by Samuel Cohen, filed a separate complaint dated on or about October 1, 2010. John Doe XLIII is participating the current motion for summary judgment; John Doe XLIV does not appear to have joined in the motion.

[6] Although John Doe XLIII is not currently on the registry due to **[*9]** this court's granting a stay from any registration enforcement litigation, should the stay be lifted, he would be ineligible to petition for termination of his registration requirements because he does not meet the provisions of the current *34-A M.R.S. § 11202-A(1)(C)*.

[7] The remaining John Does who did not join this motion for summary judgment are: XXXIII, represented by Attorney Francis Griffin, whose case was severed by order dated October 14, 2010; and John Doe XLIV, represented by Attorney Samuel Cohen.

The new challenges generated, subsequent to the Ninth Amended Complaint, by the enactment of Chapter 570 and the addition of John Doe XLIII include a request to add further facts for the court's analysis, as well as a challenge to *34-A M.R.S. §11221(1)(G)* on the grounds that it is void for vagueness and **[*10]** for numerous violations of rights guaranteed by the Maine and federal Constitutions, and an argument that Chapter 570 is unconstitutional for failing to remedy the punishment declared unconstitutionally ex post facto in *State v. Letalien, 2009 ME 130, 985 A.2d 4*, as well as the application of the plaintiffs' remaining counts to Chapter 570. The state defendants have responded sequentially to the plaintiffs' arguments in their cross-motion for summary judgment.

The court will address the issues according to the plaintiffs' organization, which combines the counts remaining from the Ninth Amended Complaint and the new arguments related to Chapter 570, and includes the state defendants' argument that the plaintiffs who have been removed from the registry lack standing. That order is as follows, in addition to the ex post facto argument after the Law Court's ruling in *Letalien*: (1) Justiciability (including the standing issue); (2) Constitutionality of *34-A M.R.S. §11221(1)(G)*; (3) Equal protection; (4) Void for vagueness; (5) Procedural due process; (6) Substantive due process; (7) Cruel and unusual punishment; (8) Maine's Declaration of Rights, *Article I, section 1 of the Maine Constitution*; **[*11]** (9) Improper use of guilty plea; (10) Right to jury trial; and (11) Violation of Maine's Civil Rights Act.[8]

STANDARD OF REVIEW

Summary judgment is appropriate when the court's review of the parties' statements of material fact and cited record evidence indicates there are no genuine issues of disputed material fact, and that the moving party is entitled to judgment as a matter of law. *Dyer v. DOT, 2008 ME 106, ¶14, 951 A.2d 821, 825*. A fact is material if it can affect the outcome of the case. *Id*. An issue of fact is genuine if "there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Inkel v. Livingston, 2005 ME 42, ¶ 4, 869 A.2d 745, 747*.

"Although no longer an extreme remedy, summary judgment is 'not a substitute for trial.'" *Cookson v. Brewer School Dep't, 2009 ME 57, ¶ 12, 974 A.2d 276, 280* (quoting *Arrow Fastener Co. v. Wrabacon, Inc., 2007 ME 34, ¶ 18, 917 A.2d 123, 127)*. "Thus, 'even when one party's version of the facts appears more credible and persuasive to the court, a summary judgment **[*12]** is inappropriate if a genuine factual dispute exists that is material to the outcome,' in which case 'the dispute must be resolved through fact-finding,' regardless of the nonmoving party's likelihood of success." *Id*. (quoting *Arrow Fastener Co., 2007 ME 34, ¶ 17, 917 A.2d at 126-27*). The nonmoving party may not rely on "conclusory allegations, improbable inferences, and unsupported speculation" to oppose summary judgment. *Dyer, 2008 ME 106, ¶ 14, 951 A.2d at 825* (quoting *Vives v. Fajardo, 472 F.3d 19, 21 (1st Cir. 2007))*. "A court may properly enter a summary judgment in a case when the parties are not in dispute over the facts, but differ only as to the legal conclusions to be drawn from those facts." *Tondreau v. Sherwin-Williams Co., 638 A.2d 728, 730 (Me. 1994)* (citing *Chadwick-BaRoss, Inc. v. T. Buck Constr., Inc., 627 A.2d 532, 534 (Me. 1993))*.

FINDINGS AND CONCLUSIONS

As a threshold issue, the plaintiffs seek to add further facts to the record for the court to consider in evaluating the motions for summary judgment. Prior to the Law Court's decision in *State v. Letalien, 2009 ME 130, 985 A.2d 4*, the parties engaged in considerable discovery. After *Letalien*, this court halted discovery **[*13]** due to the Law Court's holding that "the determination of the constitutionality of the retroactive application of SORNA of 1999 depends on a facial examination of the statute, and not on an as-applied analysis as we previously suggested in *Doe v. DA, 2007 ME 139, 932 A.2d 552*." *Letalien, 2009 ME 130, ¶ 1, 985 A.2d 4, 7*. The plaintiffs now seek to introduce evidence based upon the previously-conducted discovery for the court to consider in evaluating their challenges to SORNA based upon grounds other than an allegation that it is in violation of the *ex post facto clause*. In response, the state

[8] It is unclear to what extent the plaintiffs continue to advance their parallel argument under *42 U.S.C. §1983*.

defendants cite *Letalien*, and point out that the plaintiffs' decision to plead in pseudonym, to which the state defendants objected, results in the state defendants' inability to adequately challenge the plaintiffs' stated facts.

The court recognizes the state defendants' argument that the plaintiffs may gain an unfair advantage in a factual inquiry by pleading in pseudonym. Both parties, however, have submitted extensive statements of undisputed facts, and many of the John Does have been deposed. If the court finds that the facts to which the parties explicitly agree support an **[*14]** as-applied challenge, the court will consider those agreed-upon facts. Likewise, those counts to which the plaintiffs' challenge is facial can proceed based upon minimal or no fact-finding. The court will consider briefly which of the plaintiffs' challenges are to be evaluated facially and which proceed "as applied," thus requiring the court to determine if the parties explicitly agree on the facts underlying the claim. Any claims which are analyzed "as applied," and as to which the parties' facts do not agree closely enough to allow the court to consider them are not appropriate for summary judgment.

1. Ex Post Facto

"The prohibition on ex post fact laws in the Maine Constitution, *Me. Const, art. I, β 11*, is coextensive with the corresponding prohibition in the United States Constitution, *U.S. Const. art. I, β 10, cl. 1*." *State v. Letalien, 2009 ME 130, ¶ 63, 985 A.2d at 26*. "[T]he determination of the constitutionality of the retroactive application of SORNA of 1999 depends on a facial examination of the statute, and not on an as-applied analysis as we previously suggested in *Doe v. DA, 2007 ME 139, 932 A.2d 552*." *Id*. at *¶ 1, 985 A.2d at 7*; *see also id*. at ¶ 63, *985 A.2d at 26* **[*15]** ("For ex post facto purposes, SORNA of 1999 is properly evaluated on its face, and not in relation to how it has been applied against any individuals. Our suggestion to the contrary in *Doe v. DA, 2007 ME 139, 932 A.2d 552*, is overruled.").

Because the court's analysis is based upon a facial reading of the statute alone, the court need not consider the parties' factual allegations.

2. Justiciability:

> One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, see *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*, and, in addition, an "ongoing interest in the dispute" on the part of the opposing party that is sufficient to establish "concrete adverseness." *Camreta v. Greene, 563 U.S. 701, 693, 131 S. Ct. 2020, 179 L. Ed. 2d 1118, 1125 (2011)* (internal quotation marks omitted).

Bond v. United States, 564 U.S. 211, 217, 131 S. Ct. 2355, 2361, 180 L. Ed. 2d 269 (2011). Though the plaintiffs plead their case before the Maine courts rather than the federal courts, standing and a case and controversy are requirements of this court as well. *See, e.g., Collins v. State, 2000 ME 85, ¶¶ 5-6, 750 A.2d 1257, 1260* **[*16]** ("A party must assert a personal stake in the outcome of the litigation and present a real and substantial controversy touching on the legal relations of parties with adverse legal interests. . . . [A] party must show they suffered an injury that is fairly traceable to the challenged action and that is likely to be redressed by the judicial relief sought. . . . Further, the injury must be particularized.") (quotations and citations omitted). In order to determine the plaintiff Does' "ongoing interest in the dispute," the court will need to consider facts to evaluate whether each individual plaintiff has alleged a concrete injury, caused by SORNA of 1999 and redressable by invalidation of that statute. *See Bond, 131 S. Ct. at 2361*. The court will examine the parties' statements of material fact to ensure that both parties agree to the facts constituting the alleged injuries.

3. Constitutionality of *34-A M.R.S. §11221 (1)(G)*

The plaintiffs' challenge to the statute is facial; the court need not consider any facts.

4 Equal protection

> The *equal protection clause* of the Maine Constitution provides that "[n]o person shall . . . be denied the equal protection of the laws . . . ." *ME. CONST, art. I, § 6*-A. **[*17]** The United States Constitution provides similarly, and the two clauses provide co-extensive protection. *See* U.S. CONST, amend. XIV, § 1; *Sch. Admin. Dist. No. 1 v. Comm'r, Dep't of Educ., 659 A.2d 854, 857 (Me. 1995)*. We apply a two-step test to determine whether a statute violates the *equal protection clause*. First, the party challenging the statute must show that similarly situated persons are not treated equally under the law. *See Mahaney v. State, 610 A.2d 738, 743 (Me. 1992)*. Where this step is met, the Court must then determine what level of scrutiny to apply. *See Sch. Admin. Dist. No. 1, 659 A.2d at 857*. Where, as here, the challenged legislation does not involve a fundamental right or a suspect class, the test under this step is whether the statute is rationally related to a legitimate state interest. *Id*.

Town of Frye Island v. State, 2008 ME 27, ¶ 14, 940 A.2d 1065, 1069.

An inquiry involving a determination of whether similarly situated persons are treated equally under the law must proceed on the basis of facts presented by the party challenging the statute (here, the plaintiffs). The court will consider the facts presented, to the extent they are agreed to by the state defendants, **[*18]** in evaluating the parties' motions for summary judgment. However, if the court can determine the statute's validity based upon the second step only, then the state defendants may be entitled to summary judgment without reference to the equal treatment of similarly situated persons.

5. Void for vagueness

By definition, this argument attacks the statute facially, and consideration of particular facts would be inappropriate in evaluating whether the statute itself is unconstitutionally vague.

6. Procedural due process

"The due process rights guaranteed by the Maine Constitution, *Me. Const, art. I, § 6*-A, are coextensive with those guaranteed by the *Fourteenth Amendment of the U.S. Constitution*." *Northup v. Poling, 2000 ME 199, ¶ 9 n.5, 761 A.2d 872, 875 n.5*.

> The *Fourteenth Amendment to the United States Constitution* and *Maine Constitution, article I, section 6-A* protect individuals from deprivations of life, liberty, or property by the State without due process of law. U.S. Const, amend. XIV § 1; *Me. Const, art. I, § 6*-A. *See also Me. Const, art. I, § 19* (providing a right to redress for injuries). To find a violation of the *Fourteenth Amendment*, therefore, there must be (1) state action; **[*19]** (2) a deprivation of a life, liberty, or property interest; and (3) inadequate process.

Botting v. Dep't of Behavioral & Developmental Servs., 2003 ME 152, ¶ 23, 838 A.2d 1168, 1176.

While the parties agree that SORNA of 1999 represents state action, analysis of the deprivation of the plaintiffs' alleged interests, and of the process they received in relation to the process due, requires the consideration of certain facts. The court will consider them to the extent the parties agree to the facts at issue.

7. Substantive due process

The Law Court has "repeatedly held that federal and Maine due process rights are coextensive." State v. Milliken, 2010 ME 1, ¶16, 985 A.2d 1152, 1157-58.

> The doctrine of substantive due process "does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'"

PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991) **[*20]** (quoting Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943, 273 U.S. App. D.C. 266 (D.C. Cir. 1988)) (brackets omitted).

The Supreme Court has identified two primary features of its established method of substantive due process analysis:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)] (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. [Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); Collins v. Harker Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 277-78, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)].

Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997); Green v. Comm'r of Mental Health & Mental Retardation, 2000 ME 92, ¶ 13, 750 A.2d 1265, 1270. **[*21]** "[T]he Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" Glucksberg, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). However, "[w]hen the State exercises its police power to regulate for the general welfare and a fundamental right is not at issue, statutes are subjected to rational basis review." State v. Haskell, 2008 ME 82, ¶ 5, 955 A.2d 737, 739. "Great deference is given to social and economic regulations, and reasonableness is presumed because it is the job of the Legislature, not the courts, to balance competing interests. Consequently, the party challenging a statute has the burden of proving its constitutional deficiency." *Id*. (citation omitted). "In order to prevail, a party 'must establish the complete absence of any state of facts that would support the need for [the statute's] enactment.'" *Id*. (quoting Aseptic Packaging Council v. State, 637 A.2d 457, 461 (Me. 1994)).

> The contention that a statute enacted as a purported exercise of a state's police power is unconstitutional, as violative **[*22]** of substantive due process of law, precipitates three inquiries: (1) whether the objective of the exercise of the police power is legitimately within the scope of police power action; (2) whether the means employed are appropriate to the achievement of the objective; and (3) whether the manner in which the power is exercised is arbitrary or capricious.

State v. National Advertising Co.., 409 A.2d 1277, 1288 (Me. 1979). "[T]he statute's justification need not be expressly articulated or readily apparent 'so long as a court can divine some rational purpose.'" Ngo v. State, 2008 ME 71, ¶ 14, 946 A.2d 424, 429 (quoting United States v. Neal, 46 F.3d 1405, 1409 (7th Cir. 1995)).

Because the plaintiffs, in order to invalidate the statute, must establish either a fundamental right and the absence of narrow tailoring to a compelling state interest, OR the complete absence of any state of facts that would support the need for the statute's enactment, the court may consider the facts presented. However, it appears that a substantive due process challenge in fact extends beyond the facts presented by the parties, as a statute that does not infringe upon fundamental rights will be upheld, regardless of the **[*23]** legislature's cited facts, so long as a court can divine some rational purpose.

8. Cruel and unusual punishment

> Article I of the Maine Constitution is a declaration of rights enjoyed by Maine citizens. *Section 9* sets limits on the State's power to punish: "Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." *Me. Const, art. I, β 9*.

State v. Gilman, 2010 ME 35, ¶ 12, 993 A.2d 14, 18. "[W]e hold that the clause, 'all penalties and punishments shall be proportioned to the offense,' means what its plain language says, and does not require consideration of the individual circumstances of each offender." *Id*. at ¶ 21, *993 A.2d at 21*.

This count therefore does not require the court to consider any individualized facts other than the offense or offenses of which each plaintiff was convicted.

9. Maine's Declaration of Rights

The argument under *Article I, Section 1 of the Maine Constitution* is somewhat akin to a due process argument—the plaintiffs assert that this provision makes the rights that it guarantees Mainers "fundamental" rights **[*24]** for the purposes of a substantive due process analysis. Because the court will consider the facts agreed upon in its substantive due process analysis, it will consider the same agreed-upon facts for its determination under the Maine Declaration of Rights.

10. Improper use of guilty plea

The plaintiffs agree that their argument regarding the post hoc imposition of additional requirements based upon a guilty plea is in essence an ex post facto argument, in that for the state to "expand the consequences [of the plea] violates those [plea] agreements to the extent the expansion is punishment." (Reply Memo, of Mitchell Firm Pis. and Opp. to State Defs. Cross-Mot. for Summ. J. at 22.) Because the parties agree that the analysis of this count is the ex post facto analysis under *State v. Letalien, 2009 ME 130, 985 A.2d 4*, and *Letalien* clearly states that such analysis is facial rather than as-applied (*id*. at ¶ 1, *985 A.2d at 7*), the court need not consider factual submissions in analyzing this claim.

11. Right to jury trial

The plaintiffs acknowledge, "The state defendants are correct that if plaintiffs are entitled to no hearing on dangerousness, they are not entitled to a jury trial." (Reply **[*25]** Memo. of Mitchell Firm Pls. and Opp. to State Defs. Cross-Mot. for Summ. J. at 22.) The basis for their argument of entitlement to a jury trial on the issue of dangerousness stems from an allegation that Maine's registration system has become offender-based rather than offense-based, and that a hearing on dangerousness is therefore required. This appears to be a facial challenge to the statute within the procedural due process framework, and will require no consideration of additional factual submissions.

12. Violation of the MCRA

The parties' arguments are limited to the recovery of restitution from the state, following this court's dismissal of the claims for damages under the MCRA and *42 U.S.C. §1983* on September 20, 2009. The court need not consider facts regarding the individual plaintiffs in making its determination of the availability of restitution under the MCRA.

Having determined which of the plaintiffs' claims require the court to consider the parties' agreed-upon facts, the court will turn to the substantive analysis of the issues. For the sake of efficiency, the court inverts the order of the ex post facto and justiciability analysis, as the determination of the number of **[*26]** plaintiffs who stand to gain from this action will permeate the analysis of all of the other claims.

I. Justiciability

As noted above, justiciability requires that the plaintiffs establish both standing to obtain the relief requested, and a case and controversy, including an "'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness.'" *Bond v. United States, 564 U.S. at 217, 131 S. Ct. at 2361* (quoting *Camreta v. Greene, 563 U.S. at 693, 179 L. Ed. 2d at 1125*). The State has argued that those plaintiffs who have been removed from the registry pursuant to Chapter 570 have no further interest in the dispute, so the court lacks jurisdiction absent a claim upon which these plaintiffs could recover. The plaintiffs counter that even those plaintiffs who are no longer on the registry have a remedy to recover in this lawsuit, including restitution under their MCRA and *42 U.S.C. §1983* claims, and a declaratory judgment that the law under which they registered is unconstitutional, and that these claims are sufficient to ensure their ongoing presence in this action.

The court discusses the MRCA and *42 U.S.C. §1983* arguments below, but **[*27]** for the purposes of justiciability must reveal that the plaintiffs do not prevail on those arguments. Therefore, the "ongoing interest in the dispute" that the plaintiffs who are no longer on the registry allege is limited to a declaratory judgment that the law under which they registered, since modified by Chapter 570, is unconstitutional. The plaintiffs' logic appears to be circular. They assert that, "to support the restitution, the plaintiffs no longer on the registry are entitled to a declaration that the prior law under which they were registered is unconstitutional, a finding essentially mandated by *Letalien* even though they were not sentenced to registration as he was." The purpose of requesting this declaratory judgment is that restitution cannot be awarded against the state as a retroactive remedy, but only as an award ancillary to a prospective remedy. *See, e.g., Papasan v. Allain, 478 U.S. 265, 278, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (relief that is "tantamount to an award of damages for a past violation of . . . law, even though styled as something else," is barred by sovereign immunity). So the plaintiffs' argument for justiciability is that they still have a valid case and controversy because they **[*28]** can recover restitution ancillary to a prospective declaratory judgment regarding illegality of their original registration requirements.

However, declaratory judgment actions in fact have the same requirements regarding a valid and not moot case or controversy as other actions. *See, e.g., Preiser v. Newkirk, 422 U.S. 395, 402, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)* ("this Court, noting the difficulty in fashioning a precise test of universal application for determining whether a request for declaratory relief had become moot, held that, basically, 'the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment*.'") (quoting *Maryland Cas. Co. v. Pacific Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941))*; *Wagner v. Secretary of State, 663 A.2d 564, 567 (Me. 1995)* ("The declaratory judgment statute is 'operative only in cases where a genuine controversy exists.'") (quoting *National Hearing Aid Ctrs., Inc. v. Smith, 376 A.2d 456, 458 (Me. 1977))*; *Hodgdon v. Campbell, 411 A.2d 667, 670 (Me. 1980)* ("All courts require the declaratory plaintiff to **[*29]** show jurisdiction, a justiciable controversy and the joinder of necessary parties.").

The court believes that the issue here is not ripeness, which both parties explicitly addressed, but mootness. "Mootness 'is the doctrine of standing set in a time frame: The requisite personal interest that existed at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Ten Citizens of the Town of Biddeford v. Town of Biddeford, 2003 ME 59, ¶ 5, 822 A.2d 1196, 1199* (quoting *Halfway House, Inc. v. City of Portland, 670 A.2d 1377, 1379 (Me. 1996))*, Courts analyze "mootness by examining the record to determine 'whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources.'" *Id*. (quoting *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43, 1999 ME 143, ¶ 14, 738 A.2d 1239, 1243)*. "A dispute loses its controversial vitality when a decision by this court would not provide [a litigant] any real or effective relief." *Id*. at ¶ 6, *822 A.2d at 1199* (quoting *Int'l Paper Co. v. United Paperworkers Int'l*

Union, 551 A.2d 1356, 1360-61 (Me. 1988)). "The Declaratory Judgments Act, 14 M.R.S. **[*30]** A. ββ 5951-5963 (2003), also does not authorize their claim in the absence of injury. We have consistently held that the Act may only be invoked when there is a genuine controversy." *Id*. at ¶ 7, *822 A.2d at 1200*.

There is no relief that this court could provide the plaintiffs who have already been removed from the registry. Their petition for a declaratory judgment seeks a judgment on an alleged wrong (the registration and associated costs for those plaintiffs currently free of registration requirements) that is no longer present, so the declaratory judgment action is moot. They cannot collect restitution from the state in the absence of a prospective claim, so that claim does not avail them.[9] Because the court could not provide "any real or effective relief" to those plaintiffs who have already had their registration obligations terminated, their claims are moot. The state defendants' motion for summary judgment to this effect is GRANTED; the plaintiffs' motion for summary judgment as to their continued vitality is DENIED.

II. Ex post facto

1. The parties' **[*31]** arguments and the court's task after *Letalien*

The plaintiffs contend that the imposition of any registration requirement on any plaintiff sentenced before 1991 constitutes an unconstitutional ex post facto act, and therefore seek to reargue several arguments struck down in *Letalien* as to registrants who were sentenced after 1991, when Maine's first sex offender registration law took effect. They ultimately focus on the three elements that the *Letalien* court identified as posing a constitutional problem—lifetime registration, quarterly in-person verification, and the absence of a waiver procedure, see *Letalien, 2009 ME 130, ¶ 62, 985 A.2d at 26*—and apply the Mendoza-Martinez factors to those three elements in light of the legislative changes of Chapter 570 and the status of the plaintiffs as having been sentenced prior to 1992.[10]

The plaintiffs also focus on clear language in Letalien that suggests to them that any statutory scheme that fails to provide some opportunity for an offender, any offender, to petition for termination of SORNA obligations at some point in his or her lifetime violates the mandate of that case. Indeed, the holding of Letalien is as follows:

> Specifically, we hold that the retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is punitive. As to these offenders, the retroactive application of SORNA of 1999 is an unconstitutional ex post facto law because it makes more burdensome the punishment for a crime after its commission.

Id, at ¶ 62, *985 A.2d at 26* (quotations omitted). Unsurprisingly, the plaintiffs conclude that SORNA of 1999, as revised, is unconstitutionally ex post facto as applied to them because the statutory amendments make it impossible, **[*33]** based on legislative categorization of offenders, to ever be free of the requirements of SORNA.

SORA of 1991 and SORNA of 1995 did in fact provide an opportunity to be relieved of SORNA's requirements to *all* offenders subject to the provisions of those laws. SORA of 1991 provided that its registration requirements could be waived under four circumstances: (1) vacating of the conviction; (2) granting of a full and free pardon; (3) issuance of a certificate of rehabilitation by a licensed counselor certified by the Forensic Evaluation Unit at the Department of Mental Health and Mental Retardation that deals with sex offenders; or (4) waiver of the registration requirement by the sentencing court for good cause shown. *34-A M.R.S § 11003* (1992), *repealed by* P.L. 2001, ch. 439, §

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[9] This proposition, and the precedent supporting it, is discussed in more detail in connection with the plaintiffs' MCRA claim below.

[10] Doe V was convicted in 1993, but was not subject to sex offender registration until the 2001 amendments to SORNA of 1999. *See Doe v. DA, 2007 ME 139, ¶14, 932 A.2d 552, 556* ("In 2001, the Legislature amended SORNA to apply retroactively to sex offenders sentenced on or after June 30, 1992. *See* P.L. 2001, ch. 439, β OOO-7 (effective Sept. 21, **[*32]** 2001) (codified at *34-A M.R.S.A. β 11202* (Supp. 2001)).")

OOO-5 (effective Sept. 1, 2001). It was amended in 1993 by P.L. 1993, chapter 193 §3, which repealed the provision for waiver upon issuance of a certificate of rehabilitation, and provided instead for waiver if:

> The Superior Court, upon the petition of the sex offender, waives the registration requirement.
>
> A sex offender may not petition for waiver of the registration requirement until at least 5 years after the sex **[*34]** offender is first required to register.
> A sex offender may petition once a year for waiver of the registration requirement.
> Before waiving the registration requirement, the court must determine that the sex offender has shown a reasonable likelihood that registration is no longer necessary and waiver of the registration requirement is appropriate. The court shall consider the sex offender's progress in treatment and may request an independent forensic evaluation provided through the State Forensic Service. If the court orders an independent forensic evaluation, the court shall reimburse the State Forensic Service for the cost of the evaluation and order the sex offender to reimburse the court for the cost of the evaluation . . . .

34-A M.R.S. §11003 (C-1) (1993), *repealed by* P.L. 2001, ch. 439, §OOO-5 (effective Sept. 21, 2001). SORNA of 1995 maintained the 1993 amendments. *34-A M.R.S. §§11003*, *11121* (1996), *repealed by* P.L. 2001, ch. 439 §OOO-5 (effective Sept. 21, 2001).

The fact that the Law Court's holding in *Letalien* points specifically to the waiver provisions of SORA of 1991 and SORNA of 1995, together with the clear language, "without at a minimum, affording those offenders any **[*35]** opportunity to *ever* be relieved of the duty as was permitted under those laws," *Letalien, 2009 ME 130, ¶ 62, 985 A.2d at 26* (emphasis added), suggests to this court that the Law Court was in fact concerned about any statutory scheme which imposed retroactive lifetime obligations on offenders without providing any opportunity to be relieved of those obligations.

The court also recognizes the plaintiffs' argument that the legislature sought to add an individualized waiver scheme to Chapter 570, and that the only reason an individualized waiver scheme was not included was that it would cost too much money for the judicial branch. The plaintiffs point to the summary of H.P. 1305, L.D, 1822, the bill that was signed into law as P.L. 2009, ch. 570, which provides in pertinent part: "An additional waiver scheme that authorized registrants to petition the court for relief from the duty to register was not included in the bill at this juncture due to a substantial fiscal note from the judicial branch, but may be considered again in the next legislative session." (Mitchell Pls. S.M.F. 20, quoting L.D. 1822, Summary (124th Legis. 2010)).

Turning to the state defendants' arguments, they contend **[*36]** that the Law Court's holding in *Letalien* that SORNA of 1999 was unconstitutionally ex post facto as applied to those sentenced under SORA of 1991 and SORNA of 1995 was based upon the combination of four factors: (1) the fact that the original registration requirements were part of the offender's sentence; (2) the increase of registration time to a lifetime requirement; (3) new quarterly in-person verification requirements; and (4) removal of the opportunity to be relieved from the registration requirements. Because *Letalien* was grounded in the combination of these factors, the state defendants argue, the legislature's modifications to these requirements under Chapter 570, including reduction of the in-person verification requirements and allowing large classes of registrants to petition for relief from registry verification requirements, relieve the burden that was found in the aggregate to be unconstitutionally ex post facto.

The state defendants contend that the plaintiffs are in a different position than *Letalien* in that they were not sentenced under SORA or SORNA, so that the requirements of SORNA of 1999, imposed upon the majority of these plaintiffs in 2005,[11] did not modify their **[*37]** sentences and thus cannot constitute an ex post facto

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[11] *See* *Doe v. District Attorney, 2007 ME 139, ¶ 14, 932 A.2d 552, 556* ("in 2001, the Legislature amended SORNA to apply retroactively to sex offenders sentenced on or after June 30, 1992. *See* P.L. 2001, ch. 439, β OOO-7 (effective Sept. 21, 2001) (codified at *34-A M.R.S.A. β 11202* (Supp. 2001)). . . . The Legislature amended SORNA in 2005 to apply retroactively to all sex offenders sentenced as of January 1, 1982. P.L. 2005, ch. 423, β 1 (effective Sept. 17, 2005) (codified at *34-A M.R.S. β 11202* (2006)).''). Doe V was convicted in 1993, but was not subject to sex offender registration until the 2001 amendments **[*40]** to SORNA of 1999. Does III, X, XIV, XIX, XXIII, and XLIII became subject under the 2005 amendments.

punishment. The state points to the language in *Letalien* which focused on the "unique history of the development of sex offender registration laws in Maine," together with the conclusion that "[b]ecause sex offender registration was *required* to be part of Letalien's criminal *sentence*, the retroactive application of SORNA of 1999's requirements to Letalien modified and enhanced a portion of his sentence." *Letalien, 2009 ME 130, ¶¶ 39, 43, 985 A.2d at 19, 20* (emphasis added). This court finds that argument to be quite unpersuasive. The court believes that the Law Court was using this analysis to conclude that Letalien was subject to punishment by the enactment of SORNA of 1999 in its removal of a waiver provision, and not as a suggestion that any offender sentenced before the enactment of SORA of 1991 and SORNA of 1995 would be ineligible to even argue that he or she ought to be protected from imposition of an ex post facto law.

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, **[*38]** and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products, 511 U.S. 244, 265, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994)*. This doctrine finds expression in several provisions of our Constitution. [12] The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, *United States v. Winstar Corp., 518 U.S. 839, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996)*, but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.
>
> [12] "The *Ex Post Facto Clause* flatly prohibits retroactive application of penal legislation. . . . The *Due Process Clause* also protects the interests in fair notice and repose that may be compromised by retroactive legislation . . . ." *Landgraf v. USI Film Products, 511 U.S. at 266* (footnote omitted).

Lynce v. Mathis, 519 U.S. 433, 439-40, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997). "The **[*39]** bulk of [the Supreme Court's] *ex post facto* jurisprudence has involved claims that a law has inflicted 'a greater punishment, than the law annexed to the crime, when committed.'" *Id. at 441* (quoting *Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 390, 1 L. Ed. 648 (1798))*. "[S]uch laws implicate the central concerns of the *Ex Post Facto Clause*: 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Id*. (quoting *Weaver v. Graham, 450 U.S. 24, 30, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981))*.

"To fall within the *ex post facto* prohibition, a law must be retrospective--that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it,' by altering the definition of criminal conduct or increasing the punishment for the crime." *Id*. (quoting *Weaver, 450 U.S. at 29*, and citing *Collins v. Youngblood, 497 U.S. 37, 50, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990))*. The sex offense convictions serving as the predicate for the plaintiffs' registration requirements occurred before the enactment of SORNA of 1999. And the registration and verification requirements do "disadvantage" the plaintiffs, in that their convictions, already a matter of public record, are made easily available by the registry, and in that they must report to law enforcement and provide information to law enforcement on a regular basis, in some cases for the duration of the offender's lifetime.

The state defendants' assertion that any number of requirements, no matter how onerous, may be heaped onto the plaintiffs based upon their convictions without "increasing the punishment for the crime" because **[*41]** the plaintiffs were sentenced prior to the existence of any sex offender registry defies logic, and is constitutionally unsound. The court has already ascertained that a retrospective law disadvantaged the plaintiffs; it is a matter of delicate balancing pursuant to the intent-effects test (*see* *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*, discussed below) to determine whether that retrospective law had effects so punitive that it must be considered a criminal sanction rather than the civil categorization the legislature intended. The analysis of whether SORNA of 1999, as amended, increased the punishment for the plaintiffs' crimes is thus completely independent of their original sentences; it is the convictions, rather than the sentences, which serve as the predicate for the applicability of SORNA of 1999, and the *Mendoza-Martinez* intent-effects test which will help the court to determine whether SORNA of 1999 goes beyond disadvantageous and into unconstitutionally retrospectively punitive.

This court conceives the task before it to be fundamentally different from the framework proposed by both the plaintiffs and state defendants. The court rejects, in part, the notion **[*42]** that there are four factors which worked in combination to make SORNA of 1999 unconstitutional, as the court has found highly unpersuasive the state's argument that the plaintiffs are not eligible to challenge Chapter 570 because they were not sentenced under SORA or SORNA. However, the court does agree that it must consider the state defendants' argument that the Law Court in *Letalien* found SORNA of 1999 to be unconstitutional based upon a combination of factors, but finds that there are three and not four factors to be considered. Those factors are, as the plaintiffs also highlight: (1) the increase of registration to a lifetime requirement; (2) new quarterly in-person verification requirements; and (3) removal of the opportunity to be relieved from the registration requirements. The state defendants' argument is that, since *Letalien* was grounded in the combination of these factors, the legislative response to *Letalien* is constitutional because Chapter 570 reduced the in-person verification requirements and allowed large classes of registrants to petition for relief from registry verification requirements, thus relieving two of the three factors in some measure. The plaintiffs emphasize **[*43]** the language from the holding of *Letalien*, discussed above, which they asserts render the legislative response constitutionally inadequate because, among other reasons, there remain large numbers of offenders who can never be relieved from obligations imposed by SORNA.

The tasks before the court include a reconciliation, to the extent possible, of the language in *Letalien* suggesting that the provisions of SORNA of 1999 imposing, after sentence, lifetime registration and verification obligations for offenders without an opportunity for the offenders ever to relieved of those obligations was constitutionally unacceptable, with other language from the case that may suggest that it was a combination of the three factors described above that was constitutionally unacceptable. The primary focus of the court's decision, however—at least this much is clear from Letalien—must be application of the *Mendoza-Martinez* intent-effects test to the legislative response to the Law Court's decision in that case.

2. Application of the *Mendoza-Martinez* intent-effects test

The United States Constitution provides that "[n]o State shall. . . pass any . . . ex post facto Law." *U.S. Const, art. I, § 10, cl. 1*. **[*44]** The Maine Constitution likewise provides, "The Legislature shall pass no . . . ex post facto law." *Me. Const, art. I, § 11*. "[T]he *ex post facto clauses of the Maine and United States Constitutions* are interpreted similarly and are coextensive." *Letalien, 2009 ME 130, ¶ 25, 985 A.2d at 14*. A "statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed," is an ex post facto law. *Id*. at % 17, *985 A.2d at 12* (quoting *Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990))*.

In analyzing ex post facto challenges to SORNA of 1999, the Law Court has consistently followed "the two-step 'intent/effects' test employed by the United States Supreme Court in [*Smith v. Doe, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)]*, and *Hudson v. United States, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)*." *Letalien, 2009 ME 130, ¶ 29, 985 A.2d at 16* (citing *State v. Haskell, 2001 ME 154, ¶¶ 8-22, 784 A.2d 4, 8-16*, and *Doe, 2007 ME 139, ¶¶ 22-28, 32, 36, 932 A.2d at 559-63*). "If SORNA measures are **[*45]** deemed civil rather than criminal in nature . . . they do not implicate the *Ex Post Facto Clause*." *Haskell, 2001 ME 154, ¶ 7, 784 A.2d at 8*.

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Even in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 567-568, 9 L. Ed. 2d 644 (1963*), provide useful guideposts, including: (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether **[*46]** its operation will promote the

> traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." It is important to note, however, that "these factors must be considered in relation to the statute on its face," *id. at 169, 83 S. Ct. at 568*, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

Id. at ¶ 8, *784 A.2d at 8* (quoting *Hudson v. United States, 522 U.S. 93, 99-100, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997))*. "[T]he Supreme Court has intimated . . . that the most significant question under the effects stage of the analysis is whether the law, 'while perhaps having certain punitive aspects, serves important non punitive goals.'" *Id*. at ¶ 9, *784 A.2d at 9* (quoting *United States v. Ursery, 518 U.S. 267, 290, 116 S. Ct. 2135, 135 L. Ed. 2d 549, (1996))*.

The law court has repeatedly held that SORNA of 1999 "was intended by the Legislature to be a civil regulatory statute," noting "the Legislature's express statement **[*47]** that SORNA of 1999 is intended to 'protect the public from potentially dangerous registrants by enhancing access to information concerning those registrants,'" and that the Legislature "placed SORNA of 1999 entirely outside of the Criminal Code." *Letalien, 2009 ME 130, ¶ 30, 985 A.2d at 16* (quoting *34-A M.R.S. § 11201* (2008)); *see also* *State v. Cosgro, 2008 ME 64, ¶ 3, 945 A.2d 1221* n.l, *2008 ME 64, 945 A.2d 1221, 1223*; *Doe, 2007 ME 139, ¶ 27, 932 A.2d at 560*; *Haskell, 2001 ME 154, ¶ 12, 784 A.2d at 10*. Given that the law court's analysis is clear on this factor, the plaintiffs' burden is also clear-cut: "one challenging a statute as imposing ex post facto punishment must demonstrate by the clearest proof that the statute is so punitive in purpose or effect as to overcome the Legislature's civil intent." *Cosgro, 2008 ME 64, ¶ 2, 945 A.2d at 1222* (quotations omitted). With this standard in mind, the court turns to the analysis of the seven *Mendoza-Martinez* factors.

i. Affirmative disability or restraint

As to the first factor, "affirmative disability or restraint" (see *Mendoza-Martinez, 372 U.S. at 168*), the Law Court held in *Letalien* that "quarterly, in-person verification of identity and location of home, school, **[*48]** and employment at a local police station, including fingerprinting and the submission of a photograph, for the remainder of one's life, is undoubtedly a form of significant supervision by the state," constituting a "disability or restraint that is neither minor nor indirect." *Letalien, 2009 ME 130, ¶ 37, 985 A.2d at 18*. The *Letalien* court distinguished Maine's then-applicable registration scheme from cases where the sex offender registration laws had been held not to impose a restraint "because the relevant laws afforded offenders the opportunity to seek the early termination of the registration requirement." *Letalien, 2009 ME 130, ¶ 37 n. 9, 985 A.2d at 18 n.9* (citing *Doe v. Pataki, 120 F.3d 1263, 1284-85 (2d Cir. 1997)*, *amended on other grounds by 120 F.3d 1263, 1285 (2d Cir. 1997)* (addressing a duty to register in person every ninety days for a minimum of ten years); *Doe v. Poritz, 142 N.J. 1, 662 A.2d 367, 378 (N.J. 1995)* (noting that the statute's lifetime registration requirements could be terminated early if an offender is offense-free for fifteen years and "can persuade the court that he or she is not likely to pose a threat to the safety of others")). The *Letalien* court went **[*49]** on to note that a third case, *Doe v. Otte, 259 F.3d 979, 987 (9th Cir. 2001)*, had been reversed by the United States Supreme Court in *Smith v. Doe, 538 U.S. 84, 106, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)*, wherein the Supreme Court noted that the Ninth Circuit opinion, which had ruled that lifelong quarterly in-person verification did create an affirmative disability, had mistakenly construed the Alaska statute as requiring in-person updates. *Smith, 538 U.S. at 101*; *see also* *Doe v. District Attorney, 2007 ME 139, ¶ 32, 932 A.2d at 562*.

The Law Court's analysis of this factor supports the state defendants' argument that *Letalien* stands for the proposition that the requirements imposed by SORNA of 1999, taken cumulatively, amounted to an unconstitutional ex post facto punishment. By distinguishing cases where the burden of in-person registration requirements was ameliorated by an opportunity to seek termination of the registration requirement, the court believes the Law Court gives some indication of the meaning of its oft-quoted sentence: "[W]e hold that the retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced **[*50]** subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is punitive." Letalien, 2009 ME 130, ¶ 62, 985 A.2d at 26.

However, the question remains as to whether the requirements of SORNA of 1999, as revised by Chapter 570, constitute an affirmative disability and restraint as to registrants convicted of crimes prior to 1991. The Law Court specifically found that the in-person verification procedures constituted a significant and direct disability and restraint, noting, "These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.'" *Id*. at ¶ 37, 985 A.2d at 18 (citing Doe, 2007 ME 139, ¶ 32, 932 A.2d at 562). Chapter 570 has reduced the frequency of registrants' in-person verification requirements, such that a lifetime registrant may verify his or her information in writing quarterly and **[*51]** in person every five years, or when law enforcement has reason to believe his or her appearance has changed significantly; a ten-year registrant verifies in writing annually and in person every five years or when law enforcement has reason to believe his or her appearance has changed significantly. 34-A M.R.S. §11222(4-A) and (4-B) (2011). These amendments affect in-person registration requirements for those sentenced between January 1, 1982 and September 18, 1999, including the plaintiffs. *Id*.

In addition, Chapter 570 added several exceptions to the registration requirement of 34-A M.R.S. § 11202-A (2009). These amendments allow several groups of lifetime registrants to petition for removal from the registry, including (1) registrants sentenced in Maine between January 1, 1982 and June 30, 1992, who were finally discharged from the correctional system at least 10 years prior to their petition for removal; (2) registrants sentenced in Maine on or after June 30, 1992 and prior to September 18, 1999, who were finally discharged from the correctional system at least 10 years prior to their petition for removal; (3) registrants who were sentenced in another jurisdiction, were finally discharged **[*52]** from the correctional system at least 10 years prior to their petition for removal, and who have been in compliance with the registration duties as a resident required under subchapter 2 since September 12, 2009; and (4) registrants sentenced in Maine on or after September 18, 1999 and prior to July 30, 2004 for a violation of former Title 17A, section 252 who were finally discharged from the correctional system at least 10 years prior to their petition for removal; any of whom must not have been convicted of more than one Class A sex offense, who must not have been convicted of a sex offense or a sexually violent offense prior to the registrable offense, and who must not have been convicted of a crime punishable by imprisonment for a term of one year or more subsequent to the registrable sex offense. 34-A M.R.S. §11202-A (2011).

The Chapter 570 modifications do significantly ease the burdens that the Law Court found punitive in *Letalien*. However, the statute continues to impose "restraints," on its registrants, albeit more "indirect" and "minor" than those at issue in *Letalien*. While the ability to seek relief from registration requirements is a boon to those who can benefit from it, **[*53]** many registrants cannot, including several of the plaintiffs. *Cf.* Doe v. District Attorney, 2007 ME 139, ¶ 35, 932 A.2d at 563 ("[T]he fact that a sex offender never has the ability to escape the registration requirements of the current SORNA, regardless of behavior, consequences, or contributions following the conviction, strikes us as having the capability to be excessive and as diverging from the purpose of protecting the public").

Likewise, while a reduction in the frequency of in-person verification may lighten the onus of the verification requirement in theory, in practice, the statute still compels "registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place[s] substantial restrictions on the movements of... registrants and may work an 'impractical impediment that amounts to an affirmative disability.'" Letalien, 2009 ME 130, ¶ 37, 985 A.2d at 18 (citing Doe, 2007 ME 139, ¶ 32, 932 A.2d at 562). It is thus more restrictive than the statute approved by the United States Supreme Court in Smith v. Doe, 538 U.S. 84, 101, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("[T]he record contains no indication that an in-person appearance **[*54]** requirement has been imposed on any sex offender subject to the Act,"). The provision allowing additional in-person verification requirements "if there is a reason to believe the [registrant's] appearance has changed significantly," 34-A M.R.S. §11222(4-A)(C), (4-B)(C), is also significantly intrusive. Rather than in-person verification submissions based upon a set period of time, this provision compels registrants to "physically appear at their local law enforcement agencies within five days of receiving a notice by mail" without advance notice to allow registrants to anticipate such verification procedures. Letalien, 2009 ME 130, ¶ 37, 985 A.2d at 18. This is a significant governmental intrusion. It may be one that is sustainable under the remaining factors of the *Mendoza-Martinez* analysis, but the "affirmative disability or restraint" factor weighs in favor of a finding that the statute is punitive, even once Chapter 570's mitigating provisions are taken into account.

ii. Historical interpretation as punishment

Turning to the second *Mendoza-Martinez* factor, whether retroactive application of the law has historically been regarded as a punishment (*see* Mendoza-Martinez, 372 U.S. at 168), **[*55]** the Letalien court reached two separate conclusions. First, citing Smith v. Doe, 538 U.S. 84, 97-99, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the law court held that that "Internet posting pursuant to SORNA of 1999 is not punitive in purpose or effect." Letalien, 2009 ME 130, ¶ 38, 985 A.2d at 19. The Law Court then considered Maine's unique legislative history and concluded that "retroactive application of SORNA of 1999 to offenders who were sentenced on or after June 30, 1992, and before September 18, 1999, should be regarded as punishment." *Id*. at ¶ 39, 985 A.2d at 19. This conclusion was due to the fact that the versions of the sex offender registration statutes in place between June 30, 1992 and September 18, 1999, "authorized sentencing judges, as part of the sentencing process, to waive an offender's duty to register," (*id*.), whereas SORNA of 1999 eliminated this exercise of judicial discretion. *Id*. at ¶¶ 42-43, 985 A. 2d at 20.

As discussed above, the state defendants argue that *Letalien's* holding does not apply to the plaintiffs, since that case noted, "Because sex offender registration was required to be part of Letalien's criminal sentence, the retroactive application of SORNA of 1999's requirements to Letalien **[*56]** modified and enhanced a portion of his criminal sentence," and therefore, "the retroactive application of SORNA of 1999 makes more burdensome the punishment for a crime after its commission," ultimately finding that, "SORNA of 1999 is punitive as applied to those offenders who were originally made subject to SORA of 1991 or SORNA of 1995." Letalien, 2009 ME 130, ¶ 43, 985 A.2d at 20-21 (quotations omitted).

The plaintiffs, however, counter that the essence of an ex post facto law is that punishment becomes more burdensome after the commission of a crime, and that therefore, their being subject to SORNA of 1999 is even more troublesome than that of Letalien and his class of registrants, since the *Letalien* class of registrants originally had some registration requirement which then became more onerous, but the plaintiffs ended up facing all of the onerous requirements of *Letalien*, with no notice that they would ever be required to meet its specifications. Or as plaintiffs state in their argument regarding lifetime registration: "For plaintiffs, the journey is not from fifteen years to lifetime but from no years to lifetime." The plaintiffs then argue that insofar as their situation is **[*57]** different from Letalien's and they were not notified that there would be a registration requirement, the internet publication that was approved in Letalien, 2009 ME 130, ¶ 38, 985 A.2d at 19, may still be unconstitutionally ex post facto as to them.

There now appears to be a multi-jurisdictional consensus that the internet registration requirement is not punitive, even as applied to those who were not originally subject to it. *See, e.g.,* Smith v. Doe, 538 U.S. at 91, 99; A.A. ex rel. M.M. v. New Jersey, 341 F.3d 206 (3d Cir. 2003); Femedeer v. Haun, 227 F.3d 1244, 1248, 1253 (10th Cir. 2000); A.A. v. State, 384 N.J. Super. 481, 895 A.2d 453 (N.J. Super. 2006); State v. Gragg, 143 Idaho 74, 137 P.3d 461, 464-65 (Idaho Ct. App. 2005); People v. Cornelius, 213 Ill. 2d 178, 821 N.E.2d 288, 292, 307, 290 Ill. Dec. 237 (111. 2004); Haislop v. Edgell, 215 W. Va. 88, 593 S.E.2d 839, 845-46 (W. Va. 2003); In re W.M.., 851 A.2d 431, 446 (D.C. App. 2004). Even if this were not the case, this court is bound by the determinations of the Supreme Court as to the Federal constitution, and of the Law Court as to the Maine Constitution, and both courts have plainly and clearly ruled that internet posting is not punitive for purposes of an ex post facto analysis. *See* Smith v. Doe, 538 U.S. at 98-99 **[*58]** ("In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme. . . . These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender."); Letalien, 2009 ME 130, ¶ 38, 985 A.2d at 19 ("[W]e conclude that Internet posting pursuant to SORNA of 1999 is not punitive in purpose or effect."). This court is bound by those determinations, which do not make a distinction based upon whether registration was part of the offender's original sentence or whether it was imposed separately and subsequent to his or her conviction.

Having rejected both the plaintiffs' argument that the Internet registration requirement is unconstitutionally ex post facto as to them and the state defendants' argument that the plaintiffs are ineligible for ex post facto protection in Maine because they were not sentenced under SORA of 1991 or SORNA of 1995, the court turns to the question of whether sex offender registration, apart from Internet registration, is historically considered **[*59]** punishment. *Letalien* held that retroactive registration was historically considered punishment, that is, that the second *Mendoza-Martinez* factor suggested that SORNA of 1999 was punitive as to registrants originally sentenced under either SORA of 1991 or SORNA of 1995, that is, when the registration was ordered as part of a sex offender's sentence unless waived by judicial decree. *Letalien, 2009 ME 130, 42-43, 985 A.2d at 20-21*. The court notes that *Letalien* limited its analysis to the case before it in that the case only dealt with a situation in which the registration requirements of SORNA of 1999 were applied retroactively to sex offenders who were convicted and sentenced of sex crimes under either SORA of 1991 or SORNA of 1995.

Analysis of the same factor for those registrants convicted of sex offenses between 1982 and 1991 requires that the court consider more generally what the term "punishment" means for those registrants convicted and sentenced before the enactment of any registration law. *See Letalien, 2009 ME 130, ¶ 61, 985 A.2d at 25*; *cf*. P.L. 2003, ch. 771, § B-13 (eff. July 30, 2004) (codified at *17-A M.R.S. § 1152(2-C)* (2006) (modifying SORNA of 1999 to remove the provision **[*60]** stating that registration should be ordered "as part of the sentence" and to substitute, "At the time the court imposes a sentence"). *Letalien* noted, "[W]hen sex offender registration is made a part of an offender's criminal sentence, it necessarily constitutes a part of the punishment administered by the State in response to that offender's criminal conviction," *Letalien, 2009 ME 130, ¶ 61, 985 A.2d at 25*. When the legislature first enacted sex offender registration in Maine, it enacted those requirements as part of the offender's sentence—and therefore "part of the punishment administered by the State in response to that offender's criminal conviction." *Id*. Even after the legislature had amended SORA of 1991 and SORNA of 1995, the registration requirement remained part of the offender's sentence—and thus, punishment, at least in part— until P.L. 2003, ch. 771, § B-13 (effective July 30, 2004), codified at *17-A M.R.S. § 1152(2-C)* (2005). *See State v. Johnson, 2006 ME 35, ¶ 14, 894 A.2d 489, 492*. While the Legislature has since recast SORNA of 1999 as part of a civil regulatory scheme, rather than part of a sex offender's sentence, the Law Court emphasized the importance of "[t]he **[*61]** unique history of the development of sex offender registration laws in Maine . . . to the question of whether the retroactive application of SORNA of 1999 . . . should be regarded as punishment." *Letalien, 2009 ME 130, ¶ 39, 985 A.2d at 19*. Examination of the registry's history shows the closeness of its association with punishment. The court recognizes that the plaintiffs' connection to the "sentencing" and therefore punishment provisions of the registration scheme are slightly more attenuated than those of the *Letalien* class, who were sentenced to registration, but notes that the burdens imposed by retroactive application of SORNA of 1999 to the plaintiffs—including but not limited to the initial registration process, the quarterly written requirements, the in-person verification every 5 years, and the inability to ever petition for removal from the registry— impose duties upon the plaintiffs, in perpetuity, of more that their initial sentences (or "punishment") required. "[B]ecause the purpose of the ex post facto prohibition is rightfully considered to be at its apex when a law's retroactive application is more punitive than the punishment that was actually imposed against an offender **[*62]** as part of a sentence," *Letalien, 2009 ME 130, ¶ 61, 985 A.2d at 25-26*, the court considers this factor to weigh in favor of a finding that the retroactive application of SORNA of 1999 to the plaintiffs is punitive.

iii. Scienter

"The third factor asks whether the obligation to register according to SORNA is triggered only on a finding of *scienter*. In *Haskell* we concluded that it is not and that this factor supports SORNA being viewed as non-punitive." *Letalien, 2009 ME 130, ¶ 44, 985 A.2d at 21* (citing *Mendoza-Martinez, 372 U.S. at 168*; *Haskell, 2001 ME 154, ¶ 17, 784 A.2d at 12*).

iv. Promotion of retribution and deterrence

"The fourth factor requires consideration of whether SORNA of 1999 promotes retribution and deterrence, the traditional aims of punishment" *Letalien, 2009 ME 130, ¶ 45, 985 A.2d at 21* (citing *Mendoza-Martinez, 372 U.S. at 168*). In *Smith v. Doe, 538 U.S. 84, 102, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)*, the United States Supreme Court found that Alaska's SORNA was not punitive merely because the statute might deter future crimes, nor was it retributive, even though it was applied based upon the extent of the wrongdoing rather than the extent of the risk posed. In its analysis of Maine's SORNA, the law **[*63]** court considered this factor to be "neutral" as to its determination of whether SORNA is punitive. *Letalien, 2009 ME 130, ¶ 46, 985 A.2d at 21*. In the law court's view, the record before it provided little basis on which to assess the reasonableness of SORNA of 1999's disparate treatment categorizing some offenders as lifetime registrants and others as ten-year registrants, or on which to determine "whether Maine's requirement of lifetime registration is reasonably related to the danger of recidivism." *Id*.

This court considers that the legislative provisions of Chapter 570 help to mitigate this disparity as to offenders who are categorized as lifetime registrants based upon actions undertaken prior to the effective date of SORNA of 1999, previously given no opportunity to petition for removal from the registry, regardless of their likelihood lo reoffend. The amendments allow several groups of lifetime registrants to petition for removal from the registry, as discussed in connection with the court's analysis of whether SORNA of 1999, as amended, constitutes an affirmative disability or restraint. Those categories of registrants eligible to petition for removal from the registry have **[*64]** in common an absence of multiple offenses, whether sex offenses or felony offenses, and a "[final] discharge[] from the correctional system at least 10 years prior to submitting documentation to the bureau" seeking removal from the registry. *34-A M.R.S. §11202-A* (2011).

While SORNA of 1999, like the Alaska statute considered in *Smith*, "differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense," *Smith, 538 U.S. at 102*, the United States Supreme "Court recognized in *Smith* that 'the broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.'" *Letalien, 2009 ME 130, ¶ 45, 985 A.2d at 21* (quoting *Smith, 538 U.S. at 102*) (brackets omitted).

It appears that the legislature, in amending the statute to create these exceptions, was attempting to create greater congruence between a registrant's likelihood to reoffend and the registrant's lifetime registration requirement. There remain broad categories of offenders whose lifetime registration requirement is not ameliorated by these legislative **[*65]** categories, and who do not have an opportunity to present evidence of their non-dangerousness in order to pursue removal from the registry. However, in light of the Law Court's finding that SORNA of 1999 was neutral as to this factor when it did not allow any registrants to petition for removal, the court finds that the statute remains neutral as to its promotion of the traditional aims of punishment, retribution and deterrence.

v. Application based upon conviction of a crime

The fifth *Mendoza-Martinez* factor requires the court to consider whether the behavior to which SORNA of 1999 applies is already a crime. *Mendoza-Martinez, 372 U.S. at 168*.

> Because registration under SORNA of 1999 only applies to offenders who were convicted of specified crimes, does not arise based on individualized assessment of an offender's risk of recidivism, and cannot be waived based on proof that an offender poses little or no risk, SORNA of 1999 applies exclusively to behavior that is already a crime. It is punitive in effect in this respect.

Letalien, 2009 ME 130, ¶ 48, 985 A.2d at 22 (citing *Smith, 538 U.S. at 112-13* (Stevens, J., dissenting); *Doe v. Alaska, 189 P.3d 999, 1015 (Alaska 2008)*). The Chapter **[*66]** 570 amendments do not alter this analysis, and so this factor continues to weigh in favor of a finding that SORNA of 1999 is punitive.

vi. Connection to non-punitive purpose

The court next considers the sixth *Mendoza-Martinez* factor, whether SORNA of 1999 has a rational connection to a non-punitive purpose. *Mendoza-Martinez, 372 U.S. at 168-69*. The Supreme Court has intimated, in other cases, that this is the most significant question under the effects stage of the analysis: whether the law, "while perhaps having certain punitive aspects, serves important non punitive goals." *Haskell, 2001 ME 154, ¶ 9, 784 A.2d at 9-10* (citing *United States v. Ursery, 518 U.S. 267, 290, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996)*; *Moore v. Avoyelles Corr. Ctr., 253 F.3d 870, 873 (5th Cir. 2001)* ("The most significant question under [the effects] stage of the 'intent-effects' analysis is whether the law[,] while perhaps having certain punitive aspects, serves important nonpunitive goals.") (quotations and brackets omitted); *Russell v. Gregoire, 124 F.3d 1079, 1091 (9th Cir. 1997)*, *cert, denied*, *523 U.S. 1007, 118 S. Ct. 1191, 140 L. Ed. 2d 321 (1998))*; *see also* *Smith, 538 U.S. at 102* ("The Act's rational connection to a nonpunitive purpose is a 'most significant' factor in **[*67]** our determination that the statute's effects are not punitive.") (quoting *Ursery, 518 U.S. at 290*). "There is no doubt that SORNA of 1999 serves a valid governmental purpose separate from punishment. The Legislature declared that SORNA of 1999 is intended 'to protect the public from potentially dangerous registrants by enhancing access to information concerning those registrants.'" *Letalien, 2009 ME 130, ¶ 50, 985 A.2d 22* (quoting *34-A M.R.S. §11201* (2008)). "Protecting the public from potentially dangerous sex offenders is, without question, a compelling state interest in furtherance of the state's police powers . . . . The protection advanced by SORNA is among the most basic obligations state government owes its people--ensuring their safety." *Id*. SORNA advances these safety concerns "by alerting the public to the risk of sex offenders in their community." *Smith, 538 U.S. at 103* (quotation omitted). This factor weighs against a conclusion that SORNA is punitive.

vii. Proportionality in relation to non-punitive purpose

The seventh and final *Mendoza-Martinez* factor addresses whether SORNA of 1999 "appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez, 372 U.S. at 169*. **[*68]** "The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith, 538 U.S. at 105*: *see also* *Letalien, 2009 ME 130, ¶ 51, 985 A.2d at 22*. "Reasonableness is an objective standard." *Letalien, 2009 ME 130, ¶ 51, 985 A.2d at 22*.

The law court treated this factor as neutral in its evaluation of SORNA of 1999 prior to the Chapter 570 amendments, finding that the court lacked sufficient information upon which "to gauge whether the regulatory means chosen—in particular, increasing the registration period from fifteen years [as it would have been under the prior version of SORNA] to life without the possibility of a waiver, and increasing the verification from infrequent notices to quarterly in-person reporting and fingerprinting at a police station—are reasonable in light of the law's non-punitive purpose." *Id*. at *¶ 52, 55, 985 A.2d at 23, 24*. In conducting its analysis, the law court focused upon "the increased burdens resulting from SORNA of 1999's **[*69]** retroactive application to individuals who were originally subject to a fifteen-year registration period under SORA of 1991 or SORNA of 1995, but who are now subject to lifetime registration and quarterly in-person verification." *Id*. at *¶ 51, 985 A.2d at 22-23*. The *Letalien* court balanced the registry's over-inclusiveness and the stigma that registration imparted even to those registrants who had worked to successfully rehabilitate themselves, *id*. at *¶ 53, 985 A.2d at 23-24*, with the benefit to public safety of "ready access to information for a longer period regarding a group of individuals who, at least as a class of persons, pose a public safety risk," noting, "Even in the absence of individualized risk assessments of registrants, information concerning the conviction history and current whereabouts of every sex offender benefits public safety." *Id*. at *¶ 54, 985 A.2d at 24*.

Despite the court's tendency to "lean toward the view that the increased regulatory scheme of SORNA of 1999 appears excessive when applied to registered offenders previously" subject to no registration requirement at all "because there is no consideration of the individual circumstances or rehabilitation of each **[*70]** offender," *see id*. at *¶ 55, 985 A.2d at 24*, the court cannot categorically state that SORNA of 1999 is excessive or unreasonable in relation to its purpose of promoting public safety by collecting and making available already public information regarding sex offense convictions—particularly given the slight reduction in onerousness of the registration requirements and the possibility of removal from the registry for some offenders brought about by Chapter 570. Accordingly, the court treats this factor as neutral.

The *Letalien* court synthesized its review of the *Mendoza-Martinez* factors as follows:

> [T]he retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is punitive.

Letalien, 2009 ME 130, ¶ 62, 985 A.2d at 26. Because of the pains the Law Court took to distinguish those cases where registrants were subject to some of the punitive elements but not others, *see id*. at ¶ 37 n.9, *985 A.2d at 18 n.9*, the court **[*71]** is persuaded that the Law Court found the combination of burdensome factors to be punitive in effect, rather than each factor individually. In response to *Letalien*, the legislature lightened the burden of in-person registration by making the in-person verification requirements less frequent, and offered classes of offenders an opportunity to seek removal from the registry. The overall effect of SORNA of 1999, as amended, is therefore lighter for the plaintiffs now than it was for Letalien when his case came before the Law Court, despite the fact that the plaintiffs suffered from greater surprise than Letalien by their addition to the registry. The law court's observation in *Letalien* that quarterly, in-person, lifetime registration constitutes a "substantial disability or restraint on the free exercise of individual liberty," *Letalien, 2009 ME 130, ¶ 58, 985 A.2d at 24-25*, remains valid, but the legislative amendment allowing many registrants to petition for removal from the registry lightens the impairment of liberty that the *Letalien* court found.

> It is not our role to ask whether the Legislature could achieve its goals through alternative means. Indeed, we properly exercise restraint **[*72]** in our review of a legislative effort to apply retroactively a civil regulatory scheme intended to address a complex public safety issue. We proceed with care so as not to interfere with innovative legislative efforts intended to advance the public interest, unless required otherwise by constitutional mandates.

Letalien, 2009 ME 130, ¶ 56, 985 A.2d at 24.

Whether the plaintiffs are correct as to the meaning of *Letalien's* holding, only the Law Court can clarify. It may be that any statutory scheme must, in order to withstand constitutional scrutiny, provide offenders with an individualized opportunity to be relieved of SORNA obligations, particularly when the obligations must be endured by the offender until the day the offender dies. In other words, it may be that the "opportunity" provided to the plaintiffs is an individualized one that must be provided to each offender, depending on how they have lived their lives after conviction. Alternatively, the Law Court may find that "opportunity" satisfied by the Legislature's determinations of classes of offenders who are eligible to be relieved of the obligations, and others who will never be eligible. SORA of 1991 and SORNA of 1995 provided **[*73]** opportunities for individual offenders to prove rehabilitation, as did the original version of Chapter 570—until a fiscal note became affixed to it. See L.D. 1822, Summary (124th Legis. 2010)).

However, the plaintiffs' burden here cannot be underestimated. "A statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity." *Letalien, 2009 ME 130, ¶ 15, 985 A.2d at 12* (quoting *Kenny v. Dep't of Human Servs., 1999 ME 158, ¶ 7, 740 A.2d 560, 563)*. "We must assume that the Legislature acted in accord with constitutional requirements if the statute can reasonably be read in such a way, notwithstanding other possible unconstitutional interpretations of the same statute." *Id*. (quoting *Haskell, 2001 ME 154, ¶ 4, 784 A.2d at 7*). SORNA of 1999 is intended to be a "civil regulatory statute." *Id*. at ¶ 30, *985 A.2d at 16*. "[A] statute that is intended to be civil will be found to be an ex post facto law only if the 'party challenging the statute provides 'the clearest proof that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id*.at ¶ 31, *985 A.2d at 16* **[*74]** (quoting *Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997))*.

Because the plaintiffs have not demonstrated by the clearest proof that SORNA of 1999, as amended, is punitive and therefore a criminal law, their assertion that it is an ex post facto law must fail. Their motion for summary judgment on this ground is DENIED. The state defendants' motion for summary judgment is GRANTED as to the ex post facto argument.

III. Constitutionality of *34-A M.R.S. §11221(1)(G)*

The plaintiffs argue that *34-A M.R.S. §11221(1)(G)*, allowing the sex offender registry to obtain "any other information the bureau determines important," might allow police to seek information that would violate the *Fourth*, *Fifth*, or *Fourteenth Amendments to the Constitution of the United States* and their analogues under the Maine Constitution, or be void for vagueness. The state defendants counter that the argument is not ripe, as the statute has not been used to request any information at all, so that there is nothing for the plaintiffs to challenge.[12]

The provision to which the plaintiffs object provides: "The bureau shall establish and maintain a registry of persons required to register pursuant to this subchapter. The registry must include the following information on each registrant: . . . G. Any other information the bureau determines important." *34-A M.R.S. §11221(1)(G)* (2011).

"The void-for-vagueness doctrine incorporated within due process rests on the assumption that the law must provide reasonable and intelligible standards to guide the future conduct of individuals and to allow the courts and enforcement officials to effectuate the legislative intent in applying these laws." *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247, 253 (Me. 1974)*; *see also* *Gun Owners' Action League, Inc. v. Swift, 284 F.3d 198, 205 (1st Cir. 2002)* **[*76]** ("When citizens cannot determine what conduct a law proscribes, the law's vagueness may raise constitutional due process concerns.") "A statute is void for vagueness when it sets guidelines which would force men of general intelligence to guess at its meaning, leaving them without assurance that their behavior complies with legal requirements and forcing courts to be uncertain in their interpretation of the law." *Shapiro Bros., 320 A.2d at 253*. "Such an unacceptable statute would often be so vague and indefinite as really to be no rule or standard at all." *Id*. (quotation omitted). "The principle underlying the doctrine is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Gun Owners' Action League, 284 F.3d at 205* (quotation omitted).

> Alleging that the Act is unconstitutionally vague, the plaintiffs complain about the threat of enforcement, but not any particular instances of enforcement. Such facial challenges raise special justiciability concerns. Particularly relevant here is the doctrine of ripeness, which "asks whether an injury that has not yet happened is sufficiently likely to happen" to warrant judicial review. **[*77]** 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, B 3531.12, at 50 (2d ed. 1984) (citing *Warth v. Seldin, 422 U.S. 490, 499 n.10, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)*) (defining ripeness inquiry as "whether the harm asserted has matured sufficiently to warrant judicial intervention.")). The requirement of ripeness is "particularly relevant in the context of actions for preenforcement review of statutes," because it "focuses on the timing of the action." *Navegar, Inc. v. United States, 322 U.S. App. D.C. 288, 103 F.3d 994, 998 (D.C. Cir. 1997)*.

Id. "In determining ripeness, we apply a familiar test: 'the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id*. (quoting *Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972))*. "Nevertheless, threats of enforcement of a vague statute can support a facial challenge to a statute when certain conditions are met." *Id. at 206*. "To determine whether the threat of enforcement

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[12] The state defendants go on to distinguish the cases upon which the plaintiffs rely (*Doe v. Nebraska*, 2010 WL 3259366 (D. Neb. 2010); *Doe v. Pros., Marion County, Ind., 566 F.Supp.2d 862 (S.D. Ind. 2008)*; **[*75]** and ***United States v. Reese, 92 U.S. 214, 221, 23 L. Ed. 563 (1876))*** but the court does not find it necessary to make this distinction in any detail, as the plaintiffs' pre-enforcement objection to the statute does not raise any concrete case or controversy and is thus not ripe for judicial consideration. *See, e.g., Gun Owners' Action League, Inc. v. Swift, 284 F.3d 198 (1st Cir. 2002)*.

of an allegedly vague statute is ripe for judicial review, we **[*78]** examine 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id*. (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967))*.

"'Fitness typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed, whereas hardship typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties.'" *Id*. (quoting *Rhode Island Ass'n of Realtors, Inc., v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999))*. "In all of the vagueness counts, the main hardship alleged by the plaintiffs is the threat of prosecution. A threatened prosecution is only immediate enough to satisfy the hardship prong of the ripeness inquiry when 'the challenged action creates a 'direct and immediate' dilemma for the parties.'" *Id*. (quoting *W.R. Grace & Co. v. United States Envtl. Prot. Agency, 959 F.2d 360, 364 (1st Cir., 1992))*.

> Such a dilemma exists when threatened prosecution puts the party seeking preenforcement review between a rock and a hard place—absent the availability of preenforcement review, [they] **[*79]** must either forego possibly lawful activity because of [their] well-founded fear of prosecution, or willfully violate the statute, thereby subjecting [themselves] to criminal prosecution and punishment.

Id. (quotation omitted).

The plaintiffs' claim fails at this point. There is no threatened prosecution. The plaintiffs allege that the immediate hardship they suffer is the authority provided to bureau to request information and publicize it, which "could present *Fourth* or *Fifth Amendment* issues." (Reply Memo, of Mitchell Firm Pis. and Opp. to State Defs. Cross-Mot. for Summ. J. at 17.) The bureau has not requested any such information. At the time that the bureau requests information to which it, arguably, is not constitutionally entitled, then the plaintiffs' pre-enforcement challenge may conceivably be ripe. At this time, when the bureau has not requested any information to which they are even arguably not entitled, there is no "direct and immediate" dilemma for the parties. There is no lawful activity they must forgo to avoid prosecution; nor is there any way in which they could willfully violate the statute and incur prosecution. The challenge is therefore not ripe for review.[13]

Even if this point did not conclude the court's analysis in favor of the state defendants, the court would point out the second dimension of the analysis likewise does not support the plaintiffs' contention. "The fitness component of ripeness addresses whether the factual and legal dimensions of the challenge to the Act are developed enough to permit adjudication of the plaintiffs' claim." *Id*. at 207-208. The First Circuit noted in *Gun Owners' Action Association* that the statute at issue in that case "empowers an agency of the Commonwealth . . . to promulgate regulations **[*81]** clarifying its meaning and to publish a list of weapons proscribed by the statute" (*id*. at 208), thereby reducing the vagueness that was the subject of the plaintiffs' attacks - on the statute. Likewise, in this case, the statute allows the bureau to request additional information that "it determines important" from registrants; the information will not be collected in the absence of a statement of what information the bureau finds important, thereby clarifying the vagueness the plaintiffs find objectionable.

The court cannot find *34-A M.R.S. §11221(1)(G)*(2011) unconstitutional at this time, so the plaintiffs' motion for summary judgment seeking such a judgment is DENIED; the state defendants' motion for summary judgment on this count is GRANTED.

IV. Equal protection

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[13] The **[*80]** plaintiffs' reference to *Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999)* is unavailing. In that case, the Sixth Circuit noted, the "statute is written in such a manner that the release of registry information can take place at any time law enforcement officials have determined that release is necessary to protect the public." *Cutshall, 193 F.3d at 472*. Here, law enforcement does not have the information at its disposal; the greatest risk to the plaintiffs that the statute would allow would be for the bureau to request information from the registrants, at which point they could bring a challenge which would then be ripe.

"The Equal Protection Clause of the Fourteenth Amendment forbids any state from denying 'to any person within its jurisdiction the equal protection of the laws,' U.S. CONST, amend. XIV, § 1, and requires, generally, that persons similarly situated be treated alike." Anderson v. Town of Durham, 2006 ME 39, ¶ 29, 895 A.2d 944, 953 (citing Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)). Article I, § 6-A of the Maine Constitution **[*82]** likewise provides, "No person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof." The protections of the state and federal constitutional provisions are coextensive. Town of Frye Island v. State, 2008 ME 27, ¶ 14, 940 A.2d 1065, 1069.

> If government action that is challenged on equal protection grounds infringes on a fundamental constitutional right, or involves an inherently suspect classification such as race, it is subject to analysis under the strict scrutiny standard. *Sch. Admin. Dist. No. I v. Comm'r, Dep't of Educ.,* 659 A.2d 854, 857 (Me. 1995). Strict scrutiny requires that the challenged action be narrowly tailored to achieve a compelling governmental interest. *See* Butler v. Supreme Judicial Court, 611 A.2d 987, 992 (Me. 1992). If the government action does not implicate either a fundamental right or a suspect class, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *Sch. Admin.* Dist. No. 1, 659 A.2d at 857. When a statute is reviewed under the rational basis standard, it bears a strong presumption **[*83]** of validity. *See id*. Under the rational basis standard, the burden is on the party challenging the government action to demonstrate that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Eulitt [v.* State of Me., Dep't of Educ., 386 F.3d 344, 356 (1st Cir. 2004)].

Anderson, 2006 ME 39, ¶ 29, 895 A.2d at 953-54.

Sex offenders are not a suspect class. Doe v. Moore, 410 F.3d 1337, 1346 (11th Cir. 2005) (citing United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir. 2001)). Nor do the various subclassifications among sex offenders, which the plaintiffs point to as unsustainable because of their diverging responsibilities and opportunities to petition for removal under SORNA of 1999, as amended, implicate a suspect class. Therefore, in order to determine whether to apply strict scrutiny or rational basis review, the court must analyze whether the plaintiffs have pled the existence of a fundamental right. They do not allege a fundamental right in their equal protection arguments, but they do so argue in their substantive due process line of reasoning. In order to avoid disrupting **[*84]** that analysis, the court will leave it under the heading where the plaintiffs have pled it, but for the purposes of our equal protection analysis, it suffices to state that the court has not found a fundamental right to be at issue. The court's assignment of rational basis review to this issue is bolstered by the fact that the Law Court has held, "Only classifications involving a suspect or quasi-suspect class, or impacting certain fundamental constitutional rights, are subject to heightened scrutiny. Other classifications, like those presented by SORNA, need only be rationally related to a legitimate government goal." State v. Haskell, 2001 ME 154, ¶ 16 n.10, 784 A.2d at 11 n.10 (citations omitted). Since "the government action does not implicate either a fundamental right or a suspect class, different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *See* Anderson, 2006 ME 39, ¶ 29, 895 A.2d at 953.

"[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" Heller v. Doe, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quoting FCC v. Beach Communications., 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). **[*85]** "For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Id*. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id*. (citing Nordlinger v. Hahn, 505 U.S. 1, 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); [New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) *(per curiam)*].

"Further, a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" *Id*. (quoting Nordlinger, 505 U.S. at 15). *See also, e. g.,* United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S Ct. 453 (1980); Allied Stores of Ohio, Inc. v.

Bowers, 358 U.S. 522, 528, 3 L. Ed. 2d 480, 79 S. Ct. 437, 82 Ohio Law Abs. 312 (1959). "Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id*. (quoting Beach Commc'ns, 508 U.S. at 313. Further, "those attacking the rationality of the legislative classification have **[*86]** the burden to negative every conceivable basis which might support it." Beach Commc'ns, 508 U.S. at 314. And since courts "never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature," and "the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis." Id. at 315 (quotations and citations omitted).

Because "[a] statute is presumed constitutional, . . . and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record," the court looks to the plaintiffs' arguments to determine whether they have successfully shown that there is absolutely no conceivable basis to support the distinctions the legislature has drawn. Heller, 509 U.S. at 320-21 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)). The plaintiffs allege "several suspect inequalities," including "the fact of registration vs. non-registration for the Does previously **[*87]** all treated alike before ch. 570; [and] the difference between ten year and lifetime registrants; sex offenders generally vs. other perpetrators of heinous crimes." (Reply Memo. of Mitchell Firm Pls. and Opp. to State Defs. Cross-Mot. for Summ. J. at 18.) They also point to a submission by their expert, Dr. Brian Rines, which they allege supports a finding that the legislative categories do not predict dangerousness. (Memo. of Mitchell Firm Pls. at 8.) The plaintiffs' memo also includes a version of their ex post facto argument regarding the arbitrariness of treating pre-1991 convictions as harshly as or more harshly than those registrants for whom *Letalien* provided relief, which argument the court need not address after the extensive consideration given to both parties' ex post facto arguments above. The plaintiffs also argue that the law is not narrowly tailored, in that the plaintiffs fall into different categories with no discernable justification, and that the category into which a registrant falls could easily be a matter of prosecutorial discretion; "Particularly if all charges relate to a single incident, possibly repeated, the prosecutor could bargain them down to one to secure **[*88]** a guilty plea. Thus one's duty to register may devolve to luck or accident." (Memo. of Mitchell Firm Pls. at 9.)

The court can comfortably reject all of the plaintiffs' arguments save the last. However, his opinion does not "negative every conceivable basis" for the legislative distinctions among and between registrants. Given the proper deference, almost all of the legislature's distinctions, including those between sex offenders and other forms of criminals,[14] easily withstand rational basis review.

As to the argument regarding offenders whose status as lifetime registrants, even after the modifications of Chapter 570, arose from multiple pre-SORA or SORNA convictions which may have arisen from a single incident, however, the court has serious reservations as to whether the law would rational basis review. *Cf.* State v. Heald, 382 A.2d 290, 301 (Me. 1978) **[*89]** ("It is well established that a reasonable prosecutorial discretion in the enforcement of criminal laws is inherent in our criminal justice system . . ."). Were any of the plaintiffs participating in this motion for summary judgment unable to petition for termination of the registration requirements because of multiple convictions, which convictions stemmed from the same transaction, that would potentially present a level of arbitrariness sufficient to provide the extraordinary case on which a law may not withstand rational basis review. If two identical offenders committed identical crimes, but one district attorney charged every incident of an interaction separately, for example, charging for each incident of penetration, or for the sexual contact leading up to that point, and the other district attorney charged once for the overall occurrence, then the two offenders would have significantly different possibilities for removal from the registry under SORNA of 1999, as amended. That difference of registration effect for two identical crimes might be unsustainable, as it does not bear a rational relationship to the state's legitimate interest of protecting the public and increasing **[*90]** awareness regarding convicted sex

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[14] *See, e.g.,* McKune v. Lile, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. See Sex Offenses 27; U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)).

offenders. Because SORNA of 1999, as amended, does not provide for individualized review of registrants' dangerousness or even their underlying convictions, there is a the potential for an equal protection violation under a different case or cases.

However, the plaintiffs have not presented the court with such a case as would implicate these concerns. While Doe V pled guilty to two counts of unlawful sexual contact in 1993[15] it appears that he will be able to petition for termination of his registration requirements once the required ten-year period following his probation has passed, which the State suggest will be in 2012. *34-A M.R.S. §11202-A(1)(A)* (2011). The court agrees with the plaintiffs that it is the retroactive lifetime quality of the registration requirements that triggers further review (*see* the court's analysis of the plaintiffs' claims under Maine's Declaration of Rights, below). The other plaintiffs' records reveal either that their convictions stemmed from multiple incidents, or their record reflects other disqualifications that would prevent them from seeking termination of their registration requirements pursuant to *§11202-A*.

Therefore, since neither a fundamental right nor a suspect class is implicated, and since none of the plaintiffs has shown that SORNA of 1999, as amended, has established "different treatment accorded to similarly situated persons" which is not "rationally related to a legitimate state interest," *see Sch. Admin.* *Dist. No. 1, 659 A.2d at 857*, the plaintiffs' equal protection claims must fail. The plaintiffs' motion for summary judgment is DENIED; the state defendants' motion for summary judgment is GRANTED.

V. Void for vagueness

The plaintiffs allege that Chapter 570's modifications to the verification procedures for registrants sentenced between 1982 and 1999, intended to alleviate the quarterly in-person verification requirements found unconstitutionally punitive in *Letalien, 2009 ME 130, ¶¶ 37, 62, 985 A.2d 4, 18, 26*, are void for vagueness and may indeed require **[*92]** more frequent intrusions into registrants' lives than the statute held unconstitutional in *Letalien*, The state defendants disagree.

The provisions at issue, *34-A M.R.S. §§11222(4-A)(C)* and *11222(4-B)(C)*, are substantially similar, save that the provision of sub-*section 4-A* applies to ten-year registrants and sub-*section 4-B* applies to lifetime registrants. The provision states:

> In lieu of mailing the completed verification form under paragraph B, the . . . registrant shall take the completed verification form and a current photograph of the . . . registrant to the law enforcement agency having jurisdiction once every 5 years after the anniversary of the . . . registrant's initial registration or, if there is a reason to believe the [offender's] [lifetime registrant's][16] appearance has changed significantly, the law enforcement agency having jurisdiction or the bureau may instruct the . . . registrant in writing:
>
>> 1) To appear in person at the law enforcement agency having jurisdiction with a current photograph or to allow a photograph to be taken; or
>>
>> 2) If authorized in writing by the law enforcement agency having jurisdiction for the bureau, to submit a new photograph without appearing **[*93]** in person.

34-A M.R.S. §§11222(4-A)(C); (4-B)(C) (2011).

The state defendants assert that the plaintiffs lack standing to bring a void for vagueness challenge to this statute as to *§11221(1)(G)*, in that none of the plaintiffs have been subject to enforcement under this statute or have been required to verify their appearances more frequently than every five years under the provision cited above. They

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[15] Although **[*91]** SORA of 1991 was in effect at the time, it only required registration for a very small class of crimes, not including the crimes to which Doe V pled. He was required to register by the 2001 amendments to SORNA of 1999. *See* P.L. 2001, ch. 439, B OOO-7 (effective Sept. 21, 2001) (codified at *34-A M.R.S.A. β 11202* (Supp. 2001)).

[16] *34-A M.R.S. §11222(4-A)(C)* contains the word "offender"; *34-A M.R.S. §11222(4-B)(C)* uses the term "lifetime registrant."

cite *State v. Witham, 2005 ME 79, ¶11, 876 A.2d 40, 43* (quotations omitted), for the proposition that, "In response to a void for vagueness challenge, the sufficiency of the language of [a] statute is properly tested in the circumstances of the case at bar," and that the sufficiency of this statute thus cannot be tested by these plaintiffs, as they have not been arrested under it. The court disagrees. Unlike in the case of *§ 11221(1)(G)*, here the plaintiffs' contentions are ripe for review.

The court notes once again that "threats of enforcement of a vague statute can support a facial challenge to a statute when certain conditions are met." *Gun Owners' Action League, 284 F.3d at 206*. **[*94]** "To determine whether the threat of enforcement of an allegedly vague statute is ripe for judicial review, we examine 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id*. (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967))*. "'Fitness typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed, whereas hardship typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties,'" *Id*. (quoting *Rhode Island Ass'n of Realtors, Inc., v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999))*.

Unlike the plaintiffs' challenge to the provision granting the bureau authority to request additional information it deems necessary, which objection was based upon the risk of prosecution in case of noncompliance with potentially unconstitutional demands by the bureau, here, the plaintiffs' allegations of hardship are based upon the statute's grant to law enforcement of the power to require frequent in-person verification. The court did not have any evidence of what theoretical **[*95]** information requests permitted by *§11221(1)(G)* might be contemplated; this court noted that the seeking of constitutionally inappropriate information might trigger review provisions. In contrast to that uncertainty, *§11222(4-A)(C)* and *(4-B)(C)* do state the powers granted to law enforcement, namely, to require registrants to submit to in-person verification procedures upon a reasonable belief that the registrant's appearance has significantly changed. Also unlike the theoretical information requests under $11221(1)(G), in-person verification every ninety days has already been held unconstitutionally punitive for registrants sentenced between 1982 and 1999 in the absence of an opportunity to seek removal from the registry. *See* *Letalien, 2009 ME 130, ¶¶37, 62, 985 A.2d 4, 18, 26*. The court thus turns to the merits of the void-for-vagueness analysis.

"The *Due Process Clause of the Fifth Amendment to the United States Constitution* and *Article I, section 6-A of the Maine Constitution* require that criminal defendants be given 'fair notice of the standard of conduct to which they can be held accountable.'" *State v. Witham, 2005 ME 79, ¶7, 876 A.2d 40, 42* (quoting *State v. Weeks, 2000 ME 171, ¶7, 761 A.2d 44, 46)* **[*96]** (brackets omitted). "To satisfy due process, 'a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States, 561 U.S. 358, 364, 130 S. Ct. 2896, 2927-28, 177 L. Ed. 2d 619, 656* (quoting *Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))* (brackets omitted). "A statute is unconstitutionally vague when it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Witham, 2005 ME 79, ¶7, 876 A.2d at 42* (quotations omitted). "A statute may be void for vagueness when people of common intelligence must guess at its meaning." *Id*.

The plaintiffs' challenge thus appears to target the second half of the vagueness analysis, arguing that the statute may lead to "arbitrary and discriminatory enforcement" and potentially frequent in-person verification of law-abiding registrants.

However, the court notes that "[i]n examining **[*97]** the sufficiency of statutory language, 'objective quantification, mathematical certainty, and absolute precision are not required.'" *Id*. (quoting *Town of Baldwin v. Carter, 2002 ME 52, ¶7 n.2, 794 A.2d 62, 66)*. "In light of the fundamental precept that we will, if possible, construe statutes 'so as to avoid a danger of unconstitutionality, . . . legislation should not be held invalid on the ground of uncertainty if susceptible of any reasonable construction that will support it.'" *Id*. (quoting *State v. Davenport, 326 A.2d 1, 5-6 (Me. 1974))* (brackets omitted).

In light of the requirement that the court avoid invalidating a statute as unconstitutional as long as the statute is "susceptible of any reasonable construction that will support it" *Witham, 2005 ME 79, ¶7, 876 A.2d at 42* (quotations omitted), the court is unpersuaded by the plaintiffs' assertion that the statute is unconstitutionally vague because it fails to clarify the "reason to believe," and who might have the reason, how he or she might report it, or to where. Rather, the court finds that the plain language of the statute charges the "law enforcement agency having jurisdiction or the bureau" with determining whether the **[*98]** evidence provided, by tip or otherwise, constitutes "reason to believe" that the registrant's "appearance has changed significantly," in which case that law enforcement agency or the bureau may instruct the registrant to provide evidence of his or her current appearance, whether in person or by sending an updated photograph. *34-A M.R.S. §§11222(4-A)(C)*; (4-B)(C).

"[R]easonable grounds to believe . . . must depend upon the totality of the circumstances and include consideration of not only the nature and specificity of available information but also the credibility of the source of that information and the basis of the source's knowledge." *In re Trever I, 2009 ME 59, ¶24, 973 A.2d 752, 759* (quotation omitted) (discussing "reason to believe" in the context of the Indian Child Welfare Act of 1978); *see also* *State v. Vaughan, 2009 ME 63, ¶¶11-12, 974 A.2d 930, 933-34* (admitting evidence that the arresting "officer had an objective, reasonable belief, under the totality of the circumstances," that the defendant was in violation of the law, and providing that even an anonymous tip may be a reliable basis for an officer's reasonable belief if the officer corroborates the tip through verifying **[*99]** "details such as the physical description and location of the suspect") (quotation omitted). *See also* *Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)* (allowing "stop and frisk" based on law enforcement officer's reasonable belief of danger); *cf.* *Kolender v. Lawson, 461 U.S. 352, 360-61, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)* (comparing objective standard of *Terry* with unconstitutionally vague statutory provision which would allow police to detain a person pending the person's submission of "credible and reliable" identification to the officer's satisfaction).

Law enforcement and related agencies in Maine are frequently entrusted with decisionmaking under the "reason to believe" or "reasonable belief" standard. *See, e.g.*, *4 M.R.S. § 960* (2011) ("Whenever the Attorney General has reason to believe that a person in the State has engaged in or is engaging in activities that violate this section, the Attorney General may initiate an action in the Superior Court to enforce this section."); *5 M.R.S. §4660-A* (2011) ("Whenever a law enforcement officer has reason to believe that a person has been a victim of harassment, the officer shall immediately use all reasonable means to prevent further harassment"); *17-A M.R.S. §303* (2011) ("For **[*100]** purposes of this subsection, 'reasonable belief a child has been taken, retained or enticed in violation of this section' includes, but is not limited to, a determination by a law enforcement officer, based on the officer's review of the terms of a certified copy of the most recent court decree granting custody of the child, that the parent who is exercising control over the child is not the person authorized to have custody under terms of the decree."); *19-A M.R.S. § 2203* (2011) (permitting the Department of Health and Human Services to issue an order to seize and sell real property in order to satisfy a support lien, which carries the same effect as a writ of execution from the District Court or the Superior Court, as long as the department "know[s] or ha[s] reason to believe the obligor has a substantial ownership interest in the property identified in the order"); *22 M.R.S. §2159* (2011) ("Whenever a duly authorized agent of the Commissioner of Agriculture, Food and Rural Resources finds or has reason to believe that any food is adulterated, or so misbranded as to be dangerous or fraudulent, within the meaning of this subchapter, he may issue an order . . . "); *22 M.R.S. § 2519-A* **[*101]** (2011); *25 M.R.S. § 3501* (2011) ("This chapter shall apply to all personal property of which possession is transferred to a police department or other law enforcement agency of the State or any political subdivision thereof, under circumstances supporting a reasonable belief that such property was abandoned, lost or stolen, or otherwise illegally possessed . . ."); *24-A M.R.S. § 2101* (2011) ("If the superintendent has reason to believe that any insurer or other person is acting in violation of this section or *section 404*, the superintendent shall commence proceedings in accordance with *sections 12-A* and *404*."); *26 M.R.S. § 777* (2011) ("Whenever there is reason to believe that a work permit was improperly signed, the director, deputy director or agent shall notify the local superintendent of schools of the place in which the certificate was signed."); *35-A M.R.S. § 3203* (2011) ("If the commission has reason to believe that any competitive electricity provider or transmission and distribution utility has violated any provision of law for which criminal prosecution is provided and would be in order or any ***antitrust law*** of this State or the United States, the commission shall notify the **[*102]** Attorney General. The Attorney General shall promptly institute any actions or proceedings the Attorney General considers appropriate.").

The statutory provision charging the law enforcement agency with jurisdiction over the registrant or the bureau itself with verifying the registrant's appearance if there is reason to believe his or her appearance has changed thus meets the constitutional due process requirement of '"fair notice of the standard of conduct to which they can be held accountable."' State v. Weeks, 2000 ME 171, ¶7, 761 A.2d 44. 2000 ME 171, 761 A.2d 44, 46 (quoting United States v. Robinson, 137 F.3d 652, 653 (1st Cir. 1998)). The plaintiffs do not challenge the public policy underlying this provision—to ensure that those seeking to identify convicted offenders have access to accurate depictions of them. The legislature's limitation of the verification requirement to those appearance changes which are "significant" both serves to support that public policy, in that it ensures that a registrant's photo will be updated when his or her appearance has changed to the extent that he or she would be difficult to recognize from the former photo, and serves as a limitation against arbitrary enforcement, **[*103]** requiring registrants to verify their appearances based on minimal changes. The court therefore finds that the statute is sustainable against a vagueness challenge as it '"define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."' Weeks, 2000 ME 171, ¶7, 761 A.2d 44, 46 (quoting Kolender v. Lawson, 461 U.S. at 357). The plaintiffs' motion for summary judgment to the contrary is therefore DENIED, while the state defendants motion for summary judgment on this count is GRANTED.

VI. Procedural due process

The plaintiffs assert that the registration requirements of SORNA of 1999, as amended, violate their procedural due process rights because they lacked "notice of the issues, an opportunity to be heard, the right to introduce evidence and present witnesses, the right the respond to claims and evidence, and an impartial fact-finder" prior to their placement on the registry. *See* In re Chelsea C., 2005 ME 105, ¶16, 884 A. 2d 97, 102 (listing requirements of due process where significant rights are at stake).

This question has been settled by the **[*104]** United States Supreme Court in Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003). There, the Court held that, "even assuming, arguendo, that [the registrant] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute," and that "the fact that [the registrant] seeks to prove — that he is not currently dangerous — is of no consequence under Connecticut's [sex offender registration and notification] Law," because "the law's requirements turn on an offender's conviction alone — a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." Conn. Dep't of Pub. Safety, 538 U.S. at 7. Because Maine's constitutional due process protections are coextensive with those of the federal constitution, *see, e.g.,* Botting v. Dep't of Behavioral & Developmental Servs., 2003 ME 152, ¶23, 838 A.2d 1168, 1176, this is dispositive of the court's analysis.

The plaintiffs' attempts to argue that additional process is due because SORNA of 1999, as amended, implies that registrants are currently dangerous is unavailing. They cite State v. Briggs, 2008 UT 83, 199 P.3d 935, 946 (Utah 2008) **[*105]** for the proposition that an implication of current dangerousness requires a due process hearing—but in fact, that case supports the court's analysis that no such process is due. In *Briggs*, the court ruled:

> As to Briggs's procedural due process argument, we hold that the provisions of the registration statute requiring him to register and requiring the DOC to publish information related to his prior convictions, current address, appearance, and other similar information do not violate his right to procedural due process. . . . However, we hold that the provision in the registration statute that requires the DOC to publish his primary and secondary targets, implying that he is currently dangerous, violates his right to procedural due process unless the DOC provides him with notice and an opportunity to be heard as to whether he is currently dangerous.

Briggs, 199 P.3d at 938. This case supports the distinction that many courts have made, including the United States Supreme Court in *Connecticut Department of Public Safety*, between statutes which require registration based solely upon the fact of conviction, and those which contain a finding of dangerousness. *See, e.g.,* Montana v. Samples, 2008 MT 416, 347 Mont. 292, 198 P.3d 803, 808 (Mont. 2008) **[*106]** (distinguishing *Connecticut Department of Public Safety* because "[i]n Montana, facts other than conviction are used to make the designation, and the designation leads to varying requirements for an offender"); State v. Guidry, 105 Haw. 222, 96 P.3d 242, 251-52 (Haw. 2004) ("The Supreme Court's due process analysis highlights a seeming distinction between Connecticut's registration statute and the Hawai'i registration statute."); Noble v. Bd. of Parole & Post-Prison Supervision, 327 Ore. 485, 964 P.2d 990, 995-96 (Or. 1998) (finding that determination that a person is a predatory sex offender implicates a liberty interest, reasoning that when an agency gathers and synthesizes evidence in making such a determination the interest of the person to be labeled goes beyond mere reputation and includes an interest in avoiding ostracism, loss of employment opportunities, and likely verbal or even physical harassment).[17] The plaintiffs' attempt to distinguish *Connecticut Department of Public Safety* on the ground that the statutory purpose of SORNA of 1999, as amended, implies a finding of dangerousness on the part of its registrants because the statute provides, "The purpose of this chapter is to protect the public from **[*107]** potentially dangerous registrants and offenders by enhancing access to information concerning those registrants and offenders," 34-A M.R.S. §11201 (2011), has already been addressed and struck down by the Sixth Circuit in Fullmer v. Michigan Department of State Police, 360 F.3d 579 (6th Cir. 2004). In that case,

> the plaintiff point[ed] to a provision in the Michigan registration act to the effect that "the legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people" and that "the registration requirements of this act are intended to provide law enforcement and the people an effective means to monitor those persons who pose such a potential danger." Mich. Comp. Laws β 28.721a (2003). He contend[ed] that this language in the statute, even though it did not appear in the information presented on the website, deprive[d] him of his "constitutionally protected interest in not being falsely labeled as a dangerous sex offender" and [would be] sufficient to invalidate the act despite the holding in *Connecticut Department of Public Safety v. Doe*.

Fullmer, 360 F.3d at 582 **[*108]** (ellipses omitted). The Sixth Circuit rejected this argument, noting, "Regardless of the language in the statute, the information on the registry's website makes it clear to anyone accessing the registry that all sex offenders convicted after a certain date are listed, without exception," and that "there is nothing on the website to Indicate that the state has made an individual determination as to a registrant's dangerousness." *Id*. Likewise, there is nothing on Maine's Sex Offender Registry website that indicates that the state has made an individual determination of a registrant's dangerousness. On the contrary, the disclaimer on the website, highlighted in yellow in a text box above the button that a reader would click to search the registry, reads as follows:

> The information provided on this web site is intended to be used for public safety and community awareness purposes only. The Maine State Bureau of Identification has not considered or assessed the specific risk of re-offense with regard to any individual prior to his or her inclusion on this web site and has made no determination that any individual included on this web site is currently dangerous. Individuals included on **[*109]** the web site are included solely by virtue of their conviction record and Maine state law. The primary purpose of providing this information is to make the information easily available and accessible, not to warn about any specific individual. Use of this information to threaten, intimidate, or harass any registrant or any other person may result in criminal prosecution.

Maine Sex Offender Registry Online Search Service, Me. State Police web site (visited July 31, 2011). Although the statute recognizes that the registrants are "potentially dangerous," *cf.* Conn. Dep't of Pub. Safety, 538 U.S. at 4

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[17] The plaintiffs' emphasis on the necessity of a hearing for lifetime registrants appears to be an implicit reference to State v. Guidry, 105 Haw. 222, 96 P.3d 242 (Haw. 2004), which held "that the lifetime **[*110]** registration component of the Hawai'i sex offender registration statute implicates a protected liberty interest under the *Hawai'i State Constitution, article I, section V* and requires that minimum requirements of due process—notice and the opportunity to be heard—be afforded to convicted sex offenders." Id. at 244. The court noted that it had "provided broader due process protection under the Hawai'i Constitution" id. at 251, and that due process required the opportunity to present evidence "material to a state's statutory scheme and we independently hold so under the Hawai'i Constitution." *Id*. The *Guidry* analysis therefore does not guide this court, as the Law Court has explicitly held that the Maine Constitution does not afford greater due process protections than the Constitution of the United States. *See, e.g.,* State v. Milliken, 2010 ME 1, ¶16, 985 A.2d 1152, 1157-58.

("Sex offenders are a serious threat in this Nation . . . and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault") (quotations and citations omitted), the public searching the registry is clearly informed that registration is not based on a finding of dangerousness, or any criteria apart from conviction.

Because dangerousness is not a consideration under Maine's statute, SORNA of 1999, as amended, does not fall afoul of procedural due process protections. The plaintiffs' motion for summary judgment on this ground is accordingly DENIED, while the state defendants' motion is GRANTED.

VII. Substantive due process

The **[*111]** plaintiffs also assert that the application to them of SORNA of 1999, as amended, violates their rights to substantive due process, a question specifically left open in *Connecticut Department of Public Safety v. Doe*. They argue that privacy is a fundamental right, which extends, in Maine, to the acquisition and possession of property and the pursuit of happiness. Because SORNA of 1999, as amended, infringes on these rights through its interference with the plaintiffs' employability and is not narrowly tailored, they assert that it fails strict scrutiny and is unconstitutional.

The Law Court has established a three-part test to determine whether a statute is invalid because it infringes upon due process rights.[18]

> The requirements of due process in the exercise of the State's police power are as follows:
>
> 1. The *object* of the exercise must be to provide for the public welfare.
>
> 2. The legislative *means* employed must be appropriate to the achievement of the ends sought.
>
> 3. The *manner of exercising* the power must not be unduly arbitrary or capricious.
>
> In order to successfully challenge the constitutionality of a statute on due process grounds, a party "must establish the complete absence of any **[*112]** state of facts that would support the need for its enactment."

Aseptic Packaging Council v. State, 637 A.2d 457, 461 (Me. 1994) (quoting *State v. Eaton, 577 A.2d 1162, 1165-66 (Me. 1990))* (brackets omitted); *see also* *State v. Haskell, 2008 ME 82, ¶¶ 5-6, 955 A.2d 737, 739*.

1. Object of the exercise

In applying this test, the court first examines the objective of SORNA of 1999. "The purpose of [SORNA of 1999] is to protect the public from potentially dangerous registrants and offenders by enhancing access to information concerning those registrants and offenders." *34-A M.R.S. § 11201* (2009). The first requirement of the due process test therefore supports the statute's validity.

2. Legislative means employed

In evaluating the second factor of the test, the propriety of the legislative means in light of the ends sought and the process alleged to be due, the court considers federal jurisprudence under the *Fourteenth Amendment to the U.S.*

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[18] *Article 1, Section 6-A of the Maine Constitution* provides in pertinent part, "No person shall be deprived of life, liberty or property without due process of law . . . ."

Constitution.[19] "[F]ederal and Maine due process rights are coextensive." State v. Milliken, 2010 ME 1, ¶ 16, 985 A.2d 1152, 1157-58.

> Our **[*113]** established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (quotations and citations omitted). "[T]he Fourteenth Amendment forbids the government to infringe 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Id. at 721 (quotations, emphasis and ellipses omitted). Thus, "by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the [legislative] action, it avoids the need for complex balancing of competing interests in every case." **[*114]** Id. at 722.

The fundamental rights that have been upheld by the Supreme Court as "liberty" interests protected by the Due Process Clause include, "in addition to the specific freedoms protected by the Bill of Rights," Washington, 521 U.S. at 720, "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id*. (citing Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)). Courts must take care in interpreting assertions of fundamental **[*115]** rights; the Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id*. (quotations omitted). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id*. "We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court," rather than the elected legislature. *Id*. (quotations and citations omitted).

The court's review of whether the legislative means are appropriate to the achievement of the ends sought accordingly depends upon whether the asserted right is a fundamental right, in which case the legislation requires more than a "reasonable relation to a legitimate state interest" to withstand a due process challenge. The court should "analyze a substantive due process claim by first crafting a careful description of the asserted right." Doe v. Moore, 410 F.3d 1337, 1343 (11th Cir. 2005) **[*116]** (quotations omitted). "Second, [the court] must determine whether the asserted right is "one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id*. (quoting Williams v. Attorney Gen. of Alabama, 378 F.3d 1232, 1239 (11th Cir. 2004), *cert, denied, Williams v. King, [543 U.S. 1152, 125 S. Ct. 1335, 161 L. Ed. 2d 115] (2005))*.

"'Substantive due process' analysis must begin with a careful description of the asserted right, for 'the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (quoting Collins v. City of Harker

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[19] The Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

Heights, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). The "fundamental rights" that the plaintiffs assert are the right to privacy and the pursuit of happiness, and potentially reputation, under New Jersey's interpretation of a similar constitutional provision. "Despite [the plaintiffs'] broad framing of their rights in this case, however, we must endeavor to create a more careful description of the asserted right in order **[*117]** to analyze its importance." *Doe v. Moore, 410 F.3d at 1343*. "Although the Supreme Court has recognized fundamental rights in regard to some special liberty and privacy interests, it has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection," *Id. at 1343-44*. The court finds that the specific right the plaintiffs seek is the right of a person, convicted of one or more sex-based offenses, to refuse subsequent registration of his or her personal information with Maine law enforcement and prevent publication of such information on Maine's Sex Offender Registry website. *See id. at 1344*.

Having determined this narrow description, the court next asks whether this right is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*., *see also Green v. Comm'r of Mental Health & Mental Retardation* (quoting *Washington, 521 U.S. at 720-21*). Other courts which have evaluated this question concluded that it was not such a right. See, e.g., *Doe v. Moore, 410 F.3d at 1345* ("[W]e can find no history **[*118]** or tradition that would elevate the issue here to a fundamental right. In fact, the case law we have found supports the contrary conclusion."); *Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004)* (per curiam) ("[P]ersons who have been convicted of serious sex offenses do not have a fundamental right to be free from . . . registration and notification requirements."); *Gunderson v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003)* (sex offender registration statute did not infringe the fundamental right to a presumption of innocence; *Paul P. v. Verniero, 170 F.3d 396, 404, 405 (3d. Cir. 1999)* (holding that sex offender registration did not infringe fundamental right of family relationships, and although the registration of offenders' home addresses invaded the fundamental right to privacy, the state had a compelling interest to prevent future sex offenses).

In evaluating the appropriateness of the legislative means to the ends sought, the court looks to the actual provisions of the statute itself, to determine to what extent they infringe upon allegedly protected rights. SORNA of 1999, as amended, provides the following information on the internet:

1) The **[*119]** registrant's name, date of birth and photograph;
2) The registrant's city or town of domicile and residence;
3) The registrant's place of employment and college or school being attended, if applicable, and the corresponding address and location; and
4) The statutory citation and name of the offense for which the registrant was convicted.

34-A M.R.S. §11221(9)(A) (2011). Upon written request containing the name and date of birth of a registrant, the following information is accessible:

1) The registrant's name, aliases, date of birth, sex, race, height, weight, eye color, mailing address and physical location of domicile and residence;
2) The registrant's place of employment and college or school being attended, if applicable, and the corresponding address and location;
3) A description of the offense for which the registrant was convicted, the date of conviction and the sentence imposed; and
4) The registrant's photograph.

34-A M.R.S. §11221(9)(B) (2011). The information that SORNA of 1999 makes public is therefore information intended to inform the public about the potential risk posed by the registrant and to allow the public the information necessary to recognize the registrant. The statute **[*120]** does not reveal information in which courts have recognized a potential privacy interest, such as financial or medical information. *Compare Borucki v. Ryan, 827 F.2d 836, 840-49 (1st Cir. 1987)* (reviewing cases and noting circuit split regarding right to privacy in psychiatric records) *with Cutshall v. Sundquist, 193 F.3d 466, 480-81 (6th Cir. 1999)* (rejecting a constitutional right to non-disclosure of private information).

The plaintiffs do not cite any authority for the proposition that disclosure of a matter of public record, the fact of their convictions, and of their identifying characteristics in order to render that status meaningful to the public, constitutes the infringement of a fundamental right. Moreover, in the context of sex offender registration laws, persuasive precedent exists suggesting that the disclosure of information sufficient for the public to identify a convicted sex offender does not implicate any fundamental right to privacy on the part of the registrant. *See* *A. A. v. New Jersey, 341 F.3d 206, 211-13 (3rd Cir. 2003)* ("this case begins with the understanding and, indeed, the requirement that what might otherwise be private information be made public . . . **[*121]** it is clear that a registrant's right to privacy in his or her home address gives way to the State's compelling interest to prevent sex offenses"); *see also* *Smith, 538 U.S. at 101* (acknowledging the potential adverse effect of disclosure, but explaining that "consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant. . ."). Even under a more protective constitutional interpretation than our own, that of the Illinois Constitution, the Supreme Court of Illinois found "that [a registrant] does not have a cognizable privacy interest in his sex offender registry information." *People v. Cornelius, 213 Ill. 2d 178, 821 N.E.2d 288, 300, 290 Ill. Dec. 237 (2004)*. The court reasoned that the registrant "engaged in conduct that lowered the privacy bar as his acts spawned a criminal prosecution culminating in a public record that contains the challenged information," and "[a]ccordingly, [the registrant] cannot argue that the compilation and dissemination **[*122]** of truthful information that is already, albeit less conveniently, a matter of public record constitutes a legitimate privacy interest." *Id*. (quotations and citations omitted). Nor does a person have an expectation of privacy in a photograph of his or her face. *See* *United States v. Emmett, 321 F.3d 669, 672 (6th Cir 2003)* ("In addition, we think it clear that a person has no expectation of privacy in a photograph of his face. *See* *United States v. Doe, 457 F.2d 895, 898 (2d Cir. 1972)* ("There is no 'reasonable expectation of privacy' about one's face.")").

Given the Supreme Court's warning against expanding the universe of federal "fundamental rights" and the absence of precedent supporting a registrant's right to privacy in his or her identifying information, as well as SORNA of 1999's limitation of disclosed information to that which members of the public would need in order to take precautions, the court concludes that the plaintiffs do not have a fundamental liberty interest in nondisclosure of their registry information.

Because the plaintiffs have not established that SORNA of 1999, as amended, infringes upon any recognized fundamental right or liberty interest, the legislative **[*123]** means employed will be considered appropriate to the achievement of the ends sought as long as they are reasonably related to a legitimate state interest. *See* *Aseptic Packaging, 637 A.2d at 461*; *Glucksberg, 521 U.S. at 720-21*. The interest of public safety is reasonably related to the statute's provisions making available information about convicted sex offenders in order that families and the public may take appropriate precautions. The second factor of the test therefore supports upholding the statute.

3. Manner of exercising police power

The third and final factor of the due process inquiry is whether the statute's implementation is arbitrary and capricious. "[A] court, in performing a rational-basis analysis, is not limited to the face of the statute and may go beyond its face in determining whether any *conceivable* state of facts exists to support a statute." *Aseptic Packaging, 637 A.2d at 460*. "It is for the legislature, not the courts, to judge the wisdom of legislative action and to evaluate legislative facts." *Id*. "The State has no burden to come forward with such conceivable state of facts, but rather, it is the contestant who retains the burden of proving that no conceivable **[*124]** state of facts exists." *Id*. (quotations omitted). "When a statute does not implicate fundamental rights, we must ask whether it is rationally related to legitimate government interests. The rational basis standard is highly deferential and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances." *Doe v. Moore, 410 F.3d at 1345* (quotations and citation omitted). "Almost every statute subject to the very deferential rational basis . . . standard is found to be constitutional." *Id. at 1346-47*.

The court agrees with other courts which have addressed this issue that "protecting the public from sexual abuse" by allowing the public to "use the registration to determine whether any sex offenders live in their neighborhood, make an individual assessment of the risk, and take any precautions appropriate under the circumstances" is a legitimate state interest, and that SORNA of 1999 bears a rational relationship to that interest. The plaintiffs have not met their burden of establishing an absence of facts that could support this statute.

Because the plaintiffs have not met their burden, their motion for summary judgment asserting that **[*125]** SORNA of 1999, as amended, should be overturned on substantive due process grounds is DENIED. The state defendants' motion for summary judgment is GRANTED.

VIII. Cruel and unusual punishment

The *Eighth Amendment to the Constitution of the United States* provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Article 1, Section 9 of the Maine Constitution* similarly provides, "Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."

Because the court has determined that the registration requirements of SORNA of 1999, as amended, are not punitive as applied to persons sentenced after the statute's effective date, these constitutional provisions are not implicated. *See, e.g., Thun v. State of Maine, 2009 U.S. Dist. LEXIS 66670 at *53 (D. Me. 2009)* ("Thun has no viable *Eighth Amendment* challenge to his registration . . . requirements.") (citing *Cutshall v. Sundquist, 193 F.3d 466, 477 (6th Cir. 1999)* ("We have already concluded that the Act does not impose punishment; **[*126]** it is regulatory in nature. Therefore, it does not violate the *Eighth Amendment's* prohibition on cruel and unusual punishment."); *Johnson v. Terhune, 184 Fed. Appx. 622, 624 (9th Cir. 2006)* ("Requiring appellant to register as a sex offender did not violate the *Ex Post Facto Clause*, *Double Jeopardy Clause* or *Cruel and Unusual Punishment Clause* because sex offender registration is not punishment.")); *see also* *Snyder v. State, 912 P.2d 1127, 1131 (Wyo. 1996)* ("Our determination that registration is not punishment is dispositive of Snyder's claim that it is cruel and unusual punishment. . . ."). The two state court cases the plaintiffs cites in favor of their proportionality argument, *People v. Dipiazza, 286 Mich. App. 137, 778 N.W.2d 264 (Mich. App. 2009)* and *People v. Carmony, 127 Cal. App. 4th 1066, 26 Cal. Rptr. 3d 365 (Cal. Ct. App. 2005)* therefore do not inform this court's analysis, since *Dipiazza's* "cruel and unusual punishment" analysis proceeded from its finding that the application of the sex offender registration requirements constituted punishment, *778 N.W.2d at 273*[20]; and the Carmony court never addressed the issue of whether registration requirements constituted punishment[21] because it found that a prison term of **[*127]** twenty-five years to life, imposed under California's "Three Strikes" recidivism law, for failure to provide duplicate sex offender registration information was an unconstitutionally cruel and unusual sentence. *Carmony, 26 Cal. Rptr. 3d at 369, 370*.

Because registration does not constitute punishment, it cannot be cruel and unusual punishment.[22] The plaintiffs' motion for summary judgment on this ground is accordingly DENIED. The state defendants' motion for summary judgment is GRANTED.

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[20] The court would also note that *Dipiazza's* holding has subsequently been strongly limited by the Michigan Court of Appeals. *See* *State v. TD (In re TD), 292 Mich. App. 678, 823 N.W.2d 101, 2011 Mich. App. LEXIS 954 at *18* ("We note that the majority of the binding precedent holds that the SORA does not cause punishment, and the *Dipiazza* Court's holding to the contrary appears confined to the specific facts of that case.").

[21] And explicitly did not address the defendant's ex post facto claim, *Carmony, 26 Cal. Rptr. 3d at 370 n.6*.

[22] The court also analyzed the proportionality of the registration requirements in its determination that SORNA of 1999, as amended, did not constitute punishment, *see* 11(7), *supra*.

IX. Maine's Declaration of Rights

The **[*128]** plaintiffs acknowledge that they "have woven" the rights guaranteed by *Article I, Section 1 of the Maine Constitution* into their due process arguments, but nonetheless assert this provision as an independent basis for a finding that SORNA of 1999, as amended, is "unconstitutional because it violates these rights disproportionately and without proven efficacy or justification." (Memo. of Mitchell Firm Pls. at 32.)

"We have traditionally exercised great restraint when asked to interpret our state constitution to afford greater protections than those recognized under the federal constitution." *Bagley v. Raymond Sch, Dep't, 1999 ME 60, ¶ 13, 728 A. 2d 127, 132* (quoting *State v. Buzzell, 617 A.2d 1016, 1018 n.4 (Me. 1992))*. A review of recent state constitutional challenges brought by individual Maine citizens suggests that in many respects individual provisions guaranteed to all Maine citizens by the founders of our state have been interpreted extremely narrowly by the Law Court. Indeed, it might be argued that certain provisions of Maine's constitution have been rendered practical nullities as a result. Though it was difficult for this court to discern a consistent principle or principles **[*129]** at work in these decisions which would enable it to analyze Maine's Declaration of Rights to determine whether it provides unique protections to the plaintiffs in this case, it appears that the Law Court has looked both to the plain language of the constitutional provision and its location within the constitutional framework in determining whether Maine's Declaration of Rights provides greater or parallel protection to that available, under the federal constitution.

For example, in *State v. Gilman, 2010 ME 35, 993 A.2d 14*, the Court looked to the plain language of *Article I, Section 9 of the Maine Constitution* as a primary reason to interpret Maine's provision as providing no greater protection than that afforded citizens under the *Eighth Amendment to the United States Constitution*. The Court noted, "The plain language of *section 9* requires that 'punishments shall be proportioned *to the offense*,'" while the provision "says nothing about the individual offender." *Gilman, 2010 ME 35, ¶ 16, 993 A.2d at 20* (quoting *Me. Const. art, I, § 9*). Thus, despite the differences between the Maine and federal provisions, *see, e.g., Harmelin v. Michigan, 501 U.S. 957, 985, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)* ("We think it enough **[*130]** that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained."), and its recognition that "federal authority does not control our interpretation of our State Constitution," the Law Court analogized to federal jurisprudence, which "has not required an *individualized* determination that a mandatory punishment is appropriate except in death penalty cases." *Gilman, 2010 ME 35, ¶ 18, 993 A.2d at 20-21*. The Law Court thus effectively declined to interpret the Maine Declaration of Rights as providing greater protection than the federal constitution, without explicitly stating that the state and federal provisions barring cruel and unusual punishment were coextensive.

In *Letalien*, the majority noted that the wording of the federal and state ex post facto provisions was virtually the same, and then went on to consider where in the respective constitutions those provisions were located before determining that location of the provisions was essentially of no consequence: "The location of the federal and Maine ex post facto prohibitions within their respective **[*131]** constitutions is a function of history and the manner in which each constitution was developed, and does not establish that the Maine prohibition was intended to afford greater or different protection than the federal prohibition." *Letalien, 2009 ME 130, ¶ 24, 985 A.2d at 14*. Justice Silver pointed out in his concurring opinion, however, that

> The location of a provision within a constitution bears as much significance as the provision's text itself. Chief Justice Marshall recognized this point when construing the *Necessary and Proper Clause* in *McCulloch v. Maryland, 17 U.S. 316, 419-20, 4 L. Ed. 579 (1819)*. Rebuffing Maryland's argument that the clause limited Congress's power to enact legislation, the Chief Justice deftly pointed to the clause's placement "among the powers of Congress, not among the limitations on those powers." *Id. at 419*. Had the framers intended "by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been *inserted in another place*." *Id. at 420* (emphasis added).

Id. at *¶ 70, 985 A.2d at 28*.

However, the Maine Constitution does retain individuality and vitality in one area. The Law Court over the last few **[*132]** decades has expanded protection for Maine citizens under the Maine Constitution in the area of voluntariness of confessions. Beginning with *State v. Collins, 297 A.2d 620 (Me. 1972)*, the Maine Supreme Court recognized that federal constitutional authority "prescribed a mandatory *minimum* standard," and that "the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake." *Collins, 297 A.2d at 626* (quotations omitted). Ten years later, in *State v. Caouette, 446 A.2d 1120 (Me. 1982)*, Justice Wathen explored "[t]he relationship between federal and state control," reiterating "that federal decisions do not serve to establish the complete statement of controlling law but rather to delineate a constitutional minimum or universal mandate for the federal control of every State" and that "the States are free, pursuant to their own law, to adopt a higher standard." *Caouette, 446 A.2d at 1122* (quotations omitted). The *Caouette* court noted "that the privilege exists in this case by virtue of the Maine Constitution" and that the federal constitutional provisions provide "a limitation upon the federal **[*133]** government and [have] no direct reference to state action except to the extent incorporated as a requirement of due process under the *Fourteenth Amendment*." *Id*. Since the federal constitutional provision provides only the minimum of permissible protections, "The maximum statement of the substantive content of the privilege and the requirements of [the constitutional provision] must be decided by this Court — as a matter of Maine law." *Id*. The majority in *State v. Rees, 2000 ME 55, 748 A.2d 976*, upheld Maine's more stringent standard of proof for establishing the voluntariness of statements established in *Collins* and *Caouette*, even after the federal precedent had explicitly held otherwise, reasoning, "Although we may look to the construction of federal constitutional provisions in U.S. Supreme Court cases and apply the same construction as far as possible, we are not confined to that construction when, as in *Caouette*, a more protective standard is warranted under Maine law." *Rees, 2000 ME 55, ¶ 9, 748 A.2d at 979*. The dissent, authored by current Chief Justice Saufley, agreed with the majority's assertion "that it is free to provide broader protections than those provided under the **[*134]** federal constitution," but qualified that agreement: "the Court may not create concepts in the Maine Constitution that are not actually included within its terms." *2000 ME 55, ¶ 40, 748 A.2d at 988*; *see also id*. at ¶ 30, *748 A.2d at 985*.

Given the potential for the Law Court to find greater protection for the individual under the Maine Constitution than that which has been found in the Federal Constitution, the court returns to the questions left unanswered in *Doe v. District Attorney, 2007 ME 139, 932 A.2d 552*. There, Justice Caulkins, writing for the majority, found that *State v. Haskell, 2001 ME 154, 784 A.2d 4*, did not foreclose re-analysis of SORNA of 1999 under the *Mendoza-Martinez* intent-effects factors, *see Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644*, and that such analysis was not foreclosed by the United States Supreme Court's decision in *Smith v. Doe, 123 S. Ct. 1140, 538 U.S. 84, 155 L. Ed. 2d 164 (2003)*. *Doe, 2007 ME 139, ¶¶ 26, 35, 932 A.2d 552, 560, 563*. The Law Court majority in Doe concluded that, given the significant changes to SORNA between 2001, when it had decided *Haskell*, and 2007, re-analysis was appropriate, and remanded the case to this court for factual development. Although the majority did **[*135]** explicitly find, "We do not have cause to reconsider our equating the *Ex Post Facto Clause* in the Maine Constitution with the same clause in the United States Constitution," *id*. at *¶ 26 n.6, 932 A.2d at 560 n.6*, it also appeared to be troubled by the difference between SORNA as applied to Haskell, and the version of SORNA of 1999 at issue in 2007, which did not contain the provisions for "for waiver from registration 'for good cause shown,' *34-A M.R.S.A. § 11121(6)(D)* (Supp. 1999), and, after five years, upon a showing of 'a reasonable likelihood that registration is no longer necessary and waiver . . . is appropriate.' *34-A M.R.S.A. § 11121(6)(C)* (Supp. 1999)." *Doe, 2007 ME 139, ¶ 35, 932 A.2d at 563*.

> Doe would appear to have been a good candidate for the second waiver provision because, according to the complaint, he has been a productive citizen, a family man, and has no other arrests or convictions for sex offenses. Although the Supreme Court in *Smith v. Doe* was not troubled by the fact that the Alaska Act was not narrowly drawn, *538 U.S. at 102*, *the fact that a sex offender never has the ability to escape the registration requirements of the current SORNA, regardless of behavior,* ***[*136]*** *consequences, or contributions following the conviction, strikes us as having the capability to be excessive* and as diverging from the purpose of protecting the public. Doe should be given the opportunity to develop the record and to prove, if he can, the excessiveness of SORNA in relationship to its stated goal of protecting the public from potentially dangerous registrants.

Id. (emphasis added).

Justices Alexander and Silver, concurring in the judgment, agreed that "review of the 1999 and subsequent amendments to the Sex Offender Registration and Notification Act (SORNA) . . . needs further development of the facts," but wrote separately to suggest that Maine's history, precedent, and Constitution would suggest a result different from that reached federally or in other states. *Id*. at ¶¶ 38-39, 932 A.2d at 563. Most significantly, these two justices took issue with the same alteration to SORNA of 1999 that had concerned the majority, the absence of a possibility for termination of registration requirements, but they found that it raised additional concerns in light of the unique construction of the Maine Constitution's Declaration of Rights:

> [T]he Maine Constitution's Declaration of **[*137]** Rights not only ensures the right of "enjoying and defending life and liberty, acquiring, possessing and protecting property," it also protects the right of "pursuing and obtaining safety and happiness." ME. CONST., art. I, § 1. This clause, which does not appear in the Federal Constitution, demonstrates our State's commitment to providing citizens, even those who have committed heinous acts, the possibility of a secure and content existence. For lifetime registrants, the SORNA takes away that possibility and the prospect of redemption.

Id. at ¶ 63, 932 A.2d at 570.

If the Law Court were to revisit this argument and find such a right exists under the Maine Constitution's Declaration of Rights, it would be in good company. New Jersey's constitution, like Maine's, provides, "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const., Art. I, Para. 1 (2011). New Jersey's highest court, balancing the protection of the public from sex offenders with the individual rights guaranteed **[*138]** by the constitution, noted;

> [Laws limiting the amount of notification information available on registrants based upon their likelihood to reoffend] do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further. . . . The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighborhood, are entitled not to be disturbed simply because of that prior offense and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.

Doe v. Poritz, 142 N.J. 1, 662 A.2d 367, 372-73 (N.J. 1995). Thus, another state has given meaning to its constitutional provision by requiring individualized risk assessment in order to best balance public safety and individual rights and **[*139]** privileges. *See also, e.g.,* State v. Guidry, 105 Haw. 222, 96 P.3d 242, 250 (Haw. 2004) (finding, under the Hawaii Constitution, "absent a meaningful opportunity for dispensation, the subjection of offenders, who have already served their criminal sentences, to lifetime requirements is beyond the scope of permissible regulation. Thus, we hold that requiring lifetime registration of all sex offenders without qualification, noncompliance with which is punishable by criminal penalties, implicates a liberty interest that cannot be curtailed absent procedural protections"); *cf.* Poe v. Sex Offender Registry Bd., 456 Mass. 801, 926 N.E.2d 187, 195 n. 10 (Mass. 2010) ("The [statutory amendment providing indigent sex offenders a statutory right to counsel in board classification hearings] followed several decisions of this court holding parts of the Sex Offender and Community Notification Act unconstitutional for failing to comport with due process requirements. Taken together, these decisions required the board to provide sex offenders with individualized, evidentiary hearings before requiring registration or assigning a final classification level.") (citing Doe v. Attorney Gen., 430 Mass. 155, 715 N.E.2d 37, 40 (1999) (individualized **[*140]** hearing required for persons adjudicated delinquent or convicted under G. L. c. 265, § 23, before obligation to register as sex offender could be imposed); Doe, Sex Offender Registry Bd. No. 972 v. Sex Offender Registry Bd., 428 Mass. 90, 697 N.E.2d 512, 516-17, 520 (1998) (classification hearing to be held before board, rather than Superior Court; board must show appropriateness of classification by preponderance of evidence and make specific findings supporting classification); Doe v. AG., 426 Mass. 136, 686 N.E.2d 1007, 1012-14 (1997) (presumptive level one sex offender entitled to evidentiary hearing before registration requirement imposed and private information disclosed)). Other states have found protections for registering sex offenders under various provisions within their state constitutions as well. *See, e.g., Blakemore v. State, 925 N.E.2d 759 (Ind. 2010)* (ex post facto as to plea bargain); *Doe v. Alaska, 189 P.3d 999 (Alas. 2008)* (ex post facto).

The reasons supporting a finding of a right to an individualized determination, like the "opportunity to . . . be relieved of the duty as was permitted under" SORA of 1991 and SORNA of 1995, *Letalien, 2009 ME 130, ¶ 62, 985 A.2d at 26*, are numerous. **[*141]** The plaintiffs have made many of those arguments under the other headings of their memorandum, in areas of law where the court has been constrained by the coextensive nature of Maine and federal precedent, resulting in a narrowly defined analysis. The plaintiffs include several individuals who claim to have been rehabilitated and some of whom have gone years or decades without re-offense, some of whom pled guilty and waived their rights to a determination of their guilt without the idea that they would be subject to registration without the opportunity to establish rehabilitation and without the opportunity to rejoin their communities after having served their criminal sentences. This court would also note the obvious concern with the spectacle of aged, and even demented, registrants finding their way to the appropriate law enforcement agencies to comply with this law.

The court finds the plaintiffs' argument compelling in regards to Maine's Declaration of Rights. This unique state constitutional provision may require an individualized opportunity for lifetime sex offender registrants to prove their rehabilitation and achieve civic redemption, or to petition for termination of the registration **[*142]** requirements once an offender reaches a certain stage of life. However, given the challenges presented in analyzing coextensiveness, and the incomplete explication in recent decisions from the Law Court about this specific provision, this court declines to declare that such a right exists. The Law Court must determine if Justices Alexander and Silver were correct in their interpretation of this extraordinary provision in our state's constitution. *See Doe v. District Attorney, 2007 ME 139, ¶¶ 42, 63-64, 932 A.2d at 564, 570*.

The Law Court may indeed find that the language in *Article 1 Section 1* is so extraordinary in its plain language (*Gilman*) and its location (*Letalien* (Silver, J., concurring)), that such a right should be recognized, and that such a right is a concept not simply being "created" by the Court from terms not contained within the Maine Constitution (*Rees* (Saufley, J., dissenting)). This court declines, for reasons stated above, to recognize or define this right to strive toward rehabilitation and redemption, or one that might "provide the possibility of a secure and content existence." *But cf. In Re: Joseph v. Gardner, 1987 Me. Super. LEXIS 233 at *22-*37* (finding, originating **[*143]** at the superior court level, that Maine's Declaration of Rights, "especially as contained in our 'Natural rights' enumerated in the very first section encompass[es] a person's right to make decisions effecting his person and life," including, ultimately, the right to end life-sustaining medical treatment).[23]

The Court therefore denies plaintiffs' motion for summary judgment under *Article 1, Section 1 of the Maine Constitution*, and grants State defendants' motion **[*144]** under this same state constitutional provision.

X. Improper use of guilty plea

"[A] plea bargain is contractual in nature and is subject to contract-law standards." *United States v. Partida-Parra, 859 F.2d 629, 633 (9th Cir. 1988)* (quotation omitted); *see also State v. Murphy, 2004 ME 118, ¶ 8, 861 A.2d 657, 661* ("Plea agreements are contracts and contract principles apply when interpreting them."). However, it is also true that a "voluntary and intelligent plea of guilty by an accused is a self-supplied conviction precluding trial of the

[23] The privacy rights that the *Joseph* court found to sustain its decision regarding the right to die under the Maine Declaration of Rights do not affect this court's analysis that the plaintiffs here have no privacy right in the information that the registry makes publicly available through its website. While *Joseph's* analysis of the right to privacy concerned autonomy over one's own body and stemmed from the authority of *Griswold v. Connecticut, 381 U.S. 479, 484-485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)* and cases following it, the plaintiffs here have not offered any precedent to support their alleged right to privacy and counter the weight of authority upholding internet posting of a registrant's identifying information in the interest of public safety.

issue of guilt or innocence and authorizing in and of itself the imposition of the punishment fixed by law. It is an efficient waiver of all defenses other than those jurisdictional in nature." *State v. Huntley, 676 A.2d 501, 503 (Me. 1996)* (quoting *Dow v. State, 275 A.2d 815, 818 (Me. 1971))*.

The plaintiffs agree that this argument is, in fact, a recasting of their ex post facto argument, in that they assert that expanding the consequences of a plea violates the plea agreements to the extent the expansion constitutes punishment. (Memo. of Mitchell Firm Pls. and Opp. to State Defs. Cross-Mot. for Summ. J. at 22.) The plaintiffs do not appear to argue **[*145]** for the opportunity to withdraw their pleas under a voluntariness analysis; indeed, withdrawal would not be a great advantage to them, as they have already served the sentence for the crime to which they have pled. *Cf. Price v. State, 2010 ME 66, ¶¶ 14-16, 1 A.3d 426* (Alexander, J., concurring) ("The relief afforded a post-conviction petitioner who successfully challenges a conviction through a claim of inadequate advice about potential consequences of the conviction is to vacate the conviction, not to dismiss the charge. . . . With the conviction vacated, the underlying case returns to the active criminal trial docket, and the petitioner is placed in the same position he or she was in immediately before the plea proceeding . . . . If the petitioner is again convicted after either a trial or another plea, he or she is subject to a renewed sentence, but . . . [h]aving successfully attacked the conviction and the resulting sentence, the petitioner loses the benefit of any bargain with the prosecution or the court that led to the original conviction and sentence.").

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent **[*146]** choice among the alternative courses of action open to the defendant." *Laferriere v. State, 1997 ME 169, ¶ 8, 697 A.2d 1301, 1305* (quotations omitted). "A plea is valid if it is made voluntarily with knowledge of the elements of the crime, the penalty that might be imposed and the constitutional rights relinquished by foregoing trial." *Id*. at ¶ 10, *697 A.2d at 1306* (quotations omitted). "There is no requirement under Rule 11 that the court inform the defendant of each and every *collateral* consequence of his plea and the resulting sentence." *Wellman v. State, 588 A.2d 1178, 1181 (Me. 1991)*, Collateral consequences arising from a criminal conviction can be very burdensome indeed, ranging from an inability to secure certain employment or occupational licensing, to forfeiture of property, presumptions of jeopardy in child protective proceedings, or even deportation from the United States. *State v. Blakesley, 2010 ME 19, ¶¶ 26-29, 989 A.2d 746, 753*.

The court has ruled above that, despite the potentially significant burdens that the plaintiffs must endure under SORNA of 1999, as amended, the court cannot conclude that the statute is so punitive in effect as to overcome its intent as civil **[*147]** police power legislation. *Blakemore v. State, 925 N.E.2d 759, 762-63 (Ind. App. 2010)* does not affect this court's analysis, as the Indiana Constitution apparently offers greater protection than our own, which remains coextensive with the federal provision. *See Letalien, 2009 ME 130, ¶ 63, 985 A.2d at 26*. As it is not punitive, the registration obligation under SORNA of 1999 represents a collateral consequence, rather than a direct consequence, of the plaintiffs' pleas.

Because the plaintiffs' plea argument is dependent upon the ex post facto argument[24] wherein the court has determined that the retroactive application of SORNA of 1999, as amended, to the plaintiffs does not constitute punishment, the plaintiffs' motion for summary judgment on this ground is DENIED; the state defendants' motion on this ground is GRANTED.

XI. Right to jury trial

The plaintiffs agree that if they are entitled to no hearing on dangerousness, then they are likewise not entitled a jury trial on the issue. (Reply Memo. of Mitchell Firm Pls. and Opp. to State Defs. Cross-Mot. for Summ. J. at 22.) As the court has analyzed the plaintiffs' procedural due process arguments before concluding that their arguments

[24] Although the analysis was focused on the plaintiffs' ex post facto argument, the court notes that an argument potentially more compelling for a discrete and finite class of plaintiffs who pled guilty before a registry was even contemplated, is one of fundamental fairness under Maine's Declaration of Rights—a fairness and a right which this court has, above, acknowledged **[*148]** is for the Law Court alone to determine.

were foreclosed by *Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003)* and the structure of Maine's law and sex offender registry, no further analysis is necessary on this point. The plaintiffs' motion for summary judgment on the jury trial issue is DENIED; the state defendants motion for summary judgment on this point is GRANTED.

XII. Violation of the MCRA

On October 30, 2009, this court dismissed the plaintiffs' counts pursuing damages under the Maine Civil Rights Act (MCRA), *5 M.R.S. §§4681 - 4685*, and under *42 U.S.C. §1983* against the State defendants in their official capacities. The court ruled that the plaintiffs had failed to state a claim because neither the MCRA nor *§1983* permits recovery of damages from an action against the State. The plaintiffs assert, however, **[*149]** that the order failed to address the equitable relief to which all the plaintiffs, including those who have been removed from the registry, are entitled, including the restitution for the fees and costs relating to registration (including travel to and from the registration or verification location, passport photos, and time away from work) or to removal from the registry, which relief was not foreclosed by the court's order.

The state defendants counter that the plaintiffs have no right to recover, whether the recovery is deemed restitution or damages, against the State, and that qualified immunity or prosecutorial immunity would protect officers sued in their individual capacities. The state defendants advance a number of cases addressing the qualified immunity issue, despite the fact that the plaintiffs explicitly "seek their relief from the state defendants in their representative capacities, and in those capacities, they will not have to pay money out of their own pockets." (Reply Memo. of Mitchell Firm Pls. and Opp. to State Defs. Cross-Mot. for Summ. J. at 23.)

The MCRA provides a private right of action for breach of a constitutional right as follows:

> Whenever any person, whether **[*150]** or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates *section 4684-B*, the person whose exercise or enjoyment of these rights has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief.

5 M.R.S. §4682(1-A) (2011). The statutory scheme also provides for recovery of attorneys' fees and costs: "In any civil action under this chapter, the court, in its discretion, may allow the prevailing party, other than the State, reasonable attorney's fees and costs, and the State shall be liable for attorney's fees and costs in the same manner as a private person." *5 M.R.S. §4683* (2011). **[*151]** *42 U.S.C. §1983 (2011)* similarly provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Attorneys' fees are also potentially available for violations of *§1983*, as provided by *42 U.S.C. § 1988(b)*:

> In any action or proceeding to enforce a provision of sections . . . [*42 USCS §§ 1981-1983*, . . . the court, in its discretion, may allow the prevailing party, other **[*152]** than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such

> officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The court has already ruled that the plaintiffs cannot recover damages under either statute. This court has previously thoroughly evaluated the possibility of obtaining financial relief from a state entity under § 1983:

> [A] narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers in their official capacities exists, where the award sought is prospective in nature. *See* Papasan v. Allain, 478 U.S. 265, 278, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); Green v. Mansour, 474 U.S. 64, 68-69, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); Dirrane v. Brookline Police Dep't, 315 F.3d 65, 71 (1st Cir. 2002) ("Yet in the sovereign immunity context, the Supreme Court has repeatedly said that an official who acts unconstitutionally can be enjoined even though the state is immune from damages."); *Henrietta D. v. Bloomberg,* 331 F.3d 261, 287 (2d Cir. 2003) **[*153]** ("The Eleventh Amendment, however, does not preclude suits against state officers in their official capacity for prospective injunctive relief to prevent a continuing violation of federal law."). This exception appears to apply in the state sovereign immunity context.[25] *See, e.g.,* [Moody v. Comm'r, Dep't of Human Servs., 661 A.2d 156, at 158-159 (Me. 1995)] (recognizing that where an award can "lead to no relief that is prospective, but only to monetary awards from the state treasury for past violations of federal law[,]" sovereign immunity applies); Wellman v. Department of Human Services., 574 A.2d 879, 884 n. 11 (Me. 1990) (precluding, on grounds of sovereign immunity, anything but prospective relief). The doctrine applies only against state officials sued in their official capacities, not against states or state agencies. *Larsen v. State Employees' Ret. Sys.,* 553 F. Supp. 2d 403, 412 (M.D. Pa. 2008).
>
> The United States Supreme Court has recognized that the difference between retrospective and prospective relief "will not in many instances be that between day and night." *Edelman* [*v.* Jordan, 415 U.S. 651, 667, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)]. The pivotal question is whether the relief "serves directly to bring an **[*154]** end to a present violation of federal law," by governing an officer's future conduct. Whalen v. Mass. Trial Court, 397 F.3d 19, 29 (1st Cir. 2005), If so, relief is not barred "even though accompanied by a substantial ancillary effect on the state treasury." Papasan, 478 U.S. at 278. However, relief that is "tantamount to an award of damages for a past violation of. . . law, even though styled as something else," is barred by sovereign immunity. *Id*.

Reed v. Bd. of Trs.., 2008 Me. Super. LEXIS 214, at *14-*16. *See also* Wyman v. Secretary of State, 625 A.2d 307, 310 (Me. 1993) ("Although claims for damages against states or state officials acting in their official capacity are not authorized by section 1983, Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) (states are not 'persons' for purposes of section 1983), claims for injunctive and ancillary relief pursuant to section 1983 and section 1988 may be maintained against state officials acting in their official capacity.") (quoting Will, 491 U.S. at 71 n.10; Lett v. Magnant, 965 F.2d 251, 255 (7th Cir. 1992); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1519 n.1 (10th Cir. 1992)). **[*155]** In Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978), the Supreme Court explored the boundaries of what would constitute prospective relief in terms of a monetary award. The Court awarded attorneys' fees as an enforcement ancillary to prospective relief (id. at 691-92), and also awarded costs, reasoning;

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief. (An award of costs will almost invariably be incidental to an

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[25] This analysis is distinct, since "the Eleventh Amendment does not apply in state courts." Will v. Michigan Dep't of State Police, 491 U.S. 58, 63-64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (quoting Maine v. Thiboutot, 448 U.S. 1, 9, n. 7, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980)). "Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly **[*156]** protects the states from actions [in] state courts." Moody v. Comm'r, Dept. of Human Servs., 661 A.2d 156, 158 n.3 (Me. 1995).

award of prospective relief, for costs are generally awarded only to prevailing parties, see *Fed. Rule Civ. Proc. 54 (d)*, and only prospective relief can be successfully pursued by an individual in a suit against a State.)

Id. at 695 n.24.

The court is thus clearly limited to awarding prospective relief, "serv[ing] directly to bring an end to a present violation of federal law," by governing an officer's future conduct, and only if the restitution the plaintiffs seek is ancillary to that relief will it be approved, since "[r]elief that is 'tantamount to an award of damages for a past violation of federal law, even though styled as something else,' is barred." *Whalen, 397 F.3d at 29* (quoting *Papasan, 478 U.S. at 278 (1986)*. The plaintiffs have not articulated any prospective relief to which they are entitled, any action that this court should take to "bring an end to a present violation of federal law." Instead, their action appears to seek compensation for a past violation. They ask the court to rule that SORNA of 1999—at the time of *Letalien*, prior to the Chapter 570 amendments—was an unconstitutional law, and this purported declaratory judgment is the prospective relief to which their restitution claims are ancillary. The court does not see a prospective remedy in the plaintiffs' requests. They **[*157]** request an award "tantamount to an award of damages for a past violation of federal law," which the court cannot grant. Because the analysis under the MCRA is equivalent to the analysis under *§1983*, *see* *Jenness v. Nickerson, 637 A.2d 1152, 1158 (1994)*, the plaintiffs' motions for summary judgment under both the MCRA and the *§ 1983* counts are DENIED, and the state defendants' motions for summary judgment on both counts are GRANTED.

CONCLUSION

The court recognizes that there is much at stake for both the plaintiffs and defendants in this matter. The history of SORNA in Maine is one in which all branches of government have acted in an attempt to find constitutional ways to protect the public, especially children, from sex offenders. Clearly, the State of Maine has significant and legitimate reasons in monitoring the whereabouts and activities of sex offenders who reside throughout Maine. At the same time, the plaintiffs understandably argue that traditional notions of rehabilitation and civic redemption should be available to them at some point after they complete their sentences, particularly if they have gone on to become productive and law-abiding members of the community. Most of the **[*158]** plaintiffs in this matter were convicted in the 1980s. They served their sentences, then, decades later, suddenly came into unanticipated and onerous consequences from that conviction. The sting of injustice felt by those registrants is understandable, even more than for *Letalien* and his compatriots, who at least knew that registration would be a consequence of their convictions. However, in the absence of a finding of retroactive punitiveness or other specific constitutional violation, a regulation made for the public good under the legislature's police power must be upheld. The court owes the legislature that deference under the balance of powers. *See* *State v. Haskell, 2008 ME 82, ¶ 5, 955 A.2d 737, 739* ("Great deference is given to social and economic regulations, and reasonableness is presumed because it is the job of the Legislature, not the courts, to balance competing interests.").

The plaintiffs' motion for summary judgment is DENIED as to all counts.

The state defendants' motion for summary judgment is GRANTED as to all counts.

This Order shall be noted on the Docket as incorporated by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

8/18/11

DATE

/s/ Michaela **[*159]** Murphy

SUPERIOR COURT JUSTICE

End of Document

[Emilia No Bolanos v. Alter]

United States District Court for the Southern District of California

August 19, 2011, Decided; August 19, 2011, Filed

CASE NO. 11-CV-00934-H (BGS)

Reporter
2011 U.S. Dist. LEXIS 166658 *

EMILIA NO BOLANOS; GLORIA BOLLENOS, Plaintiffs, vs. RICHARD C. ALTER; WEST 11th AVENUE TRUST #356; and HSBC FINANCIAL, Defendants.

Core Terms

allegations, accounting, debt collector, Rosenthal Act, violations, cause of action, unfair, motion to dismiss, Collection, detainer

Counsel: **[*1]** For Emillano Bolanos, Gloria Bollenos, Plaintiffs: Michael T Pines, LEAD ATTORNEY, Pines & Associates, Carlsbad, CA.

For Richard C. Alter, Defendant: Jean M Heinz, LEAD ATTORNEY, Heinz and Feinberg, San Diego, CA.

Judges: MARILYN L. HUFF, UNITED STATES DISTRICT JUDGE.

Opinion by: MARILYN L. HUFF

Opinion

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

On June 3, 2011, Defendant Richard C. Alter ("Defendant") filed a motion to dismiss Plaintiffs Emilia No Bolanos and Gloria Bollenos ("Plaintiffs")'s complaint. (Doc. No. 5.) On July 27, 2011, the Court determined this matter to be appropriate for resolution without oral argument and submitted it on the parties' papers pursuant to *Local Civil Rule 7.1(d)(1)*. (Doc. No. 7.) On July 27, 2011, the Court also ordered Plaintiffs to file an opposition to Defendant's motion by August 8, 2011. (Id.) To date, Plaintiffs have not filed an opposition to Defendant's motion to dismiss.[1] For the reasons below, the Court GRANTS Defendant's motion to dismiss the complaint without prejudice.

Background

On April 30, 2011, Plaintiffs filed a class action complaint against Defendants Richard C. Alter, West 11th Avenue Trust #356, and HSBC Financial, alleging causes of action for (1) violations of the **[*2]** Federal Debt Collection Practices Act ("FDCPA"), *15 U.S.C. § 1692* ; (2) violations of California Rosenthal Fair Debt Collection Practices Act

[1] In addition, the Court notes that Plaintiffs' attorney, Michael T. Pines, has been deemed ineligible to practice law. (See Doc. No. 8.) On July 29, 2011, the Court ordered Mr. Pines to file a substitution of attorney or, in the alternative, for Plaintiff to appear *pro se* by August 8, 2011. (Id.) To date, no substitution has been filed.

("Rosenthal Act"), *California Civil Code § 1788, et seq.*; (3) violations of California's Unfair Competition Law ("UCL"), *California Business & Professions Code §§ 17200, et seq.*; (4) to set aside trustee's sale; (5) to cancel trustee's deeds; (6) quiet title; (7) accounting. (Doc. No. 1.)

The Court takes judicial notice under *Federal Rule of Evidence 201*, of the following public documents: (1) Trustee's Sale Deed recorded May 13, 2010 as Doc. No. 2010-0242529 in the San Diego County Recorder's office (Doc. No. 6, Request for Judicial Notice ("RJN") Ex. 1); (2) Complaint filed on July 8, 2010 in Superior Court Case No. 37-2010-00039109-CL-UD-NC (Id. Ex. 2); (3) Complaint filed on July 8, 2010 in Superior Court Case No. 37-2010-00039110-CL-UD-NC (Id. Ex. 2); (4) Request for Default entered on July 15, 2010 in Superior Court case No. 37-2010-00039109-CL-UD-NC (Id. Ex. 3); (5) Request for Default entered on July 15, 2010 in Superior Court case No. 37-2010-00039110-CL-UD-NC (Id. Ex. 3); (6) Judgment entered on July 15, 2010 in Superior Court case No. 37-2010-00039109-CL-UD-NC (Id. Ex. 4); (7) Judgment entered on July 15, 2010 in Superior Court case No. 37-2010-00039110-CL-UD-NC (Id. **[*3]** Ex. 4); and (8) Notice of Ruling filed December 21, 2010 in Superior Court Case Nos 37-2010-00039109-CL-UD-NC and 37-2010-00039110-CL-UD-NC. (Id. Ex. 5.)

On May 12, 2010, Plaintiffs' property was sold at a trustee's sale to Defendant HSBC Financial as the foreclosing beneficiary for an undisclosed amount. (Doc. No. 6, RJN Ex. 1.) On July 8, 2010, Defendant Richard C. Alter instituted two unlawful detainer actions on behalf of West 11th Avenue Trust #356 and HSBC Financial in state court against the two Plaintiffs. (Id. Ex. 2.) On July 15, 2011, the state court entered judgment in the two cases in favor of West 11th Avenue Trust #356 and HSBC Financial and against the two Plaintiffs in this suit, Emilia No Bolanos and Gloria Bollenos. (Id. Ex. 4.)

Discussion

I. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)*

A motion to dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Black, 250 F.3d 729, 732 (9th Cir. 2001)*. *Rule 8(a)(2)* requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The function of this pleading requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." **[*4]** *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 557*). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*; see also *Twombly, 550 U.S. at 555*.

II. Plaintiffs' Complaint

A. Violations of the FDCPA and the Rosenthal Act

Plaintiffs allege that Defendant violated the FDCPA and the Rosenthal Act. (Doc. No. 1 ¶¶ 60-74.) Defendant argues that Plaintiffs' two causes of action should be dismissed because those two Acts do not apply to him since he is not a "debt collector." **[*5]** (Doc. No. 5-1 at 4, 7.)

"To be held liable for violation of the FDCPA, a defendant must-as a threshold requirement-fall within the Act's definition of 'debt collector.'" *Izenberg v. ETS Services, LLC, 589 F. Supp. 2d 1193, 1198 (C.D. Cal. 2008)* (citing *Heintz v. Jenkins, 514 U.S. 291, 294, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995))*; see also, e.g., *Romine v. Diversified Collection Servs., 155 F.3d 1142, 1146 (9th Cir.1998)*. The federal FDCPA defines "debt collector" as one who collects consumer debts owed to another. *15 U.S.C. § 1692(a)(6)(A)*.

Similarly, the Rosenthal Act defines a "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself of others, engages in debt collection." *Cal. Civ. Code § 1788.2(c)*. In addition, the Rosenthal Act specifically excludes attorneys from its definition of debt collectors. Id. ("the term 'debt collector' . . . does not include any attorney or counsel at law").

Plaintiffs allege that Defendant is a "debt collector" under both the FDCPA and the Rosenthal Act. (Doc. No. 1 ¶ 32.) However, Plaintiffs provide no factual allegations to support this legal conclusion. Plaintiffs do not allege that Defendant collects consumer debts owed to another. Plaintiffs only allege that Defendant instituted an unlawful detainer action against them, which is insufficient by itself to make Defendant a "debt collector" under the FDCPA. See *Cook v. Hamrick, 278 F. Supp. 2d 1202, 1204 (D. Colo. 2003)*. In addition, as an attorney Defendant is specifically **[*6]** exempted from the definition of "debt collector" under the Rosenthal Act. See *Cal. Civ. Code § 1788.2(c)*. Accordingly, based on the allegations in the complaint, Defendant does not qualify as a "debt collector" under the FDCPA or the Rosenthal Act, and the Court GRANTS Defendant's motion to dismiss Plaintiffs' FDCPA Act and Rosenthal Act claims.

B. Violations of the UCL

Plaintiff alleges a cause of action for violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §17200, et seq.* (Doc. No. 1, Compl. ¶¶ 62-65.) Defendant argues that this claim should be dismissed because his participation in the eviction process was not unfair, unlawful, or fraudulent. (Doc. No. 5-1 at 8-9.)

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code §17200*. Under the UCL, conduct is deceptive or misleading if it is likely to deceive an ordinary consumer. *Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008)*. An act is "unlawful" if it violates an underlying state or federal statute or common law. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. An act is "unfair" if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly **[*7]** threatens or harms competition." *Id. at 187*.

Federal Rule of Civil Procedure 9(b)'s heightened pleading standards apply to claims for violation of the UCL that are grounded in fraud. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. Under *Federal Rule of Civil Procedure 9*, a plaintiff must plead fraud with particularity. "*Rule 9(b)*'s particularity requirement applies to state-law causes of action." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)*. "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id. at 1106* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.1997))*.

Plaintiffs' allegations only provide a conclusory statement that Defendant violated the UCL, (Doc. No. 1 ¶ 9), and they are insufficient to establish a claim for violation of the UCL. Plaintiffs do not state which of the three prongs they are bringing their claim under. However, the Court concludes that Plaintiffs' allegations are insufficient under any of the three prongs. Plaintiffs do not state what, if any, fraudulent statements were made by Defendant or provide the who, what, when, where, and how of any such statements. These allegations fall well short of *Rule 9*'s heightened pleading standards. Plaintiffs also do not allege what unlawful practices Defendant engaged in. Plaintiffs only allege that Defendant instituted an unlawful detainer action against them, (Doc. No. 1 ¶ 33.) which is a lawful practice **[*8]** under California Code of Civil Procedure *section 1161, et seq.* Finally, Plaintiffs also do not allege what conduct Defendant engaged in that was unfair, and or how it was unfair under the UCL. Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiff's UCL claim.

C. Accounting

Plaintiffs allege a claim against Defendant for accounting. (Doc. No. 1 ¶¶ 92-95.) Defendant argues that Plaintiffs' claim for accounting should be dismissed because there is no fiduciary relationship between an unlawful detainer attorney and a tenant. (Doc. No. 5-1 at 9-10.)

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." *Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696 (2009)*. In the complaint, Plaintiffs do not allege that any relationship existed between Plaintiffs and Defendant that would require an accounting. In addition, Plaintiffs do not allege that there is some balance due to them. Plaintiffs only allege they do not owe Defendants the amounts claimed in the unlawful detainer action. (Doc. No. 1 ¶¶ 93-94.) Plaintiffs may not bring an action for accounting absent an allegation that **[*9]** Defendant owes them money. See *Teselle, 173 Cal. App. 4th at 179*; *Kulberg v. Wash. Mut. Bank, 2011 U.S. Dist. LEXIS 40458, at *18 (S.D. Cal. 2011)*. Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiffs' accounting claim.

Conclusion

For the reasons above, the Court GRANTS Defendant's motion to dismiss the complaint without prejudice. The Court grants Plaintiffs 30 days from the date of this order to amend or cure the deficiencies—if they can—in an amended complaint. The Clerk of Court is instructed to send a copy of this order to Plaintiffs personally at their last known address, noted in the complaint: 356 West 11th Ave., Escondido, California, 92025.

IT IS SO ORDERED.

DATED: August 19, 2011

/s/ Marilyn L. Huff

MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT

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FTC v. Lundbeck, Inc.

United States Court of Appeals for the Eighth Circuit

June 16, 2011, Submitted; August 19, 2011, Filed

No. 10-3458/3459

Reporter
650 F.3d 1236 *; 2011 U.S. App. LEXIS 17231 **; 2011-2 Trade Cas. (CCH) P77,570

Federal Trade Commission; State of Minnesota, by and through its Attorney General, Lori Swanson, Plaintiffs - Appellants, v. Lundbeck, Inc., Defendant - Appellee, Ben Venue Laboratories, Inc., Intervenor Below.American Antitrust Institute; States of Missouri, Illinois, Arkansas, Iowa, Maryland, Nevada, New Mexico, North Dakota, South Dakota, and West Virginia, Amici Curiae on behalf of Appellants.

Prior History: [1]** Appeal from the United States District Court for the District of Minnesota.

FTC v. Lundbeck, Inc., 2010 U.S. Dist. LEXIS 95365 (D. Minn., Aug. 31, 2010)

Core Terms

relevant market, neonatologists, drugs, district court, consumers, cross-elasticity, fact-findings, constrain, marginal, prices, clearly erroneous, antitrust, generic

LexisNexis® Headnotes

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

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

HN1[ ] **Market Definition, Relevant Market**

The determination of the relevant market in an antitrust case is an issue for the trier of fact.

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

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[ ] **Market Definition, Relevant Market**

After a bench trial in an antitrust case, a court of appeals reviews for clear error the district court's fact-findings supporting its ultimate determination of the existence of a relevant market.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3[] **Trials, Bench Trials**

Fed. R. Civ. P. 52(a) does not purport to exclude certain categories of factual findings from the clearly erroneous standard of review. It does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. If the district court's fact-findings are plausible in light of the record viewed in its entirety, they must be affirmed, regardless of how a court of appeals might have weighed the evidence in the first instance. When a factual finding is supported by substantial evidence, it is not clearly erroneous.

Antitrust & Trade Law > Clayton Act > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

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

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

HN4[] **Clayton Act, Claims**

To prevail on an antitrust claim, the Federal Trade Commission (FTC) bears the burden of identifying a relevant market. The relevant product market is a question of fact, which the plaintiff bears the burden of proving. The determination of a relevant market is a necessary predicate to the finding of an antitrust violation. The relevant market is a threshold determination under the FTC Act and the Clayton Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

Minnesota ***antitrust law*** is generally interpreted consistently with federal ***antitrust law***.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN6[] **Equitable Relief, Quantum Meruit**

An unjust enrichment claim requires allegations that a party was unjustly enriched in the sense that the "unjustly" could mean illegally or unlawfully.

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

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

Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition. Antitrust claims often rise or fall on the definition of a relevant market.

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

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

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

HN8[] **Relevant Market, Geographic Market Definition**

For purposes of an antitrust claim, a relevant market consists of both a geographic market and a product market.

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

HN9[] **Relevant Market, Product Market Definition**

For purposes of an antitrust claim, the outer boundaries of a product market can be identified by the reasonable interchangeability, or cross-elasticity of demand, between the product and possible substitutes for it. Determining a product market requires identifying the choices available to consumers, focusing on whether consumers will shift from one product to the other in response to changes in their relative cost. Market definition focuses solely on demand substitution factors--i.e., possible consumer responses.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Regulated Practices, Market Definition**

Cross-price elasticity is essential to market definition in an antitrust case.

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

HN11[] **Market Definition, Relevant Market**

In determining the relevant market in an antitrust case, a district court need not consider a hypothetical market, especially where the plaintiff offers no evidence about such a hypothetical market.

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

HN12[] **Relevant Market, Product Market Definition**

For purposes of an antitrust claim, functionally similar products may be in separate product markets, depending on the facts of the case.

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

HN13[] Market Definition, Relevant Market

For purposes of determining the relevant market in an antitrust case, whether there are enough marginal consumers to constrain prices is a factual question that requires analyzing consumer-demand and profit-margins. Marginal consumer substitution and profit-margins must be supported with more than "common sense."

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

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

Evidence > Weight & Sufficiency

HN14[] Jury Trials, Province of Court & Jury

The question of an expert's credibility and the weight to be accorded the expert testimony are ultimately for the trier of fact to determine.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

HN15[] Standards of Review, Reversible Errors

A court of appeals will not disturb a district court's decision to credit the reasonable testimony of one of two competing experts.

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

HN16[] Relevant Market, Product Market Definition

Industry recognition is a factor in a product market definition in an antitrust case. A submarket may be identified by a number of a factors, including industry or public recognition of its separate economic character. It is not, however, dispositive.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN17[] Standards of Review, Clearly Erroneous Review

If there are two permissible views of evidence, the factfinder's choice between them is not clearly erroneous.

Civil Procedure > Appeals > Standards of Review > General Overview

Governments > Courts > Authority to Adjudicate

HN18[] **Appeals, Standards of Review**

It is precisely the job of a district court to consider the evidence offered by both sides and render a judgment. Whether a court of appeals would come to the same conclusion is irrelevant.

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Judges: Before COLLOTON and BENTON, Circuit Judges, and KOPF[1] District Judge. KOPF, District Judge, concurring.

Opinion by: BENTON

Opinion

[*1238] BENTON, Circuit Judge.

The Federal Trade Commission and Minnesota (collectively the FTC) sued Lundbeck, Inc., alleging its acquisition of the drug NeoProfen violated the Federal Trade Commission Act, the Sherman Act, the Clayton Act, the Minnesota ***Antitrust Law*** of 1971, and unjustly enriched Lundbeck. After a bench trial, the district court[2] ruled for Lundbeck based on the FTC's failure **[**4]** to identify a relevant market.

Patent ductus arteriosus (PDA) is a life-threatening heart condition that primarily affects low-birth-weight, usually premature, babies. There are two primary treatments: pharmacological and surgical. Pharmacological treatment (a drug) is the first-line treatment; surgical ligation is considered after other treatments are ineffective. Approximately 30,000 cases of PDA are treated with drugs in the U.S. yearly.

When this case was brought, there were two FDA-approved drugs for PDA: Indocin IV and NeoProfen. (In 2010, two generic alternatives to Indocin IV were introduced by Bedford Laboratories and APP Pharmaceuticals, LLC.) Indocin IV-an off-patent, injectable drug with the active ingredient indomethacin-has been FDA-approved for PDA since 1985. NeoProfen-a patented injectable drug with the active ingredient ibuprofen lysine-has been FDA-approved for PDA since 2006. Because their active ingredients differ, Indocin IV and NeoProfen are not bioequivalents and have different side effects.

Lundbeck purchased the rights to Indocin IV from Merck & Co. in 2005, and the rights **[**5]** to NeoProfen from Abbott Laboratories in 2006 (before it was put on the market). Until generics appeared in 2010, Lundbeck owned all the drugs for PDA.

When Lundbeck purchased Indocin IV, Merck charged $77.77 per treatment. Lundbeck immediately raised the price of Indocin IV. Two days after acquiring the rights to NeoProfen, Lundbeck raised the price thirteen-fold. By 2008, the price of Indocin IV settled at $1614.44. When Lundbeck introduced NeoProfen in 2006, it charged $1450 per NeoProfen treatment, and its price eventually settled at $1522.50.

Both Indocin IV and NeoProfen are hospital-based drugs dispensed and used in inpatient care. Most hospitals assemble a formulary-a list of recommended drugs-to streamline purchasing. The formulary-listed drugs are chosen by pharmacy and therapeutics committees who often seek input from specialist physicians. Some hospitals use closed formularies (special approval is required to prescribe non-listed drugs). Others apply open formularies (physicians can prescribe non-listed drugs at their discretion). Hospitals use inclusion in the formulary to extract better prices from sellers of clinically-substitutable drugs.

[*1239] After a bench trial, the district **[**6]** court determined that the FTC did not meet its burden to prove that Indocin IV and NeoProfen were in the same product market and thus failed to identify a relevant market.

HN1[] "The determination of the relevant market is an issue for the trier of fact." ***Ryko Mfg. Co. v. Eden Servs.***, *823 F.2d 1215, 1232 (8th Cir. 1987)*. *See also* ***General Indus. Corp. v. Hartz Mountain Corp.***, *810 F.2d 795, 805 (8th Cir. 1987)*. ***HN2***[] After a bench trial, this court reviews for clear error the district court's fact-findings supporting its ultimate determination of the existence of a relevant market. *See* ***Community Publishers, Inc. v. DR***

[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

[2] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

Partners**, 139 F.3d 1180, 1183-84 (8th Cir. 1998)*; *see also* ***Pullman-Standard v. Swint**, 456 U.S. 273, 287, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* (noting that ***HN3[] *Fed. R. Civ. P. 52(a)* does not "purport to exclude certain categories of factual findings" from the clearly erroneous standard of review. "[I]t does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts"). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." ***Anderson v. City of Bessemer City**, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)*. If the district court's **[**7]** fact-findings are "plausible in light of the record viewed in its entirety," they must be affirmed, regardless of how this court might have weighed the evidence in the first instance. ***Moore v. Forrest City Sch. Dist**., 524 F.3d 879, 884 (8th Cir. 2008)* (quotations omitted). When a factual finding is supported by substantial evidence, it is not clearly erroneous. ***Dixon v. Crete Med. Clinic, P.C**., 498 F.3d 837, 847 (8th Cir. 2007)*.

The FTC argues that this court should review the district court's judgment de novo because the court "applied an incorrect legal standard" by failing to "examin[e] all the pertinent factors" determining a relevant market. ***United States v. Empire Gas Corp**., 537 F.2d 296, 303, 304 (8th Cir. 1976)*. *See also* ***Universal Title Ins. Co. v. United States**, 942 F.2d 1311, 1314 (8th Cir. 1991)*, *quoting* ***Bose Corp. v. Consumers Union of United States, Inc**., 466 U.S. 485, 501, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)* (despite *Rule 52(a)*, a court can correct "a finding of fact that is predicated on a misunderstanding of the governing rule of law"). Contrary to the FTC's argument, the district court examined the pertinent factors determining a relevant market, including the "readiness and ability of consumers **[**8]** to turn to reasonable alternatives to the product in question." ***Empire Gas Corp**., 537 F.2d at 303*. Though cloaked as a legal argument, the FTC really challenges the district court's weighing of the relevant market factors, which this court reviews for clear error.

HN4[] To prevail, the FTC bears the burden of identifying a relevant market. *See* ***HDC Med., Inc. v. Minntech Corp**., 474 F.3d 543, 547 (8th Cir. 2007)* ("The relevant product market is a question of fact, which the plaintiff bears the burden of proving."); *see also* ***FTC v. Tenet Health Care Corp**., 186 F.3d 1045, 1051 (8th Cir. 1999)* ("The determination of a relevant market is a necessary predicate to the finding of an antitrust violation."); ***FTC v. Freeman Hosp**., 69 F.3d 260, 268 (8th Cir. 1995)* (relevant market is a threshold determination under the FTC Act and the Clayton Act); ***Lorix v. Crompton Corp**., 736 N.W.2d 619, 626 (Minn. 2007)* (***HN5***[] "Minnesota ***antitrust law*** is generally interpreted consistently with federal ***antitrust law***."); ***First Nat'l Bank of St. Paul v. Ramier**, 311 N.W.2d 502, 504 (Minn. 1981)* (***HN6***[] an unjust enrichment claim requires allegations "that a party was unjustly **[*1240]** enriched in the sense that the 'unjustly' could mean illegally **[**9]** or unlawfully"). ***HN7***[] "Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." ***Southeast Missouri Hosp. v. C.R. Bard, Inc**., 642 F.3d 608, 613 (8th Cir. 2011)*. "Antitrust claims often rise or fall on the definition of a relevant market." ***Bathke v. Casey's Gen. Stores, Inc**., 64 F.3d 340, 345 (8th Cir. 1995)*. ***HN8***[] A relevant market consists of both a geographic market and a product market. ***Little Rock Cardiology Clinic PA v. Baptist Health**, 591 F.3d 591, 596 (8th Cir.)*, *cert. denied*, *130 S. Ct. 3506, 177 L. Ed. 2d 1092 (2010)*. The parties agree that the geographic market is the United States, but dispute the product market.

HN9[] The outer boundaries of a product market can be identified by the reasonable interchangeability, or cross-elasticity of demand, between the product and possible substitutes for it. ***Brown Shoe Co. v. United States**, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Determining a product market requires identifying the choices available to consumers, focusing on "whether consumers will shift from one product to the other in response to changes in their relative cost." ***SuperTurf, Inc. v. Monsanto Co**., 660 F.2d 1275, 1278 (8th Cir. 1981)*; *see also* ***Horizontal Merger Guidelines § 1, 57 Fed. Reg. 41552 (1992)*** **[**10]** ("Market definition focuses solely on demand substitution factors-i.e., possible consumer responses.").

In its fact-findings, the district court credited the testimony of five clinical pharmacists, representing approximately 43 hospitals throughout the country. The pharmacists uniformly stated that while they make drug recommendations, the neonatologists decide which drug a patient receives. The court also credited the testimony of seven neonatologists who said that treatment decisions are based solely on perceived clinical advantages/disadvantages of Indocin IV versus NeoProfen. The neonatologists' preferences differed (some prescribe Indocin IV, others NeoProfen), but each echoed the same concept: The relative price of the drugs does not factor into the choice of drug treatment. The court was not persuaded by the testimony of one neonatologist (cited often by the FTC and its experts), who believed the drugs to be equally safe, implying he was comfortable using either one for PDA.

Based on this evidence, the court determined that the neonatologists "ultimately determine the demand for Indocin IV and Neoprofen," and that these treatment **[**11]** decisions are made "without regard to price." Thus, an increase in the price of Indocin IV would not drive a hospital to purchase NeoProfen, and vice versa. Considering these facts, as well as testimony by Lundbeck's expert whom the court found "persuasive," the court ruled that there is low cross-elasticity of demand between Indocin IV and Neoprofen, and thus the drugs are not in the same product market. *See* ***H.J., Inc. v. International Tel. & Tel. Corp****., 867 F.2d 1531, 1538, 1540 (8th Cir. 1989)* (holding that ***HN10***[] cross-price elasticity is essential to market definition. Plaintiff did not identify a relevant market because it offered only "casual statements, not made as part of a serious market analysis" and there was "no market data concerning sales . . . nor was there any testimony describing the degree of cross-elasticity").

The FTC contends that the district court relied too much on the testimony of the neonatologists, and ignored evidence demonstrating that Indocin IV and NeoProfen **[*1241]** are in the same product market.[3] Challenging the court's reliance on the neonatologists' testimony, the FTC argues that the hospitals, not the neonatologists, are the consumers, and the hospitals would **[**12]** switch between Indocin IV and NeoProfen based on price differences. The FTC offers no evidence that hospitals would disregard the preferences of the neonatologists and make purchasing decisions based on price. The district court did not err in finding more persuasive the testimony of the pharmacists and most neonatologists, compared to the one neonatologist favorable to the FTC.

According to the FTC, the district court (and the neonatologists) ignored **[**13]** the fact that Indocin IV and NeoProfen are practicable alternatives, relying instead on stated consumer preference. In fact, the practicable alternatives here are clear, were the subject of testimony by the neonatologists, and were considered by the district court. When the case was tried, Indocin IV and NeoProfen were the two drug treatments available for PDA. Aware of the drug options—the "practicable alternatives"-the neonatologists preferred one treatment or the other (without regard for cost), which the court credited as persuasive evidence of low cross-elasticity.

In a variation of the "practicable alternatives" argument, the FTC asserts that functionally similar products must be in the same product market. To the contrary, ***HN12***[] functionally similar products may be in separate product markets, depending on the facts of the case. *Compare* ***Henry v. Chloride, Inc****., 809 F.2d 1334, 1342-43 (8th Cir. 1987)* (batteries sold through route-truck distribution was a separate market from identical batteries sold through warehouses), ***United States v. Archer-Daniels-Midland Comp****., 866 F.2d 242, 248 (8th Cir. 1988)* (functionally interchangeable sweeteners were separate product markets because "a small **[**14]** change in the price of [one] would have little or no effect on the demand for [the other]"), ***Geneva Pharms. Tech. Corp. v. Barr Labs. Inc****., 386 F.3d 485, 496 (2d Cir. 2004)* (bioequivalent, functionally-interchangeable branded and generic drugs were in separate product markets), *and* ***SmithKline Corp. v. Eli Lilly & Co****., 575 F.2d 1056, 1064 (3d Cir. 1978)* (despite a certain degree of functional interchangeability among antibiotics, specific class of antibiotics was separate product market based on court's finding that there was a lack of price sensitivity and cross-elasticity of demand), *with* ***HDC Med., Inc****., 474 F.3d at 547-48* (rejecting argument that dialyzers with identical uses can be separated into two product markets based solely on a price differential), *and* ***H.J., Inc****., 867 F.2d at 1538-40* (holding that a new product and the product it was meant to supercede were in same product market because competitor did not produce evidence sufficient to establish low cross-elasticity of demand).

[3] The FTC asserts that the district court failed to examine a hypothetical market where Indocin IV and NeoProfen were owned separately. ***HN11***[] In determining the relevant market, the district court need not consider a hypothetical market, especially here where the FTC offered no evidence about such a hypothetical market. *See* ***Yamaha Motor Co., Ltd. v. FTC****, 657 F.2d 971, 977 (8th Cir. 1981)* (examining a hypothetical market, absent the challenged conduct, in order to determine whether a violation occurred, not to determine the relevant market); ***United States v. Microsoft****, 253 F.3d 34, 78-79, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (examining the market before the anticompetitive conduct in order to determine whether a violation occurred, not to determine the relevant market).

Further attacking the district court's reliance on consumer preference, the FTC argues that the court ignored the ability of marginal customers to constrain prices. **[*1242]** ***HN13***[] Whether there are enough marginal **[**15]** consumers to constrain prices is a factual question that requires analyzing consumer-demand and profit-margins. *See* ***Tenet Health Care Corp**., 186 F.3d at 1050-51, 1054* (marginal consumer substitution and profit-margins must be supported with more than "common sense." This court pointed to the "compelling and essentially unrefuted [critical loss analysis] evidence that the switch to another [product] by a small percentage of [consumers] would constrain a price increase" as evidence of marginal consumer's ability to constrain prices in a broader geographic market); *see also* ***United States v. Engelhard Corp**., 126 F.3d 1302, 1306 (11th Cir. 1997)* (requiring evidence in order to evaluate the possibility that losing marginal customers responsible for high-margin purchases may constrain prices). The FTC offered testimony of one expert explaining that "marginal customers"-neonatologists who are ambivalent between prescribing Indocin IV or NeoProfen-may constrain prices on either drug. Although not addressing this testimony in its fact-findings, the district court did state that it generally found the FTC expert unpersuasive. *See* ***Fox v. Dannenberg**, 906 F.2d 1253, 1256 (8th Cir. 1990)* (***HN14***[] "The question **[**16]** of the expert's credibility and the weight to be accorded the expert testimony are ultimately for the trier of fact to determine."). Critically, the district court did credit Lundbeck's expert who stated that the number of neonatologists willing to switch between the drugs based on price was insufficient to exercise price constraint. *See* ***Pioneer Hi-Bred Int'l v. Holden Found. Seeds, Inc**., 35 F.3d 1226, 1238 (8th Cir. 1994)* (***HN15***[] "[This court] will not disturb the district court's decision to credit the reasonable testimony of one of two competing experts."). Lundbeck's expert was clear that even those neonatologists who might be willing to switch in response to a price difference would do so only if there was a very significant price decrease, indicating that the level of cross-elasticity was low.

Finally, the FTC contends that the district court ignored its own findings about Lundbeck's internal documents, claiming they indicate Indocin IV and NeoProfen are in the same market. True, ***HN16***[] industry recognition is a factor in a product market definition. *See* ***Brown Shoe Co**., 370 U.S. at 325* (a submarket may be identified by a number of a factors, including industry or public recognition of its separate **[**17]** economic character). It is not, however, dispositive. *See* ***C.R. Bard, Inc**., 642 F.3d at 614, 617* (holding that a hospital did not identify a relevant market even though there was evidence of industry recognition). According to Lundbeck's internal documents, it anticipated that a dramatic price increase of Indocin IV would draw generic competitors into the market. As a result, it ceased promoting Indocin IV, focusing instead on increasing the market share of NeoProfen-as a superior PDA treatment. The FTC argues that this business strategy-to market NeoProfen as better than Indocin IV-means that Lundbeck viewed NeoProfen as a direct competitor to Indocin IV, and thus the drugs must be in the same product market. However, Lundbeck's strategy to discontinue promoting Indocin IV in favor of NeoProfen can also be interpreted to mean that while Indocin IV was vulnerable to generics, NeoProfen was not, and thus the products are not interchangeable. ***HN17***[] If there are two permissible views of evidence, the factfinder's choice between them is not clearly erroneous. ***Anderson**, 470 U.S. at 574*.

In the end, the FTC disagrees with the district court's weighing of the facts applicable to the relevant market **[**18]** determination. The district court reached its decision **[*1243]** after "careful consideration based upon the entire record." ***United States v. Cont'l Can Co**., 378 U.S. 441, 449, 453, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)* (holding that metal and glass containers were in the same relevant market based on the facts, which demonstrated a "general confrontation between metal and glass containers and competition between them for the same end uses which [was] insistent, continuous, effective, and quantitywise, very substantial . . . ." lasting "over the long run"). ***HN18***[] It is precisely the job of the district court to consider the evidence offered by both sides and render a judgment. *See* ***Sloan v. Hartford Life & Accident Ins. Co**., 475 F.3d 999, 1005-006 (8th Cir. 2007)* (even though appellant could identify evidence in support of its case theory, the district court's ultimate finding was not erroneous). Whether this court would come to the same conclusion is irrelevant. The district court's fact-finding was not clearly erroneous.

The judgment is affirmed.

Concur by: KOPF

Concur

KOPF, District Judge, concurring.

When defining the product market, and considering the issue of cross-elasticity of demand, the district court relied heavily upon the testimony of doctors **[**19]** that they would use Indocin or NeoProfen without regard to price. Admittedly, those doctors had no responsibility to pay for the drugs or otherwise concern themselves with cost. Thus, the doctors had scant incentive to conserve the scarce resources that would be devoted to paying for the medication. Why the able and experienced trial judge relied upon the doctors' testimony so heavily is perplexing. In an antitrust case, it seems odd to define a product market based upon the actions of actors who eschew rational economic considerations. *See, e.g.*, *F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045, 1054 & n.14 (8th Cir. 1999)* (observing that "market participants are not always in the best position to assess the market long term" and that is particularly so where their testimony is "contrary to the payers' economic interests and thus is suspect"). That oddity seems especially strange where, as here, there is no real dispute that (1) both drugs are effective when used to treat the illness about which the doctors testified and (2) internal records from the defendant raise an odor of predation.

The foregoing having been said, the standard of review carries the day in this case as it does **[**20]** in so many others. As a result, I fully concur in Judge Benton's excellent opinion.

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U.S. Ring Binder L.P. v. World Wide Stationery Mfg. Co.

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

August 19, 2011, Decided; August 19, 2011, Filed

Case No. 3:10 CV 2556

Reporter

804 F. Supp. 2d 588 *; 2011 U.S. Dist. LEXIS 93035 **

U.S. Ring Binder L.P., Plaintiff, -vs- World Wide Stationery Manufacturing Co., Ltd., Defendant.

Core Terms

Ring, commodity, products, monopoly power, allegations, patent, manufacturers, binderies, barriers, anti-competitive, tying product, prices, tying agreement, market power, monopolization, competitors, substitutes, antitrust, compete, relevant market, infringement, customers, markets, geographic, consumer, metals, factual allegations, market share, conclusory, monopolist

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

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

HN1[] **Defenses, Demurrers & Objections, Demurrers**

Fed. R. Civ. P. 8 demands that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. The pleading standard does not require detailed factual allegations, but it demands more than an unadorned legal accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Such conclusory allegations must be rejected, and only a complaint containing well-pleaded factual allegations that plausibly give rise to an entitlement to relief will survive demurrer.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN2[] **Sherman Act, Claims**

To state a claim arising from a competitor's alleged monopolization, a claimant must adequately allege that the claimant attained monopoly power in the product market through anticompetitive or exclusionary means as compared to the lawful accretion of monopoly power through, for example, superior products. To survive a motion to dismiss with respect to an attempted monopolization claim, the claimant must adequately allege that the competitor engaged in anticompetitive practices with the specific design to establish a monopoly, and that such conduct poses a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN3[] **Sherman Act, Claims**

For *§ 2* claims under the Sherman Antitrust Act, *15 U.S.C.S. § 2*, a claimant must plausibly allege the existence of geographic and product markets in which the accomplished monopolist maintains monopoly power, or in which the claimant competes with the aspiring monopolist. The failure to allege a plausible product or geographic market necessarily would doom *§ 2* claims.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] **Sherman Act, Claims**

The geographic market constitutes the area of effective competition in which consumers of a product or service can turn for alternative sources of supply. Determining the product market requires allegations identifying products that are identical to, or substitutes for, a monopolist's products. This interchangeability analysis turns on an assessment of the product uses and cross-elasticity of demand, consumer sensitivity to price levels at which the consumer elects substitutes for the monopolists's product or service.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] **Sherman Act, Claims**

A claimant bears the burden of alleging a plausible, reasonably defined market affected by a monopolist's alleged anticompetitive behavior.

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

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

HN6[] **Pleadings, Heightened Pleading Requirements**

Whether a pleading standard is heightened, and therefore improper when applied to allegations subject to *Fed. R. Civ. P. 8*, depends on the baseline from which the pleading standard's rigor is assessed.

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

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > Inferences

HN7[] **Complaints, Requirements for Complaint**

A complaint must contain enough factual content to allow a court to draw the reasonable inference of a defendant's liability. But it is not enough for a court to draw any inference from a complaint whose allegations could provide relief on some quantum of proven facts. Rather, a complaint's nonconclusory, factual allegations must demonstrate facial plausibility.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Burdens of Proof > Allocation

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

Evidence > Types of Evidence > Circumstantial Evidence

HN8[] **Sherman Act, Claims**

A claimant must plausibly allege that through anticompetitive conduct, a monopolist has attained, or is reaching for, monopoly power in the relevant product market. Monopoly power is the ability to control prices or exclude competition. A plaintiff can establish monopoly power either through direct evidence of the exercise of actual control over prices or the actual exclusion of competitors, or circumstantial evidence showing the monopolist possesses a high share of the relevant market. But a high degree of market share alone is not enough to establish the existence of monopoly power. Considerations of market share are only the starting point for monopoly power analysis. The key question a court must resolve when faced with circumstantial evidence of monopoly power is whether the monopolist has the ability to control prices in, or exclude competitors from, the relevant market. At the early pleading stage, the inquiry becomes whether the dynamics of the alleged market plausibly could support the existence and exercise of monopoly power.

Antitrust & Trade Law > Sherman Act > Claims

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

HN9[] **Sherman Act, Claims**

The question for monopoly power analysis is not whether charging supra-competitive prices or excluding competitors through anticompetitive practices would harm competition, but whether a purported monopolizer has, or could have, the ability to thus harm competition.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

The lack of entry barriers is relevant in market power analysis.

Antitrust & Trade Law > Sherman Act > Claims

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

HN11[] **Sherman Act, Claims**

The presence or absence of entry barriers is an important factor in determining whether a complaint plausibly alleges the possibility of monopoly power existing in a given market. Indeed, in some circuits, the absence of entry barriers can bar a claim under *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN12[] **Scope, Monopolization Offenses**

A seller employs a tying agreement when he sells one product (the tying product) but only on the condition that the buyer also purchases a different (or tied) product. But merely conditioning one product's sale on another's does not violate federal ***antitrust law***. Instead, a defendant must employ the market power it possesses in the tying product market to force the purchase of a product that, but for the tying agreement, a buyer would have sought elsewhere or on different terms.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN13[] **Sherman Act, Claims**

Claims under *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1* which are rooted in alleged tying agreements are only actionable under a rule of reason analysis.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

HN14[] **Sherman Act, Claims**

In cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN15[] Scope, Monopolization Offenses

Like a 15 U.S.C.S. § 2 claim, a tying product market's boundaries are determined by those products that are reasonably interchangeable by consumers for the same purposes as the tying product.

Antitrust & Trade Law > Sherman Act > Claims

HN16[] Sherman Act, Claims

In general, a manufacturer's own products do not themselves comprise a relevant product market.

Antitrust & Trade Law > Sherman Act > Claims

HN17[] Sherman Act, Claims

A product market definition provides the context for, among other things, assessing the degree of market power a defendant exercises in that market. Therefore, the fewer substitute products included in a market definition, all things being equal, the more likely a defendant's influence in that market will approach monopoly power. However, it is not the mere control each firm maintains over its own product's price that constitutes illegal monopoly power, but rather the effect of each firm's conduct on competition within the relevant market.

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

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

HN18[] Motions to Dismiss, Failure to State Claim

At the pleading stage, a court only may accept nonconclusory averments supported by factual allegations as true.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN19[] Defenses, Misuse

Patent misuse as an affirmative defense to a patent infringement claim.

Civil Procedure > Remedies > Injunctions > General Overview

HN20[] **Remedies, Injunctions**

Injunctive relief is, as the name suggests, a remedy, not a standalone claim.

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Judges: JACK ZOUHARY, UNITED STATES DISTRICT JUDGE.

Opinion by: JACK ZOUHARY

Opinion

[*591] MEMORANDUM OPINION AND ORDER

INTRODUCTION

This matter is before the Court on the Motion of Defendant World Wide Stationery Manufacturing Co., Ltd. ("World Wide") to Dismiss Plaintiff U.S. Ring Binder L.P.'s ("U.S. Ring") Amended Complaint ("Complaint") for failure to state a claim upon which relief may be granted (Doc. No. 26). The matter has been fully briefed (Doc. Nos. 27, 34 & 36).

As part of its Motion to Dismiss, World Wide filed a Notice of Constitutional Question with the U.S. Attorney General ("the Government") (Doc. No. 30). The Government **[**2]** intervened, pursuant to *Federal Civil Rule 5.1(c)* (Doc. No. 47), and opposed the Motion to Dismiss (Doc. No. 48), defending the constitutionality of *35 U.S.C. § 292* ("False Markings Act"). World Wide replied (Doc. No. 49). Thereafter, the parties stipulated to stay consideration of the constitutional challenge and related arguments until the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") disposes of a case in which the statute's constitutionality is likewise challenged (Doc. No. 52). The constitutional question, however, is dismissed as moot because World Wide's Motion to Dismiss the Complaint is granted on other grounds.

THE COMPLAINT

The Complaint advances the following allegations in support of a variety of federal and state law claims.

U.S. Ring manufactures ring metals ("rings") for use in looseleaf binders (Doc. No. 11 at ¶ 7). World Wide, a Hong Kong-based firm with its primary U.S. office in Fremont, Ohio (*id.* at ¶¶ 3—4), is the dominant manufacturer of rings, controlling 80 percent of the domestic ring industry as compared to U.S. Ring's 15 percent share (*id.* at ¶ 8).

Ring manufacturers sell their products to binderies, which incorporate the rings into notebooks **[**3]** or looseleaf binders for sale to retailers (*id.* at ¶¶ 9—10). Both the ring and bindery markets support a limited number of competitors (*id.* at ¶ 11); indeed, U.S. Ring is World Wide's "sole direct competitor[]" (*id.* at ¶ 20). By contrast, binderies sell to many retailers, which, in turn, sell binders and notebooks to end consumers (*id.* at ¶¶ 10—11).

The Complaint divides rings into two relevant product markets (*id.* at ¶ 17), distinguishing between unique or patented products versus commodity rings (*id.* at ¶ 12). Commodity rings is the relevant market for antitrust analysis (*id.* at ¶ 17). As the name implies, demand for commodity rings is price-driven (*id.* at ¶ 13). The Complaint defines the geographic market for both unique and commodity rings as the United States (*id.* at ¶ 16).

U.S. Ring alleges that World Wide exploits its dominant position in the market to pressure binderies into "less than ideal, unethical, and illegal contracts" in violation of federal ***antitrust law*** (*id.* at ¶ 22). Specifically, World Wide only sells two of its unique ring products — the One Touch Ring and the One Touch 2 Ring (collectively "the One Touch Ring products") — to binderies that agree to purchase a certain **[**4]** portion of their commodity ring requirements from World Wide regardless of price (*id.* at ¶ 43). U.S. Ring claims it experienced a significant decrease in commodity ring orders from customers subjected to World **[*592]** Wide's allegedly illegal tying agreements (*id.* at ¶ 45). Such agreements, according to U.S. Ring, violate Section 1 of the Sherman Antitrust Act under a *per se* theory (*id.* at ¶¶ 69, 82) or, in the alternative, the agreements unreasonably restrain competition under a rule of reason analysis (*id* at ¶¶ 80, 93).

In addition, World Wide is accused of "willfully acquir[ing] and maintain[ing]" monopoly power in the commodity ring market (*id.* at ¶¶ 61—62), and that World Wide's strategy is driven by a specific intent to monopolize the commodity ring market, an outcome that has a "dangerous probability" of success if U.S. Ring and other manufacturers are eliminated (*id.* at ¶¶ 65—66).

Furthermore, U.S. Ring alleges World Wide misuses patents and abuses the patent process by introducing small variations into existing ring metal products, patenting the modified product, and then representing to customers that World Wide possesses patent rights to both the new and old (unmodified) ring metal **[**5]** technologies (*id.* at ¶¶ 24—25). Based on these representations, customers purchase products incorporating the new and old technologies solely from World Wide, under the mistaken belief that World Wide maintains exclusive right to sell both products (*id.* at ¶ 26). World Wide further allegedly abuses the patent process by labeling certain of its products as patented technologies when, in fact, World Wide holds no patent for the product (*id.* at ¶ 51), a practice that violates the False Markings Act and harms World Wide's competitors (*id.* at ¶¶ 52—53). U.S. Ring offers the events leading to Hong Kong Stationery Manufacturing Co., Ltd.'s exit from the U.S. ring market as an example of World Wide's misuse and abuse of the patent process (*id.* at ¶¶ 28—32).

U.S. Ring also claims World Wide's conduct during and after two previous lawsuits, in which U.S. Ring was the opposing party, demonstrates World Wide's anti-competitive conduct. In 2001, World Wide filed a counterclaim against U.S. Ring for patent infringement (*id.* at ¶ 34), only to abandon this counterclaim and agree to a settlement of U.S. Ring's claims after U.S. Ring shared evidence of prior art. This evidence demonstrated World Wide's **[**6]** asserted patent was invalid (*id.* at ¶¶ 35—36). Thereafter, World Wide "corruptly and unethically utilizi[ed] the Chinese government to forcefully injure" U.S. Ring (*id.* at ¶ 38). Specifically, World Wide induced the Chinese government to shutter the Chinese facility that produced rings for U.S. Ring, and was the subject of World Wide's baseless patent infringement counterclaim (*id.* at ¶¶ 37—38).

Six years later, World Wide again filed claims against U.S. Ring for allegedly infringing two patents — claims U.S. Ring answered by proving the supposed World Wide patents were, in fact, invalid (*id.* at ¶¶ 54—56). During trial, World Wide's claims were demonstrated as groundless after World Wide's own uncontested evidence established the improper inventorship of the disputed patents (*id.* at ¶ 57). Further, World Wide produced scant evidence on its infringement claims and no evidence to rebut U.S. Ring's invalidity counterclaims (*id.*). Finally, World Wide caused delays through poor litigation management and pursued a willful infringement claim that, as a matter of law, had no chance of success (*id.*). Such unwarranted claims were allegedly pursued with the intent of damaging U.S. Ring's business **[**7]** by, among other things, indicating to U.S. Ring's customers that the firm's products infringed on World Wide patents (*id.* at ¶ 58).

In addition to claims for violations of federal antitrust and patent law, U.S. Ring advances the following claims:

- **[*593]** • Violations of state antitrust statues in "the various states where World Wide and U.S. Ring do business" (*id.* at ¶ 100);

• Unfair competition resulting from deceptive acts harming competition in the Relevant Market for Sales (*id.* at ¶¶ 106—08);

• A "count" labeled "injunctive relief" (*id.* at ¶¶ 111—13);

• Tortious interference with prospective economic advantage resulting from World Wide disrupting and capturing U.S. Ring's relationships with current and future customers (*id.* at ¶¶ 114—21);

• Common law and statutory unfair competition (*id.* at ¶¶ 122—24);

• Tortious interference by causing binderies to breach contracts they have entered into with U.S. Ring (*id.* at ¶¶ 125—31); and

• Relief for damage caused by World Wide's "sham litigation" (*id.* at ¶¶ 141—44).

STANDARD OF REVIEW

HN1[] *Federal Civil Rule 8* demands that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The pleading standard does not **[**8]** require "detailed factual allegations," but it demands more than an unadorned legal accusation. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Such conclusory allegations must be rejected, and only a complaint containing well-pled factual allegations that plausibly give rise to an entitlement to relief will survive demurrer. *Id. at 1950*.

DISCUSSION

The Complaint contains six counts explicitly linked to Sections 1 and *2* of the Sherman Antitrust Act ("the Act"). U.S. Ring alleges World Wide has monopolized, or is attempting to monopolize, "any part of the trade or commerce among the several States." *15 U.S.C. § 2*. U.S. Ring also invokes the prohibition of "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States," *15 U.S.C. § 1*, with respect to the alleged tying agreements under both *per se* and rule of reason analysis.

Section 2 Claims

U.S. Ring argues World Wide has monopolized, or is attempting to monopolize, the commodity ring market. ***HN2***[] To state a claim arising from World Wide's alleged monopolization, U.S. **[**9]** Ring must adequately allege World Wide attained monopoly power in the commodity ring market through "anti-competitive or exclusionary means" as compared to the lawful accretion of monopoly power through, for example, superior products. *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)*. To survive this Motion to Dismiss with respect to its attempted monopolization claim, U.S. Ring must adequately allege that World Wide engages in anti-competitive practices with the specific design to establish a monopoly, and that such conduct poses a "dangerous probability of success." *Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 932 (6th Cir. 2005)*.

Geographic and Product Markets

HN3[] For both *Section 2* claims, U.S. Ring must plausibly allege the existence of geographic and product markets in which the accomplished monopolist maintains monopoly power, or in which Plaintiff competes with the aspiring monopolist. *Id.; see also Potters Med. Cent. v. City Hosp.* ***[*594]*** *Ass'n, 800 F.2d 568, 574 (6th Cir. 1986)*. The failure to allege a plausible product or geographic market necessarily would doom U.S. Ring's *Section 2* claims. *See* *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 530—31 (6th Cir. 2001)* **[**10]** (affirming dismissal of complaint that failed to properly allege, *inter alia*, product market).

HN4[] The geographic market constitutes the area of "effective competition" in which "consumers of a product or service can turn for alternative sources of supply." *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)*. Determining the product market requires allegations identifying products that are identical to, or substitutes for, the defendant's products. *White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983)*. This interchangeability analysis turns on an assessment of the product uses and cross-elasticity of demand, "consumer sensitivity to price levels at which [the consumer] elect[s] substitutes for the defendant's product or service." *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 917 (6th Cir. 2009)*.

For its Sherman Act claims, U.S. Ring describes the United States as the relevant geographic market for both commodity and unique rings (Doc. No. 11 at ¶ 16). World Wide dismisses this alleged geographic market as conclusory. This Court disagrees. U.S. Ring specifically alleges that World Wide and U.S. Ring compete **[**11]** throughout the United States (*id.* at ¶ 18). When accepted as true, this Court cannot label as implausible an allegation that two firms, controlling 95 percent of a certain market, compete nationwide.

Next, the Complaint alleges distinct product markets for the sale of commodity and unique rings (*id.* at ¶ 15), but selects commodity rings as the relevant market for antitrust analysis (*id.* at ¶ 17). Thus, U.S. Ring alleges that World Wide has achieved, or is striving toward, monopoly power in the commodity ring market. World Wide argues that because U.S. Ring advances no allegations with respect to either the use of commodity rings or cross-elasticity of demand, this alleged product market is facially unsustainable. According to World Wide, no facts are alleged describing the uses of, or available substitutes for, commodity rings, much less the effect of product price increases on a consumer's likelihood to elect a substitute. World Wide further contends U.S. Ring does not describe why unique and commodity rings should be treated as discrete product markets, as no allegations are advanced concerning the degree of competition or substitutability, if any, between the two purported product **[**12]** markets.

U.S. Ring responds by arguing commodity rings are clearly defined as "not wholly unique to any one manufacturer" (*id.* at ¶ 12). In other words, the circle U.S. Ring draws around the commodity ring market ends where it meets unique rings, like World Wide's One Touch Ring products.

But such allegations are not sufficient to make out a product market. Nowhere in the Complaint does U.S. Ring allege the absence of reasonable substitutes for commodity rings, or that barriers to creating such substitutes are substantial (*id.* at ¶¶ 71, 85). The Complaint is silent whether other products are not substitutes for commodity rings such that if World Wide were to attempt to use anti-competitive means to raise the price of commodity rings, binderies could not then purchase potentially less expensive unique rings from U.S. Ring or others.

Moreover, the Complaint references U.S. Ring's production of "custom ring metals" (*id.* at ¶ 7). No further mention is made of this specific product or other potential products, which this Court finds **[*595]** particularly significant because the Complaint also does not definitively divide the ring industry into only two "categories." Rather, among the "different product **[**13]** categories" in which ring manufacturers compete, "one category" consists of unique rings, while "another category" contains commodity rings (*id.* at ¶ 12). This enumeration of product categories does not purport to be exhaustive.

HN5[] U.S. Ring bears the burden of alleging a plausible, reasonably defined market affected by World Wide's alleged anti-competitive behavior. *Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Assoc., 388 F.3d 955, 962 (6th Cir. 2004)*. This Court has been told what commodity rings are not, *i.e.*, patented rings, but such an assertion would be of little value to this Court when called upon to assess the anti-competitive effects of, for instance, World Wide's alleged exclusionary behavior in the commodity rings "market."

U.S. Ring counters that should this Court find that U.S. Ring failed to, among other things, properly define the relevant product market, such a finding would constitute the application of a "heightened" pleading standard (Doc. No. 34 at 8). However, ***HN6***[] whether a pleading standard is "heightened," and therefore improper when applied to allegations subject to *Federal Civil Rule 8*, depends on the baseline from which the pleading standard's **[**14]** rigor is assessed.

Having located U.S. Ring's proffered baseline, this Court concludes it is U.S. Ring's favored pleading standard that is inappropriate. In setting forth the so-called legal standard for reviewing this Motion to Dismiss, U.S. Ring specifically employs the "no set of facts" standard rejected by the Court in *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("The 'no set of facts' language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: *once* a claim has been *stated adequately*, it may be supported by showing *any set of facts consistent with the allegations in the complaint*") (emphasis added). U.S. Ring does reference *Iqbal*, but only for the adage that ***HN7***[] a complaint must contain enough factual content to allow a court to draw the reasonable inference of a defendant's liability. *See* *Iqbal, 129 S. Ct. 1949*. But it is not enough for this Court to draw *any* inference from a complaint whose allegations could provide relief on *some* quantum of proven facts. Rather, a complaint's non-conclusory, factual allegations must demonstrate facial plausibility. **[**15]** *See id.* Plaintiff's description of the relevant pleading standard calls for less, and is thus rejected.

Market Power Analysis

Even assuming on re-pleading U.S. Ring could properly allege a relevant market, U.S. Ring's actual and attempted monopolization claims must fail. As discussed above, ***HN8***[] U.S. Ring must plausibly allege that through anti-competitive conduct, World Wide has attained, or is reaching for, monopoly power in the commodity ring market. Monopoly power is the ability to "control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. A plaintiff can establish monopoly power either through direct evidence of "the exercise of actual control over prices or the actual exclusion of competitors," or circumstantial evidence showing the defendant possesses a high share of the relevant market. *Re/Max Int'l, Inc., 173 F.3d at 1016*. But a high degree of market share alone is not enough to establish the existence of monopoly power. Considerations of market **[*596]** share are only the starting point for monopoly power analysis. *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc. ("Am. Council I"), 185 F.3d 606, 623 (6th Cir. 1999)*. **[**16]** The key question a court must resolve when faced with circumstantial evidence of monopoly power is whether the defendant has the ability to control prices in, or exclude competitors from, the relevant market. *Conwood Co., L.P., 290 F.3d at 783 n.2*. At the early pleading stage, the inquiry becomes whether the dynamics of the alleged market plausibly could support the existence and exercise of monopoly power.

World Wide argues a high share of the commodity ring market does not directly lead to the potential existence of monopoly power; rather, other factors, such as market competitiveness, barriers to entry, or the number of market competitors, must accompany "commanding market share" to establish monopoly power. In this case, World Wide argues certain features of the commodity ring market, described in the Complaint, render implausible World Wide's actual or potential exercise of monopoly power. Of particular note is the absence of market entry barriers which precludes a firm from charging supra-competitive prices and thereby injuring competition. If World Wide artificially inflated its prices, either U.S. Ring or an upstart firm could undercut the supposed monopolist by selling commodity **[**17]** rings at prices in tune with natural market forces.

U.S. Ring reiterates that because World Wide is the dominant manufacturer of rings, "elimination of [U.S. Ring] from the ring market in the U.S. would create a monopoly for [World Wide]" (Doc. No. 34 at 11).

However, U.S. Ring ignores the implausibility of monopoly power existing in the ring market described by U.S. Ring. Among other things, the Complaint describes a ring market containing large volume sellers and acutely price-sensitive buyers (Doc. No. 11 at ¶ 13). "As little as 1/8 to 1/4 of a cent difference between the different manufacturers' prices can dictate whether or not a deal is made" (*id.*). In this market, it is the binderies, not the ring manufacturers, who hold the upper hand. Whereas binderies sell to a "quite large" number of retailers, a ring manufacturer's loss of even one bindery's business could spell failure (*id.* at ¶ 11). There even appears to be room for small manufacturers, a term that presumably refers to firms other than U.S. Ring, to enter the market and win contracts for the sale of commodity rings through "merit and prices" (*id.* at ¶ 13).

This description directly conflicts with later conclusory paragraphs **[**18]** alleging "[i]f World Wide suddenly decided to stop selling ring metals to [binderies], their businesses would be endangered" because binderies depend on the availability of World Wide products (*id.* at ¶ 21). This assumes, of course, that U.S. Ring, other small manufacturers of rings, or new entrants to the ring market could not fill the gap left by World Wide in this scenario. But the Complaint does not sufficiently allege existing or future sources of rings lack the capacity to expand output in response to World Wide's refusal to sell.

Coupled with the Complaint's description of a sharply competitive marketplace, the allegation that monopoly power does or could exist in the commodity ring market is not plausible. The allegation that "[i]f a large manufacturer were to extinguish [through anti-competitive means U.S. Ring's or] a smaller manufacturer's ability to sell commodity rings to specific customers, the action would prove highly detrimental to the small manufacturer and to competition in general" (*id.* at ¶ 14) is a mere truism. ***HN9***[] The question for **[*597]** monopoly power analysis is not whether charging supra-competitive prices or excluding competitors through anti-competitive practices would **[**19]** harm competition, but whether the purported monopolizer has, or could have, the ability to thus harm competition. *Conwood Co., L.P., 290 F.3d at 783 n.2*.

In reaching this conclusion, this Court does not, and need not, accept World Wide's assertion that the absence of barriers to entry in the commodity ring market alone is enough to doom U.S. Ring's claim. World Wide cites to *Am. Council I* for the proposition that "even a firm holding a commanding percentage of the market cannot charge a price above the competitive price, for once it does, competitors will enter the market and undercut the firm's price." *185 F.3d at 623*. This Court, of course, agrees with this statement, but notes that the court in *Am. Council I* prefaces this point by referring to ***HN10***[] the lack of entry barriers as "relevant" in market power analysis. *Id.; see also Rodney v. Nw. Airlines, Inc., 146 F. App'x 783, 789 (6th Cir. 2005)* (describing entry barriers as among the "probative factors" of monopoly power).

Still, ***HN11***[] the presence or absence of entry barriers is an important factor in determining whether a complaint plausibly alleges the possibility of monopoly power existing in a given market. *See Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005)* **[**20]** ("Plaintiffs relying on market share as a proxy for monopoly power must plead and produce evidence of a relevant product market, of the alleged monopolist's dominant share of that market, and of high barriers to entry"); *United States v. Microsoft Corp., 253 F.3d 34, 82, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (holding that a firm cannot possess monopoly power in a market unprotected by barriers to entry); *Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 366 (9th Cir. 1988)* ("A firm with a high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry") (quotations omitted); *Moecker v. Honeywell Int'l, Inc., 144 F. Supp. 2d 1291, 1308 (M.D. Fla. 2001)* ("[W]here entry barriers are low, market share does not accurately reflect the party's market power") (quoting *United States v. Waste Mgmt., Inc., 743 F.2d 976, 982—83 (2d Cir. 1984))*. Indeed, in some circuits, the absence of entry barriers can bar a *Section 2* claim. *See, e.g., Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, 108 F.3d 1147, 1154 (9th Cir. 1997)*.

Because this Court concludes U.S. Ring fails to **[**21]** allege with sufficient particularity the relevant product market, and fails to plausibly allege the potential exercise of monopoly power in the commodity rings market, this Court need not reach the question of whether World Wide acquired, or is striving toward, monopoly power through unlawful, exclusionary conduct. Counts I and II are dismissed.

Section 1 Claims

U.S. Ring alleges World Wide's use of tying agreements unlawfully restrains trade in violation of Section 1 of the Sherman Act. ***HN12***[] A seller employs a tying agreement when he "sell[s] one product [(the tying product)] but only on the condition that the buyer also purchases a different (or tied) product." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5—6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. But merely conditioning one product's sale on another's does not violate federal ***antitrust law***. Instead, a defendant must employ the market power it possesses in the tying product market to force the purchase of a product that, but for the tying agreement, a buyer would have sought elsewhere or on different terms. *Ill. Tool Works Inc. v.* ***[*598]*** *Indep. Ink, Inc., 547 U.S. 28, 34—35, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*.

Here, U.S. Ring alleges that, for certain World Wide customers, purchase of commodity rings are **[**22]** tied to the purchase of two World Wide unique ring products — the One Touch Ring and One Touch 2 Ring. U.S. Ring characterizes the One Touch Ring as profitable, without reasonable substitutes, available only from World Wide, and hemmed in from competition from other manufacturers by "substantial" barriers for creating substitute products (Doc. No. 11 at ¶¶ 71, 85). According to U.S. Ring, World Wide refuses to sell either One Touch Ring product to a bindery unless the bindery agrees to purchase a certain percentage of its commodity rings from World Wide, regardless of the price charged for the tied commodity rings (*id.* at ¶ 43). U.S. Ring provides Avery Dennison Corp. as one example of a firm subjected to World Wide's alleged tying agreements (*id.* at ¶ 44). U.S. Ring posits that World Wide's alleged tying agreements violate Section 1 under a *per se*, or, in the alternative, a rule of reason analysis.

HN13[] Section 1 claims rooted in alleged tying agreements are only actionable under a rule of reason analysis, and therefore the *per se* Counts III and V are dismissed. Citing a string of cases after the Supreme Court's rejection of the presumption that *all* tying agreements worked anti-competitive **[**23]** effects in *U.S. Steel Corp. v. Fortner Enter., Inc., 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*, the Court in *Illinois Tool Works Inc.* explicitly held that, ***HN14***[] in cases involving a tying arrangement, "the plaintiff must prove that the defendant has market power in the tying product." *Ill. Tool Works Inc., 547 U.S. at 46*. Moreover, in light of legislative amendments repealing the statutory "patent-equals-market-power presumption," the Court rejected the view that a patent necessarily confers upon the patent holder market power in a given product market. *Id. at 44—45*.

In addition to the previously discussed critique of the Complaint's commodity ring market definition, World Wide argues U.S. Ring's tying product market definition is also improper. Specifically, World Wide contends U.S. Ring cannot limit the tying market to one product without additional factual allegations plausibly suggesting such a limitation is appropriate. World Wide also challenges the "unique" characterization of the One Touch Ring products as insufficiently pled because U.S. Ring offers no description of product uses or why the product lacks reasonable substitutes.

HN15[] Like a *Section 2* claim, a tying product market's boundaries are determined **[**24]** by those products that are "*reasonably* interchangeable by consumers for the *same purposes*" as the tying product. *Ky. Speedway, LLC, 588 F.3d at 916* (emphasis added). Necessarily then, to restrict each tying product market to a single One Touch Ring product, U.S. Ring must plausibly allege that a consumer could not reasonably use any other product for the same purpose served by the One Touch Ring product.

For good reason, "[s]ingle brand products are, at a minimum, extremely rare." *Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008)*; *see also* *Green County Food Mkt., Inc. v. Bottling Grp., LLC, 371 F.3d 1275, 1282 (10th Cir. 2004)* (***HN16***[] "In general, a manufacturer's own products do not themselves comprise a relevant product market."). ***HN17***[] A product market definition provides the context for, among other things, assessing the degree of market power a defendant exercises in that market. *Microsoft Corp., 253 F.3d at 81*. Therefore, the fewer substitute products included in a market definition, all things being equal, the more **[*599]** likely a defendant's influence in that market will approach monopoly power. However, it is not the mere control each firm maintains over its own product's **[**25]** price that constitutes illegal monopoly power, but rather the effect of each firm's conduct on competition within the relevant market. *See* *E.I. du Pont de Nemours & Co., 351 U.S. at 393* ("[O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power . . . is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.").

U.S. Ring's description of the relevant unique ring market suffers certain deficiencies much like the description of the commodity ring market. Aside from naming the One Touch Ring products and defining what these products are not, *i.e.*, commodity rings, the Complaint fails to provide any description of the product's functionality. Nor does the Complaint provide factual allegations supporting the conclusory assertion that the One Touch Ring products lack any reasonable substitutes. The Complaint does not allege, for instance, any features of the One Touch Ring products that prevent other rings from serving the same purpose. Without further factual refinement, this **[**26]** Court will not allow U.S. Ring to proceed to discovery on a conclusory market sketch that confers upon World Wide the unlawful ability to control prices in, and exclude competition from, an implausibly narrow product market containing *only* a product World Wide, presumably, has been granted the sole ability to sell. [1]

Yet the Complaint also alleges U.S. Ring and World Wide *do* compete in the product market containing the One Touch Ring products. According to the Complaint, ring manufacturers "compete in different product categories" (Doc. No. 11 at ¶ 12). Among these different product categories are "innovative and unique products," as well as "[a]nother category [of] so-called commodity ring metals, which are not wholly unique to any one manufacturer" (*id.*). Both "categories" are later designated as "distinct product market[s]" (*id.* at ¶ 15). The One Touch Ring products **[**27]** belong to the former category, or unique rings (*id.* at ¶ 43). Thus, the Complaint alleges in conclusory terms both that U.S. Ring — or any other firm, for that matter — does *not* compete with World Wide in the tying product market *and* that U.S. Ring and World Wide *do* compete in the unique ring market, which includes the tying products. Therefore, U.S. Ring's tying product market definitions are not only implausible, but also are self-contradictory.

HN18[] At the pleading stage, this Court only may accept non-conclusory averments supported by factual allegations as true. *Iqbal, 129 S. Ct. at 1940*. Accordingly, "[b]ecause [U.S. Ring has] not nudged [its Section 1] claims across the line from conceivable to plausible" with allegations this Court can accept as true, these claims must be dismissed. *Twombly, 550 U.S. at 570*.

U.S. Ring's Request for Leave to Re-Plead Federal Claims

U.S. Ring has requested leave to re-plead "with additional specificity" any claims this Court deems insufficiently pled (Doc. No. 37 at ¶ 3). This Court denies U.S. Ring's request for leave to re-plead **[*600]** the federal law claims. Even assuming U.S. Ring could cure the defects in its definition of the commodity ring market under **[**28]** the Sherman Act, the Complaint's description of that market's competitive dynamics cannot be amended to render plausible the possibility of monopoly power being exercised in that market without directly contradicting portions of the current Complaint. Likewise, removing allegations that U.S. Ring and World Wide directly compete in the "product category" and "distinct product market" that includes the One Touch Ring is necessary to even begin the process of plausibly alleging a single-brand product market. Leave to re-plead would allow U.S. Ring the opportunity to supplement, not redact, the Complaint. As a result, no Sherman Act claim can be salvaged through further Complaint amendments.

Claims Providing No Independent Grounds for Relief

Despite U.S. Ring's reference to its patent misuse claim as a "cause of action" in both the Complaint (Doc. No. 11 at ¶¶ 94—98) and its opposition brief (Doc. No. 34 at 15), World Wide correctly notes that each case relied on by U.S. Ring refers to patent misuse as an affirmative defense (Doc. No. 36 at 9 n.12). U.S. Ring provides no case accepting patent misuse as an independent grounds for relief, and this Court finds no such case. *See, e.g., Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1323 (Fed Cir. 2010)* **[**29]** (describing ***HN19***[] patent misuse as an affirmative defense to a patent infringement claim). Not having filed a responsive pleading, World Wide, of course, has not asserted a patent infringement claim in this case.

Rather, U.S. Ring's patent misuse claim is offered, like the sham litigation claim, as an example of the alleged anti-competitive conduct by which World Wide violates federal ***antitrust law***. (*See* Doc. No. 11 at ¶ 23) ("World Wide

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[1] Though the Complaint does not specifically allege the One Touch Ring products are patented, they are classified as unique rings, a product market that "involves inventing and patenting innovative and unique products that the manufacturer would then have the exclusive right to sell to the binderies" (Doc. No. 11 at ¶ 12).

has a history of promoting anti-competitive and monopolistic behavior through its misuse of patents"); (*see also id.* at ¶ 59) ("The baseless litigation brought against U.S. Ring by World Wide is yet another example of World Wide's history of behavior meant to weaken and remove its competitors from the ring metal industry in order to create a monopoly in the Relevant Market for Sales."). **[**30]** Because this Court concludes U.S. Ring does not sufficiently plead the relevant product markets, and cannot plausibly plead the potential exercise of monopoly power in either product market, this Court does not, and need not, reach the sufficiency of allegations offered as a demonstration of World Wide's supposed exclusionary behavior. Therefore, Counts VII and XV are dismissed.

Finally, Count X of the Complaint is styled "injunctive relief" (*id.* at ¶¶ 111—13). Despite World Wide's treatment of this "count" (Doc. No. 27 at 11 n.4), U.S. Ring in opposition does not reference an injunctive relief "claim." This Court need not cite to authority supporting the elementary proposition that ***HN20***[] injunctive relief is, as the name suggests, a remedy, not a standalone claim. Moreover, U.S. Ring properly requests injunctive relief elsewhere in the Complaint (Doc. No. 11 at 28). Count X of the Complaint is also dismissed.

Supplemental Jurisdiction and Remaining Claims

Lastly, having dismissed U.S. Ring's federal claims, the Court declines to exercise supplemental jurisdiction over U.S. Ring's state law claims and dismisses the state claims without prejudice. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. **[**31]** This case is at the earliest stage and there is no judicial efficiency or economy in retaining those claims. Furthermore, because there is otherwise no remaining live case or controversy **[*601]** other than the stayed constitutional False Markings Act claim, that claim too is dismissed as moot, without prejudice.

CONCLUSION

For the foregoing reasons, World Wide's Motion to Dismiss is granted. The Complaint is dismissed without prejudice.

IT IS SO ORDERED.

/s/ *Jack Zouhary*

JACK ZOUHARY

U. S. DISTRICT JUDGE

August 19, 2011

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Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health

United States Court of Appeals for the Ninth Circuit

March 10, 2011, Argued and Submitted, Seattle, Washington; August 19, 2011, Filed

No. 10-35497, No. 10-35543

Reporter
654 F.3d 919 *; 2011 U.S. App. LEXIS 17222 **; 2011-2 Trade Cas. (CCH) P77,577

YAKIMA VALLEY MEMORIAL HOSPITAL, a Washington nonprofit corporation, Plaintiff-Appellant, v. WASHINGTON STATE DEPARTMENT OF HEALTH; MARY C. SELECKY, in her official capacity as Secretary of the Washington State Dept. of Health, Defendants-Appellees.YAKIMA VALLEY MEMORIAL HOSPITAL, a Washington nonprofit corporation, Plaintiff-Appellee, v. WASHINGTON STATE DEPARTMENT OF HEALTH; MARY C. SELECKY, in her official capacity as Secretary of the Washington State Dept. of Health, Defendants-Appellants.

Subsequent History: Motion denied by *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health, 2011 U.S. Dist. LEXIS 161610 (E.D. Wash., Dec. 20, 2011)*

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Washington. D.C. No. 2:09-cv-03032-EFS, D.C. No. 2:09-cv-03032-EFS. Edward F. Shea, District Judge, Presiding.

Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health, 717 F. Supp. 2d 1159, 2010 U.S. Dist. LEXIS 51897 (E.D. Wash., May 25, 2010)

Disposition: AFFIRMED IN PART, REVERSED IN PART, REMANDED.

Core Terms

regulations, certificate, authorization, unilateral, elective, incumbent, dormant, interstate commerce, private party, hybrid, anticompetitive, barrier, Sherman Act, repealed, preemption, license, district court, licensees, planning, provider, planning area, licensing requirements, restraint of trade, antitrust, projected, delegate, promulgated, prices, power to regulate, saving clause

LexisNexis® Headnotes

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

HN1[] **Business Administration & Organization, Facility & Personnel Licensing**

Wash. Admin. Code § 246-310-705(4) defines "percutaneous coronary intervention" as including, but not limited to, seven mechanical procedures and devices used by cardiologists for the revascularization of obstructed coronary arteries.

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN2[] Business Administration & Organization, Facility & Personnel Licensing

Wash. Admin. Code § 246-310-705(2) defines "elective" percutaneous coronary intervention to mean an elective percutaneous coronary intervention performed on a patient with cardiac function that has been stable in the days or weeks prior to the operation, which is usually scheduled at least one day prior to the surgical procedure. The licensing requirement only applies to "adult" procedures, Wash. Admin. Code § 246-310-700, which includes only those performed on the planning area residents over fifteen years of age, Wash. Admin. Code § 246-310-745(10) (Step 1b).

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

HN3[] Certificates of Need, Hospitals

The concept of certificate of need regimes, which many states enforce, is to avoid private parties making socially inefficient investments in health-care resources they might make if left unregulated. A certificate of need program corrects the market by requiring preapproval for certain investments and, in theory, thereby ensures that providers will make only necessary investments in health care. One type of investment the state of Washington regulates is the capacity to perform tertiary health services, which are specialized health-care services including percutaneous coronary interventions. Wash. Rev. Code § 70.38.105(4)(f). In the National Health Planning and Resources Development Act of 1974 (NHPRDA). Congress intended to assist in preventing overinvestment in and maldistribution of health facilities. The NHPRDA conditioned federal funding on enforcement of certificate of need regimes as part of the congressional effort to reduce health-care inflation and achieve an adequate supply and distribution of health resources. In response, Washington enacted its current certificate of need framework in 1979. Wash. Rev. Code § 70.38.015. Although Congress repealed the NHPRDA in 1986, leaving states free to abandon their certificate of need programs, Washington has continued its program.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN4[] Certificates of Need, Hospitals

In 2007, the Washington legislature passed a law directing the Washington State Department of Health to promulgate regulations requiring a certificate of need for elective percutaneous coronary intervention (PCI). Wash. Rev. Code § 70.38.128. The Department responded in 2008 by promulgating PCI regulations. Wash. Admin. Code §§ 246-310-700-755. The PCI regulations(a) require that a licensed hospital perform at least 300 elective PCI procedures per year; and (b) provide that the Department shall issue a certificate of need only if projected demand in an applicant's geographic market exceeds the capacity of incumbent certificate holders by at least 300 procedures.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Pretrial Judgments, Judgment on Pleadings**

On review of a judgment on the pleadings under *Fed. R. Civ. P. 12(c)* the appellate court assumes the facts alleged in the complaint are true and reviews de novo whether the plaintiff stated a claim.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6[] **Appeals, Standards of Review**

In reviewing the dismissal of a complaint, the appellate court inquires whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN7[] **Standards of Review, De Novo Review**

An appellate court reviews de novo whether the plaintiff has standing.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN8[] **Judgments, Summary Judgment**

Judgment on the pleadings is limited to material included in the pleadings. Otherwise, the proceeding is converted to summary judgment. *Fed. R. Civ. P. 12(d)*.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN9[] **Judgments, Summary Judgment**

The district court has discretion not to convert a motion for judgment on the pleadings into a summary judgment motion.

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

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN11[] Sherman Act, Claims

There are two primary modes of analysis under Sherman Act *§ 1*: The U.S. Supreme Court has repeatedly recognized that by the language of the Sherman Act, Congress intended to outlaw only unreasonable restraints. Most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors. Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. Such restraints are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. The blanket condemnation of per se analysis applies only where the challenged practice has manifestly anticompetitive effects and lacks any redeeming virtue. Otherwise, the rule of reason is the default mode of analysis.

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

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

HN12[] Per Se Rule & Rule of Reason, Per Se Violations

The distinction between the rule of reason and per se analysis is important for federal preemption, which requires an irreconcilable conflict between the federal and state regulatory schemes. The Sherman Act *§ 1*, *15 U.S.C.S. § 1*, preempts state law only when the conduct contemplated by the state statute is in all cases a per se violation — without per se illegal conduct, there can be no certainty that the regulation conflicts with the Sherman Act. Conduct contemplated by the regulation is that which it mandates, authorizes, or places irresistible pressure on a private party to commit. Importantly, a state regulation is not preempted simply because it has anticompetitive effects.

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

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

HN13[] Sherman Act, Scope

To determine whether a regulation facially conflicts with Sherman Act § 1, 15 U.S.C.S. § 1, an appellate court first considers whether the challenged regulation involves: (1) unilateral action by the state and is thus not subject to preemption (because there is no concerted action); or (2) a hybrid of state and private action and is thus potentially subject to preemption.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

HN14[] Sherman Act, Claims

A hybrid regulation is only potentially preempted because the private discretionary conduct it incorporates may not in all cases be a per se violation. To be preempted as a per se illegal, hybrid restraint, a regulation must involve a delegation of market power to private parties that is per se illegal because otherwise, the hybrid restraint could not be attacked as facially invalid. Where regulations lack the element of concerted action needed before they can be characterized as a per se violation, there can be no preemption. Not all delegations of discretion will amount to per se illegal restraints of trade — for example, the delegation might resemble a vertical non-price restraint uniformly analyzed under the rule of reason. Even a per se illegal hybrid restraint may be saved from preemption by the state action immunity doctrine.

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

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

HN15[] Sherman Act, Scope

A regulation is a unilateral restraint of trade when no further action is necessary by the private parties because the anticompetitive nature of the restraint is complete upon enactment. Public officials determine the nature and extent of the resulting consumer injury, with no degree of discretion delegated to private actors. Consequently, any anticompetitive effects are the logical and intended result of the state's action, rather than the result of private parties being empowered to dictate market conditions to others. Because the state acts alone in creating the restraint, there is no concerted action to be evaluated for consistency with Sherman Act § 1, 15 U.S.C.S. § 1. In contrast, a hybrid restraint may be attacked under Sherman Act § 1 as per se unreasonable. The hallmark of a hybrid restraint is the delegation of discretion to private actors. The key distinction is that the regulation leaves a gap in the restraint of trade for private parties to fill at their discretion. A regulation is not hybrid solely because it produces an effect that could not be produced by agreement of private parties without violating the antitrust laws. Rather, hybrid regulations merely enforce private marketing decisions, granting a degree of private regulatory power to the regulated parties.

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

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

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

HN16[] Regulated Practices, Price Fixing & Restraints of Trade

General statements that a restraint is hybrid because the federal antitrust laws preempt state laws authorizing or compelling private parties to engage in anticompetitive behavior, or because regulations creating unsupervised private power in derogation of competition are subject to preemption, must be understood in context. Not all potentially anticompetitive conduct creates an irreconcilable conflict with federal law, either because it is subject to the rule of reason or because it is unilateral action by private parties covered by the fact-specific analysis Sherman Act *§ 2*, *15 U.S.C.S. § 2*. A regulation akin to a non-price vertical restraint would be analyzed under the rule of reason.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN17[] Certificates of Need, Hospitals

The Washington legislature has ordered the Washington State Department of Health to promulgate a certificate of need requirement for elective percutaneous coronary intervention (PCI) addressing, at a minimum, factors related to access to care, patient safety, quality outcomes, costs, and the stability of Washington's cardiac care delivery system and of existing cardiac care providers. *Wash. Rev. Code § 70.38.128* (2007). In response, the Department promulgated regulations setting forth a variety of requirements for an elective PCI certificate of need. *Wash. Admin. Code §§ 246-310-700-755*. Memorial challenges only the PCI regulations' methodology for calculating a community's need for an additional elective PCI provider. *Wash. Admin. Code § 246-310-745*. As is apparent from the regulations, once the Department grants a hospital a certificate of need to perform elective PCI, the requirement that there be an unmet demand for 300 procedures before granting another certificate of need creates a barrier to entry for potential competing hospitals.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN18[] Certificates of Need, Hospitals

For purposes of Washington's percutaneous coronary intervention (PCI) licensing regulations, the Washington State Department of Health calculates need based on dividing the state into 14 geographical markets (planning areas). Wash. Admin. Code §§ 246- 310-705(5), -745(10). A hospital applies for a certificate of need to serve a particular planning area. The Department then forecasts whether the planning area will have unmet demand for elective PCI procedures within five years. Wash. Admin. Code § 246- 310-745(10) (explaining a five-step numeric methodology). A planning area needs another provider of elective PCI only if projected demand exceeds current capacity by 300 procedures.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN19[] **Certificates of Need, Hospitals**

For purposes of Washington's percutaneous coronary intervention (PCI) licensing regulations, projected demand is based on the planning area's current use rate (procedures per 1,000 residents) in the base year and the planning area's estimated population in the forecast year, five years into the future. *Wash. Admin. Code §§ 246-310-745 (1)*, *(3)*, *(5)* & *(10)* (Steps 1-2). Assuming a constant use rate, the Washington State Department of Health projects demand in the forecast year. That is, the projected demand is the current use rate multiplied by the forecasted population. If the projected demand sufficiently exceeds the planning area's current capacity, the Department will issue a certificate of need.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN20[] **Certificates of Need, Hospitals**

For purposes of Washington's percutaneous coronary intervention (PCI) licensing regulations, current capacity is based on the volume of procedures performed by the planning area's existing certified PCI providers in the base year. The planning area's current capacity is assumed to remain constant over the forecast period. Wash. Admin. Code § 246- 310-745(10) (Step 3). The Washington State Department of Health calculates the planning area's net need for an additional provider by subtracting the current capacity from the projected demand. Wash. Admin. Code § 246- 310-745(10) (Step 4). If the difference exceeds 300 procedures, the Department will issue one certificate of need for every 300 excess procedures. That is, if there is excess demand from 301 to 599 procedures, the Department will issue only a single additional certificate of need. Similarly, if there is excess demand up to 299 procedures, the Department will not issue any new certificates. Wash. Admin. Code § 246- 310-745(10) (Step 5). The regulations' limitation on when hospitals may offer elective PCI procedures serves as a barrier to market entry for hospitals who, but for the certificate of need requirement, would begin offering elective PCI procedures and competing for those patients.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Personnel Licensing

HN21[] **Certificates of Need, Hospitals**

For purposes of Washington's percutaneous coronary intervention (PCI) licensing regulations, the Washington State Department of Health licenses the first certificate of need holder in a planning area to perform as many PCI procedures as it wishes. The logical and intended result of the PCI regulations is that the Department will issue a second certificate of need only if the incumbent does not expand its capacity to meet growing demand. The PCI regulations create market power, but that is different from a hybrid regulation that delegates regulatory power.

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

HN22[] **Regulated Practices, Price Fixing & Restraints of Trade**

Responsiveness to private activity does not amount to a hybrid restraint of trade.

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

Constitutional Law > Supremacy Clause > Federal Preemption

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

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

HN23[] **Actual Monopolization, Claims**

At worst, capacity expansion, if motivated by a specific intent to monopolize with a dangerous probability of success, might be attempted monopolization under Sherman Act *§ 2*, *15 U.S.C.S. § 2*, but that cannot be decided on a facial challenge and thus could not warrant preemption. An allegation of monopolization or attempted monopolization would go beyond the scope of a facial preemption challenge. Congress intentionally subjected unilateral, private conduct to a less demanding standard under Sherman Act *§ 2*, *15 U.S.C.S. §2*, than agreements under Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

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

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

HN24[] **Per Se Rule & Rule of Reason, Per Se Violations**

Horizontal market division is a classic per se antitrust violation.

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

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

HN25[] **Per Se Rule & Rule of Reason, Per Se Violations**

Where a case deals with a barrier to entry into the market, the case law on hybrid and unilateral restraints involving price-fixing is instructive. For instance, horizontal price fixing is per se illegal. Agreements to post and hold prices have been found to be such prohibited horizontal conduct.

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

HN26[] **Vertical Restraints, Price Fixing**

Vertical resale price maintenance is no longer per se illegal, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007)* overturned the per se rule against vertical resale price maintenance announced in *Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)*.

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

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

HN27[] **Per Se Rule & Rule of Reason, Per Se Violations**

In a post-and-hold regime, the restraint of trade is that private parties hold to their prices.

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

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

HN28[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Identification of per se illegal restraints is a question of law.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

HN29[] **Commerce Clause, Interstate Commerce**

Even laws that are applied evenhandedly and impose only an incidental burden on interstate commerce can be unconstitutional. Actions are within the domain of the *Commerce Clause* if they burden interstate commerce or impede its free flow. Where a law only incidentally burdens interstate commerce, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

HN30[] **Commerce Clause, Dormant Commerce Clause**

The *Commerce Clause of the Constitution* explicitly grants Congress authority to regulate interstate commerce. *U.S. Const. art. I, § 8, cl. 3*. As a corollary, the *Commerce Clause* implicitly limits the regulatory authority of the states over interstate commerce. This inference is commonly referred to as the dormant *Commerce Clause*.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN31[] **Justiciability, Standing**

Standing includes two components: Article III constitutional standing and prudential standing. Prudential standing requires that the plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. The zone-of- interests test denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the relevant constitutional provision.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN32[] **Justiciability, Standing**

Article III standing is jurisdictional and can neither be waived by the parties nor ignored by the court.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Stimulation of Commerce

HN33[] **Interstate Commerce, Prohibition of Commerce**

The chief purpose underlying the *Commerce Clause* is to limit the power of the States to erect barriers against interstate trade. The intent is to promote a national market and the free flow of goods and services through the several states; it is the economic interest in being free from trade barriers that the clause protects. The ultimate question, therefore, is whether the plaintiff's claims bear more than a marginal relationship to claims addressing a state or county's effort to erect barriers to interstate commerce.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN34[] **Justiciability, Standing**

As the name implies, the "zone of interests" test turns on the interest sought to be protected, not the harm suffered by the plaintiff. Any alleged injury must somehow be tied to a barrier imposed on interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN35[] **Commerce Clause, Dormant Commerce Clause**

The *Commerce Clause* protects the vitality of the national market for goods and services, not the location of a particular participant, and thus a state burdens the rights of its own residents as well as those of other states when it burdens interstate commerce. Although the dormant *Commerce Clause* primarily targets discrimination against out-of-state economic activity, under Pike it prohibits all unjustifiable burdens on interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

HN36[] **Commerce Clause, Dormant Commerce Clause**

It is well established that Congress may authorize the States to engage in regulation that the *Commerce Clause* would otherwise forbid. Congressional authorization must be unmistakably clear and unambiguous. Congress must clearly evince its intent to alter the limits of state power otherwise imposed by the *Commerce Clause*. Congressional authorization is a defense that the state must prove.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

HN37[] **Legislation, Expiration, Repeal & Suspension**

For more than a century, the general rule has been that when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed. Even in a pending action, no judgment could be rendered after the repeal of the act under which it was brought and prosecuted. A statute that Congress snuffed out of existence by repeal leaves no residual clear statement of authorization.

Governments > Legislation > Expiration, Repeal & Suspension

HN38[] **Legislation, Expiration, Repeal & Suspension**

Savings clauses can be used to preserve state authority from implied preemption when Congress passes a statute. By the same token, Congress could enact a savings clause to avoid the natural implication of repealing an act.

Governments > Legislation > Expiration, Repeal & Suspension

Public Health & Welfare Law > General Overview

HN39[] **Legislation, Expiration, Repeal & Suspension**

See Pub. L. No. 99-660, tit. VII, § 701, 100 Stat. 3743, 3799 (1986).

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Richard A. McCartan, Assistant Attorney General, Michael Steven Tribble(argued), Assistant Attorney General, Washington State Office of the Attorney General, Olympia, Washington, for the appellee and cross-appellant.

Judges: Before: Raymond C. Fisher, Ronald M. Gould and Richard C. Tallman, Circuit Judges. Opinion by Judge Fisher.

Opinion by: Raymond C. Fisher

Opinion

[*923] FISHER, Circuit Judge:

The Washington State Department of Health (Department) will not license Yakima Valley Memorial Hospital (Memorial) to perform certain procedures known as elective percutaneous coronary interventions (PCI), which are used to treat diseased arteries of the heart. Examples of such procedures include stent implantation and laser angioplasty.[1] Although Memorial already performs PCI in emergencies (no license required), it cannot perform "elective" procedures without a license that is required as part of the **[**2]** state's broader "certificate of need" regulatory regime. *See Wash. Admin. Code § 246-310-700*.[2] According to the Department, the community Memorial serves does not need another PCI provider.

HN3[] The concept of certificate of need regimes, which many states enforce, is to avoid private parties making socially inefficient investments in health-care **[**3]** resources they might make if left unregulated. A certificate of need program corrects the market by requiring preapproval for certain investments and, in theory, thereby ensures that providers will make only necessary investments in health care. One type of investment the state of Washington regulates is the capacity to perform "tertiary health services," which are specialized health-care services including PCI. *See Wash. Rev. Code § 70.38.105(4)(f)*.[3] Congress made certificate of need regimes part of the federal government's national **[*924]** health planning policy in the National Health Planning and Resources Development Act of 1974 (NHPRDA). *See Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 384, 101 S. Ct. 2415, 69 L. Ed. 2d 89 (1981)* (noting that Congress intended to "assist in preventing overinvestment in and maldistribution of health facilities").[4] The NHPRDA conditioned federal funding on enforcement of certificate of need regimes as part of the congressional effort to reduce health-care inflation and achieve an adequate supply and distribution of health resources. *See id. at 385-86*; *42 U.S.C. § 300k (1976)*; *see also Walgreen Co. v. Rullan, 405 F.3d 50, 52 (1st Cir. 2005)*. In response, Washington **[**4]** enacted its current certificate of need framework in 1979. *See Wash. Rev. Code § 70.38.015*.[5] Although Congress repealed the NHPRDA in 1986, leaving states free to abandon their certificate of need programs, Washington has continued its program. *Cf. Rullan, 405 F.3d at 53* (noting that after 1986 "several states followed suit by repealing their certificate of need laws").

HN4[] In 2007, the Washington legislature passed a law directing the Department to promulgate regulations requiring a certificate **[**5]** of need for elective PCI. *See Wash. Rev. Code § 70.38.128*. The Department responded in 2008 by promulgating the PCI regulations Memorial now challenges. *See Wash. Admin. Code §§ 246-310-700-755*. The PCI regulations, which are explained in detail below, (a) require that a licensed hospital perform at least 300 elective PCI procedures per year; and (b) provide that the Department shall issue a certificate of need only if projected demand in an applicant's geographic market exceeds the capacity of incumbent certificate holders by *at least* 300 procedures. Under this formula, Memorial has no hope of receiving a certificate of need in the near

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[1] *See* ***HN1***[] *Wash. Admin Code § 246-310-705(4)* (defining PCI as including, but not limited to, seven "mechanical procedures and devices that are used by cardiologists for the revascularization of obstructed coronary arteries"); *see also id. § 246-310-745(4)* (defining PCI by reference to "diagnosis related groups" developed under a Centers for Medicare and Medicaid Services contract).

[2] *See* ***HN2***[] *Wash. Admin. Code § 246-310-705(2)* (defining "elective" to mean "a PCI performed on a patient with cardiac function that has been stable in the days or weeks prior to the operation," which is "usually scheduled at least one day prior to the surgical procedure"). The licensing requirement only applies to "adult" procedures, *See id. § 246-310-700*, which includes only those "performed on the planning area residents over fifteen years of age," *Id. § 246-310-745(10) (Step 1b)*.

[3] For a statement of purpose, *see Wash. Rev. Code §§ 70.38.015(2)*, *115*; *Wash. Admin. Code § 246-310-001*; *Overlake Hosp. Ass'n v. Dep't of Health, 170 Wn.2d 43, 239 P.3d 1095, 1098-99, 1101 (Wash. 2010)* (en banc) (¶¶ 9, 18). For a description of tertiary health services, *see Wash. Rev. Code § 70.38.025(14)*; *Wash. Admin. Code §§ 246-310-010(58)*, *-020(1)(d)*.

[4] *See* Pub. L. 93-641, 88 Stat. 2225, §§ 1-3 (1975) (formerly codified at *42 U.S.C. § 300k-300n-5*) (repealed by *Pub. L. 99-660, title VII, § 701(a), 100 Stat. 3743, 3799 (1986)*).

[5] Washington, along with 23 other states, had a certificate of need program prior to 1979. However, Washington enacted its current program in direct response to Congress' enactment of the NHPRDA.

future. Memorial operates a single nonprofit hospital in Yakima, Washington. The surrounding market is already served by the for-profit Yakima Regional Medical and Cardiac Center, which holds an elective PCI certificate and is the only competing hospital in the city of Yakima. The Department does not contest Memorial's assertion that the market's "need" will not exceed 300 procedures until 2022.

Memorial sued the Department after it promulgated the PCI regulations, arguing that the certificate of need requirement violates the dormant *Commerce Clause* **[**6]** by unreasonably burdening interstate commerce. Memorial also claimed that the Department's methodology for defining "need" is anticompetitive and preempted by *§ 1* of the Sherman Act because it allows incumbent certificate holders to expand their capacity and preclude new certificates. The Department moved to dismiss the case for failure to state a claim and lack of standing to raise a dormant *Commerce Clause* challenge. Although the district court held that Memorial had standing, it dismissed the case on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)*. *See* *Yakima Valley Mem'l Hosp. v. Wash. State Dept. of Health, 717 F. Supp. 2d 1159 (E.D. Wash. 2010)*.

The district court held that Memorial failed to state a claim of antitrust preemption, holding that the PCI regulations were a unilateral restraint of trade not barred by the Sherman Act. With regard to the dormant *Commerce Clause*, the district **[*925]** court found Memorial had standing because it alleged it would participate in an interstate market for PCI patients, doctors and supplies. Nevertheless, the district court found that any burden on Memorial's interstate commercial activity was expressly authorized by Congress' approval **[**7]** of certificate of need regimes, making a dormant *Commerce Clause* violation impossible. Memorial appeals the judgment, and the Department cross-appeals the ruling on standing. We agree that Memorial failed to state a claim of antitrust preemption because the PCI regulations are a unilateral licensing requirement rather than an agreement in restraint of trade. We also agree that Memorial has standing under the dormant *Commerce Clause*, but we reverse the district court's judgment on that claim because the Department failed to prove congressional authorization for the PCI regulations.

Discussion

HN5[] The district court ruled on the pleadings under *Federal Rule of Civil Procedure 12(c)*, so we assume the facts alleged in the complaint are true and review de novo whether Memorial stated a claim under the Sherman Act or dormant *Commerce Clause*. *See* *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1053 (9th Cir. 2011)*.[6] ***HN6***[] "In reviewing the dismissal of a complaint, we inquire whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Id. at 1054* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 173 L. Ed. 2d 868, 129 S. Ct. 1937, 1949 —50 (2009)*). **[**8]** ***HN7***[] We also review de novo whether the plaintiff has standing. *See* *Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 2011 U.S. App. LEXIS 10655, 2011 WL 2041149, at *9 (9th Cir. May 26, 2011)*; *Barnum Timber Co. v. EPA, 633 F.3d 894, 905 n.3 (9th Cir. 2011)*.

A. The Sherman Act

1. Antitrust Preemption Requires a Per Se Violation

[6] In granting the *Rule 12(c)* motion, the district court declined to consider two expert reports submitted by Memorial months after briefing and argument on the motion had concluded, because the reports were outside of the pleadings. Memorial appeals that decision, but the argument merits little discussion. ***HN8***[] Judgment on the pleadings is limited to material included in the pleadings. *See* *Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)*; *see also* *Ranch Realty, Inc. v. DC Ranch Realty, LLC, 614 F. Supp. 2d 983, 987-88 (D. Ariz. 2007)*. Otherwise, the proceeding is converted to summary judgment. *See* *Fed. R. Civ. P. 12(d)*. ***HN9***[] The district court had discretion not to convert the motion for judgment on the pleadings into a summary judgment motion, *see* *Hamilton Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1207 (9th Cir. 2007)*, and did not abuse its discretion here. To the extent Memorial's expert reports contain factual information, the **[**9]** district court reasonably found them unhelpful when submitted *after* the hearing on the motion to dismiss.

Memorial argues that the PCI regulations are preempted by Sherman Act *§ 1*, which declares ***HN10***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . to be illegal." *15 U.S.C. § 1*. ***HN11***[] There are two primary modes of analysis under Sherman Act *§ 1*:

> The Supreme Court has repeatedly recognized that by the language of the Sherman Act, "'Congress intended to outlaw only *unreasonable* restraints.'" *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of **[*926]** factors. . . ." *State Oil, 522 U.S. at 10*. . . .
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> "Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *State Oil, 522 U.S. at 10*. **[**10]** Such restraints "'are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Nw. Wholesale Stationers[, Inc. v. Pac. Stationery and Printing Co.], 472 U.S. [284,] 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 [(1985)]*(quoting *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*.

*California ex rel. Harris v. Safeway, Inc.,651 F.3d 1118, 2011 U.S. App. LEXIS 14259, 2011 WL 2684942 at *11 (9th Cir. 2011)* (en banc). The blanket condemnation of per se analysis applies only where the "challenged practice [has] 'manifestly anticompetitive' effects and lack[s] 'any redeeming virtue.'" *Id*. (quoting *Con'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*. Otherwise, the rule of reason is the default mode of analysis. *See id*.

HN12[] The distinction between the rule of reason and per se analysis is important for federal preemption, which requires "an irreconcilable conflict between the federal and state regulatory schemes." *Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*. Sherman Act *§ 1* preempts state law only "when the conduct contemplated by the statute is in all cases a *per se* violation" — without per se illegal conduct, there can be no **[**11]** certainty that the regulation conflicts with the Sherman Act. *Id. at 661* (quoted by *Sanders v. Brown, 504 F.3d 903, 910-11 (9th Cir. 2007))*. Conduct "contemplated" by the regulation is that which it "mandates," "authorizes," or "places irresistible pressure" on a private party to commit. *Id*; *Sanders, 504 F.3d at 910* (quoting *Rice*); *see also Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 885-86 (9th Cir. 2008)* ("[T]o be struck down, the regulation or restraint must effect a per se violation of the Sherman Act."). Importantly, a state regulation is not preempted simply because it has anticompetitive effects. *See* *Fisher v. City of Berkeley, 475 U.S. 260, 264, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*.

HN13[] To determine whether a regulation facially conflicts with Sherman Act *§ 1*, we first consider whether the challenged regulation involves (1) unilateral action by the state and is thus not subject to preemption (because there is no concerted action), *See* *id. at 266-67* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*[7]; or (2) a hybrid of state and private action and is thus potentially subject to preemption, *See* *id. at 267-69*.[8] *See also Costco, 522 F.3d at 887-89* (distinguishing between unilateral **[**12]** and hybrid regulations).

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[7] *See also* *Hoover v. Ronwin, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)* ("When the conduct is that of the sovereign itself, . . . the danger of unauthorized restraint of trade does not arise."); *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.").

[8] ***HN14***[] A hybrid regulation is only *potentially* preempted because the private discretionary conduct it incorporates may not "in all cases [be] a *per se* violation." *Sanders, 504 F.3d at 910-11*; *see also* *id. at 919* (holding that to be preempted as a per se illegal "hybrid restraint," a regulation must involve "a delegation of market power to private parties that is *per se* illegal" because "[o]therwise, the hybrid restraint could not be attacked as facially invalid"); *Fisher, 475 U.S. at 270* (holding that where regulations lacked "the element of concerted action needed before they can be characterized as a per se violation," there could

[*927] ***HN15***[] A regulation is a unilateral restraint when "[n]o further action is necessary by the private parties because the anticompetitive nature of [the] restraint is complete upon enactment." *Costco, 522 F.3d at 890*. "[P]ublic officials determine[ ] the nature and extent of the resulting consumer injury, with no degree of discretion delegated to private actors." *Id*. Consequently, any anticompetitive effects are the "logical and intended result" of the state's action, rather than **[**14]** the result of private parties being empowered to "'dictate market conditions to others.'" *Id. at 887* (quoting *Sanders, 504 F.3d at 918*). Because the state acts alone in creating the restraint, there is no concerted action to be evaluated for consistency with Sherman Act § 1. *See* *Fisher, 475 U.S. at 267*.

In contrast, a hybrid restraint "may be attacked under [Sherman Act] *§ 1*" as per se unreasonable. *324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.8, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)* (quoting *Fisher, 475 U.S. at 268*) (quotation marks omitted). The "hallmark" of a hybrid restraint is the "*delegation* of discretion to private actors." *Costco, 522 F.3d at 898 n.20*. The key distinction is that the regulation leaves a gap in the restraint of trade for private parties to fill at their discretion. A regulation is not hybrid "*solely* because it produces an effect that could not be produced by agreement of private parties without violating the antitrust laws." *Id. at 889* (emphasis added). Rather, hybrid regulations "merely enforce private marketing decisions," granting "a degree of private regulatory power" to the regulated parties. *Fisher, 475 U.S. at 268* (citing *Rice, 458 U.S. at 665* **[**15]** (Stevens, J., concurring in judgment)).[9]

In light of the foregoing principles, we must decide whether the PCI regulations go beyond the anticompetitive tendencies of a licensing requirement and actually delegate a degree of regulatory power to incumbent licensees.[10] Memorial argues **[*928]** that the PCI regulations grant regulatory power to incumbent licensees by calculating the need for a new certificate based in part on the **[**16]** number of PCI procedures they per- form, thereby allowing the incumbent licensees to manipulate the number of PCIs they perform so as to exclude competing hospitals from the elective PCI market. We disagree, for reasons explained below. We begin with an analysis of the regulations.

2. The PCI Regulations Impose a Barrier to Entry

HN17[] The Washington legislature ordered the Department to promulgate a certificate of need requirement for elective PCI addressing, "at a minimum, factors related to access to care, patient safety, quality outcomes, costs, and the stability of Washington's cardiac care delivery system and of existing cardiac care providers." *Wash. Rev. Code § 70.38.128* (2007). In response, the Department promulgated regulations setting forth a variety of requirements for an elective PCI certificate of need. *See* *Wash. Admin. Code §§ 246-310-700-755*. Memorial

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be no preemption). Not all delegations of discretion will amount to per se illegal restraints of trade — for example, **[**13]** the delegation might resemble a vertical non-price restraint uniformly analyzed under the rule of reason. *See* *Rice, 458 U.S. at 661-62*; ***Costco, 522 F.3d at 891 n.11***.

Even a per se illegal hybrid restraint may be saved from preemption by the "state action" immunity doctrine. *See* *Fisher, 475 U.S. at 265* (citing *Parker, 317 U.S. at 341*). We do not need to reach the question of stateaction immunity, and thus our opinion should not be construed as an analysis of the state's supervision of PCI providers, despite the suggestion in *Costco* that state-action immunity and unilateral action analyses can be conflated. *See* ***522 F.3d at 887*** (citing *Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189, 1192 n.8 (9th Cir. 2001))*.

[9] ***HN16***[] General statements that a restraint is hybrid because "the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior," *324 Liquor, 479 U.S. at 345 n.8*, or because regulations "creating unsupervised private power in derogation of competition are subject to preemption," ***Costco, 522 F.3d at 889***, must be understood in context. Not all potentially anticompetitive conduct creates an irreconcilable conflict with federal law, either because it is subject to the rule of reason or because it is unilateral action by private parties covered by Sherman Act *§ 2*'s fact-specific analysis. *See* ***id. at 891 n.11*** (recognizing that a regulation "akin to a non-price vertical restraint" would be analyzed under the rule of reason).

[10] *See* *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 & n.11 (1995)* ("It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation." (quoting *United States v. Syufy Enters., 903 F.2d 659, 673 (9th Cir. 1990)* (quotation marks omitted))).

challenges **[**17]** only the PCI regulations' methodology for calculating a community's need for an additional elective PCI provider. *See* Wash. Admin. Code § 246-310-745. As is apparent from the regulations, once the Department grants a hospital a certificate of need to perform elective PCI, the requirement that there be an unmet demand for 300 procedures before granting another certificate of need creates a barrier to entry for potential competing hospitals.

HN18[] The Department calculates need based on dividing the state into 14 geographical markets (planning areas). *See id*. §§ 246-310-705(5), -745(10). A hospital applies for a certificate of need to serve a particular planning area. The Department then forecasts whether the planning area will have unmet demand for elective PCI procedures within five years. *See id*. § 246-310-745(10) (explaining a five-step numeric methodology). A planning area "needs" another provider of elective PCI only if projected demand exceeds current capacity by 300 procedures. *See id*. (Steps 4-5).[11]

HN19[] Projected demand is based on the planning area's current "use rate" (procedures per 1,000 residents) in the "base year" and the planning area's estimated population in the "forecast year," five years into the future. *Id*. §§ 246-310-745 (1), (3), (5) & (10) (Steps 1-2). Assuming a constant use rate, the Department projects demand in the forecast year. That is, the projected demand is the current "use rate" multiplied by the forecasted population. If the projected demand sufficiently exceeds the planning area's current capacity, the Department will issue a certificate of need.

HN20[] Current capacity is based on the volume of procedures performed by the planning area's existing certified PCI providers in the base year. The planning area's current capacity is "assumed to remain constant over the forecast period." *Id*. § 246-310-745(10) (Step 3). The Department calculates the planning area's net need for an additional provider by subtracting the current capacity from the projected demand. *See id*. (Step 4). If the difference exceeds 300 procedures, the Department will issue one certificate of need for every 300 excess procedures. That is, if there is excess demand from 301 to 599 procedures, **[**19]** the Department will issue only a **[*929]** single additional certificate of need. Similarly, if there is excess demand up to 299 procedures, the Department will not issue any new certificates. *See id*. (Step 5). The regulations' limitation on when hospitals may offer elective PCI procedures serves as a barrier to market entry for hospitals who, but for the certificate of need requirement, would begin offering elective PCI procedures and competing for those patients.

3. The PCI Regulations are a Unilateral Restraint Not Subject to Preemption

Memorial's challenge focuses on Step 3, which relies on incumbent certificate holders' "current capacity" to define whether need exists for an additional licensee. Memorial argues that, because incumbent hospitals can expand their current capacity to meet demand, they can forestall entry of a competing PCI provider.

Memorial mistakes the barrier to entry created by the licensing requirement, and its attendant anticompetitive effects, for a hybrid restraint. ***HN21***[] The Department licenses the first certificate of need holder in a planning area to perform as many PCI procedures as it wishes. The logical and intended result of the PCI regulations is that the Department **[**20]** will issue a second certificate of need only if the incumbent does not expand its capacity to meet growing demand. The PCI regulations create *market* power, but that is different from a hybrid regulation that delegates *regulatory* power.

That the Department leaves open the number of procedures that an incumbent licensee may perform does not mean it delegates regulatory power to licensees. The restraint of trade is the licensing requirement — a barrier to entry — and it is complete upon enactment. The state imposes the licensing requirements. The state decides what the licensing requirements will be and whether they are met. The state does not delegate any aspect of need

[11] *See also* Wash. Admin. Code §§ 246-310-010(58), -715(2). If a planning area's net need is negative, the Department may revoke existing certificates of need. *See* Wash. Admin. Code §§ 246-310-715(2), **[**18]** -755(a).

calculation to private parties. Admittedly, the state takes notice of whether incumbent providers are meeting the needs of the planning area, but that*HN22*[] responsiveness to private activity does not amount to a hybrid restraint. *See* Fisher, 475 U.S. at 269 (holding that despite the power of tenants to trigger enforcement of a regulated rent ceiling, the rent levels were set exclusively by the state and the ceiling thus was a unilateral restraint).

Rather, the Department has decided that monopoly is preferable in the market **[**21]** for elective PCI; otherwise it would grant a second certificate when a planning area's demand exceeded 600 procedures annually ? that is, when the market would support two competing providers both able to perform the minimum 300 procedures annually. That a licensee meets the Department's expectation and supplies all demand is the logical and intended consequence of the PCI regulations, not a delegation of *regulatory* power to the incumbent. Entry is prohibited by the Department's decision to grant an unlimited license and then withhold additional licenses until the incumbent can no longer meet demand, not the incumbent's natural inclination to capitalize on the *market* power the licensing requirement creates.

Moreover, an incumbent provider's discretion to increase supply unilaterally to meet demand is neither per se illegal nor recognizable as an element of a per se illegal agreement.[12] The only facet **[*930]** of the PCI regulations that could be equated with a per se illegal agreement is the division of the state into planning areas, but the licensees have no role in drawing the dividing lines.[13] It is true that within a planning area the incumbent certificate holders might conspire to jointly **[**22]** keep current capacity within 300 procedures of projected demand, but the PCI regulations neither require, encourage nor condone collusion. In short, nothing about the PCI regulations involves private discretion to engage in per se anticompetitive conduct.

HN25[] Although this case deals with a barrier to entry, the case law on hybrid and unilateral restraints involving price-fixing is instructive. For instance, horizontal **[**23]** price fixing is per se illegal. *See* Dagher, 547 U.S. at 5. Agreements to post and hold prices have been found to be such prohibited horizontal conduct. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649-50, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (discussing Sugar Inst. v. United States, 297 U.S. 553, 601-02, 56 S. Ct. 629, 80 L. Ed. 859 (1936)). Thus, we held in *Costco* that a state regulation requiring competing wholesalers to post their prices and hold to those posted prices for a fixed period was a hybrid restraint. Such regulatory post-and-hold requirements do not mandate, authorize or compel the concerted action necessary to make a private post-and-hold system per se illegal. But the regulations do have the effect of delegating to private parties the discretion to set the posted price to be held — an anticompetitive arrangement they could not achieve legally by explicit agreement. *See Costco, 522 F.3d at 895-96*; *see also* 324 Liquor, 479 U.S. at 345 n.8 ("Our decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing . . . private parties to engage in anticompetitive behavior.").[14]

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[12] *HN23*[] At worst, capacity expansion, if motivated by a specific intent to monopolize with a dangerous probability of success, might be attempted monopolization under Sherman Act § 2, but that could not be decided on a facial challenge and thus could not warrant preemption. *See* Fisher, 475 U.S. at 270 n.2 (holding that an allegation of monopolization or attempted monopolization would "go[ ] beyond the scope of the facial [preemption] challenge presented here"); Copperweld, 467 U.S. at 774-75 (explaining Congress intentionally subjected unilateral, private conduct to a less demanding standard under Sherman Act § 2 than agreements under Sherman Act § 1).

[13] *HN24*[] Horizontal market division is a "classic per se antitrust violation." United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991).

[14] The Supreme Court reached a similar result in holding preempted a regulation that compelled vertical resale price **[**24]** maintenance but allowed wholesalers to fix the price. *See* 324 Liquor, 479 U.S. at 341-42 (discussing Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)); Fisher, 475 U.S. at 268-69 (same); Rice, 458 U.S. at 659 (same). *HN26*[] Although vertical resale price maintenance is no longer per se illegal, *Midcal* remains instructive. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (overturning the per se rule against vertical resale price maintenance announced in Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)).

If the state fixes the price, however, the requirement that private parties adhere to the fixed price is a unilateral restraint. For example, in *Fisher*, the Supreme Court held that a regulation requiring private landlords to adhere to a maximum rent ceiling fixed by the state was a unilateral restraint. *See* *Fisher, 475 U.S. at 269* ("Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city."). The anticompetitive effects were the same as if the landlords had conspired, but the extent of the harm to competition was decided by the state **[**25]** and complete upon enactment of the regulation.

Memorial argues that incumbent certificate holders' control over their PCI capacity makes them like the wholesalers in *Costco* (who were free to set their own **[*931]** prices), not the landlords in *Fisher* (for whom rent was fixed by regulation). Memorial fails to recognize that ***HN27***[] in a post-and-hold regime the restraint of trade is that private parties hold to their prices, whereas here the restraint is not that licensees are allowed to expand their capacity, but rather that the Department requires licenses and doles them out based on a standard skewed toward monopoly.

We made a similar distinction in *Costco*, which in addition to holding that a post-and-hold regulation was a hybrid restraint, held that a regulation requiring wholesalers to charge at least a 10-percent mark-up was a unilateral restraint. Although the minimum mark-up regulation "gave" private parties discretion to mark up higher than the minimum, the state did not create that discretion. Wholesalers could already mark up their prices unilaterally. The regulation simply created a floor on price competition without allowing private parties any role in setting what the floor would be. The **[**26]** regulated market was less competitive, but the restraint of trade was complete upon enactment of the regulation. Significantly, the state did not grant "to private parties a means to manipulate, and therefore control, the pricing decisions of other firms," in contrast to post-and-hold regulations. *Costco, 522 F.3d at 899*.

In sum, "[t]he distinction between unilateral and concerted action is critical here" because the state unilaterally imposes the barrier to entry and unilaterally determines when to issue a new PCI license. *Fisher, 475 U.S. at 266*. Any anticompetitive effect from allowing the first licensee the option of holding a monopoly in the planning area is "part-and#x2D;parcel of the state-imposed licensing scheme." *Costco, 522 F.3d at 890*. There is neither a per se illegal agreement nor its functional equivalent to turn the PCI regulations into a hybrid restraint. Absent a hybrid restraint or other per se violation of the antitrust laws, there is no preemption and the district court properly granted judgment on the pleadings.[15]

B. The Dormant *Commerce Clause*

Memorial's complaint alleges that the PCI regulations violate the dormant *Commerce Clause* by placing an undue burden on interstate commerce.[16] If it were not for the licensing requirement, Memorial would offer elective PCI to out-of-state patients, as well as hire out-of-state doctors and import medical supplies from out-of-state to perform the procedures. There is no allegation of intentional discrimination against interstate commerce, but ***HN29***[] "[e]ven laws that are applied evenhandedly and impose only an incidental burden on interstate commerce can be unconstitutional." *Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1179 (9th Cir. 1998)*; *see also* *C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)* ("It is **[*932]** well settled **[**28]** that actions are within the domain of the *Commerce Clause* if they burden interstate commerce or impede its

[15] Memorial complains that by rejecting its allegation that the PCI regulations are a hybrid restraint of trade, the district court did not construe the **[**27]** facts alleged in the complaint in its favor. Whether a regulation is a hybrid restraint of trade is a question of law, *see* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, vol. XI ¶ 1909b (2d ed. 2000) (explaining that ***HN28***[] identification of per se illegal restraints is a question of law, citing *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 337 n.3, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982))*, so there was no need to construe that allegation in Memorial's favor.

[16] ***HN30***[] The *Commerce Clause of the Constitution* explicitly grants Congress authority to regulate interstate commerce. *See* *U.S. Const. art. I, § 8, cl. 3*. As a corollary, the *Commerce Clause* implicitly limits the regulatory authority of the states over interstate commerce. This inference is commonly referred to as the dormant *Commerce Clause*. *See* *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 523 (9th Cir. 2009)*.

free flow."). Where a law only incidentally burdens interstate commerce, it "will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338-39, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)) (quotation marks and alteration omitted).

We must decide whether Memorial has standing to raise a dormant Commerce Clause challenge under Pike, and if so, whether the PCI regulations are immunized by congressional authorization. The ultimate question of whether the PCI regulations survive *Pike* scrutiny is not before **[**29]** us.

1. Memorial has standing to raise a dormant Commerce Clause challenge

HN31[] Standing includes two components: Article III constitutional standing and prudential standing. See City of L.A. v. Cnty. of Kern, 581 F.3d 841, 845 (9th Cir. 2009). The Department challenges only Memorial's prudential standing.[17] As relevant here, prudential standing requires that "the plaintiff's complaint must 'fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Individuals for Responsible Gov't, Inc. v. Washoe Cnty., 110 F.3d 699, 702-03 (9th Cir. 1997) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)). The zone-of- interests test "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the relevant constitutional provision." Id. at 703 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 469, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992) (Scalia, J., dissenting)) (omission in original) (quotation marks and alteration omitted). Thus, we must first identify the purpose of the dormant Commerce Clause.

HN33[] "The chief purpose underlying [the Commerce] Clause is to limit 'the power of the States to erect barriers against interstate trade.'" Washoe Cnty., 110 F.3d at 703 (quoting Dennis v. Higgins, 498 U.S. 439, 446, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991)). The intent is to promote a national market and "the free flow of goods and services through the several states; it is the *economic* interest in being free from trade barriers that the clause protects." S.D. Myers, Inc. v. City & Cnty. of S.F., 253 F.3d 461, 471 (9th Cir. 2001) (citing C&A Carbone, 511 U.S. at 390; On the Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235, 1238 (9th Cir. 2001)). The ultimate question, therefore, is whether Memorial's claims "bear more than a marginal relationship to claims addressing a state or county's effort to erect barriers to interstate commerce." Cnty. of Kern, 581 F.3d at 847 (quotation marks omitted).

HN34[] "As the name implies, the zone of interests test turns on the *interest* sought to be protected, **[**31]** not the *harm* suffered by the plaintiff." Id. at 848. Any alleged injury "must somehow be tied to a barrier imposed on interstate commerce." *Id*. Here, the barrier to interstate commerce is the requirement of a certificate of need to offer elective PCI to *all* patients, in-state **[*933]** or out-of-state. By virtue of the certificate of need requirement, the Department prevents Memorial from soliciting out-of-state patients and competing in an interstate market to offer elective PCI services, activities that clearly involve interstate commerce. *See* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329-30, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991). Under Pike such incidental effects on interstate commerce are an unconstitutional barrier to trade if they are "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.

The Department contends that Memorial lacks standing because it operates only an in-state hospital. **HN35**[] The Commerce Clause, however, protects the vitality of the national market for goods and services, not the location of a particular participant, and thus a state burdens the rights of its own residents as well as those of other states when it burdens interstate commerce. Although the dormant Commerce Clause **[**32]** primarily targets discrimination against out-of-state economic activity, under *Pike* it prohibits all unjustifiable burdens on interstate commerce. *See* Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 392, 398-99 (9th Cir. 1995)

[17] Recognizing that **HN32**[] Article III standing is jurisdictional **[**30]** and can neither be waived by the parties nor ignored by the court, we are independently satisfied that Memorial has Article III standing under Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). *See* Cnty. of Kern, 581 F.3d at 845.

(reviewing a facially neutral licensing regime under *Pike* where the plaintiff was an in-state "corporation with all of its facilities located within the state"). Memorial's alleged injury is thus tied to an alleged violation of the dormant Commerce Clause. The district court correctly held that prudential standing is satisfied.

2. Congress has not authorized the 2008 PCI regulations

HN36[] "It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." Maine v. Taylor, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (citing S. Pac. Co. v. Ariz. ex rel. Sullivan, 325 U.S. 761, 769, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)); *see* Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174, 105 S. Ct. 2545, 86 L. Ed. 2d 112 (1985). Congressional authorization must be "'unmistakably clear'" and "unambiguous." Taylor, 477 U.S. at 139 (quoting South-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 91, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984)). Congress must clearly evince **[**33]** its intent "to alter the limits of state power otherwise imposed by the Commerce Clause." *Id*. (quotation marks omitted) (quoting United States v. Pub. Utils. Comm'n of Cal., 345 U.S. 295, 304, 73 S. Ct. 706, 97 L. Ed. 1020 (1953); *see* South-Central Timber, 467 U.S. at 91 (requiring clear evidence that Congress "affirmatively contemplate[d] otherwise invalid state legislation"). Congressional authorization is a defense that the state must prove. *See* Wyoming, 502 U.S. at 458.

The district court granted judgment on the pleadings to the Department because it concluded Congress had authorized certificate of need programs in the National Health Planning and Resources Development Act of 1974 (NHPRDA). *See supra* n.4. Although recognizing that the NHPRDA had been repealed in 1986 before the Department promulgated the challenged regulations in 2008, the district court accepted the repealed statute as a prima facie authorization and erroneously put the burden on Memorial to prove the significance of repeal. We reverse because the Department has failed to show that the NHPRDA, a statute repealed without a savings clause, provides the requisite clear statement of authorization for the 2008 PCI regulations.[18] We do not decide **[**34]** whether the NHPRDA is sufficient **[*934]** authorization for certificate of need requirements established prior to repeal.

The Department argues that the NHPRDA was a clear statement of authorization for certificate of need regimes because the statute made them a condition of federal funding. Memorial disputes whether this suffices as a sufficiently clear statement of authorization, but we need not decide the question. Whatever the NHPRDA authorized prior to 1986, after Congress repealed the statute there was no NHPRDA left to authorize a regulation promulgated in 2008. **HN37**[] For more than a century, "the general rule . . . [has been] that when an act of the legislature is repealed, it must be considered, except **[**35]** as to transactions past and closed, as if it never existed." Ex Parte McCardle, 74 U.S. 506, 514, 19 L. Ed. 264 (1868) (quotation marks omitted). Even in a pending action, "no judgment could be rendered . . . after the repeal of the act under which it was brought and prosecuted." *Id*. A statute that Congress snuffed out of existence by repeal leaves no residual clear statement of authorization.

Had Congress meant to perpetuate its alleged authorization for certificate of need programs, it could have included a savings clause in the repeal.[19] The savings clause would then itself be an unmistakably clear statement of

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[18] The burden did not fall on Memorial to rebut the alleged clear statement in the NHPRDA because there was no NHPRDA in force to make a clear statement. A different situation arose in Central Valley Chrysler- Jeep v. Witherspoon, 456 F. Supp. 2d 1160 (E.D. Cal. 2006), which put the burden on the plaintiff to prove that an apparently clear statement of authorization had in fact been implicitly revoked by subsequent legislation. *See* id. at 1185. Here, there is no doubt the NHPRDA was repealed.

[19] The repeal stated:

> **HN39**[] Sec. 701. Repeal of Title XV
>
> (a) Repeal — Title XV of the Public Health Services Act is repealed effective January 1, 1987.
>
> (b) Funds — The repeal made by subsection (a) shall not affect any funds obligated for the purposes of title XV of the Public Health Service Act before January 1, 1987.

authorization. ***HN38***[] Savings clauses can be used to preserve state authority from implied preemption when Congress passes a statute. *See, e.g., Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1010 (9th Cir. 2010)*; *Qwest Corp. v. Ariz. Corp. Comm'n, 567 F.3d 1109, 1117-18 (9th Cir. 2009)*. By the same token, Congress could enact a savings clause to avoid the natural implication of repealing an act. *Cf. Daghlian v. DeVry Univ., Inc., 574 F.3d 1212, 1213 (9th Cir. 2009)* (order) (dismissing for lack of jurisdiction because the California statute under which the plaintiff sued "was repealed without a savings **[**36]** clause" to preserve pending claims). Instead, Congress repealed the NHPRDA with terse language that, at best, leaves it ambiguous whether Congress affirmatively contemplated the fate of state certificate of need programs.

To the extent there is ambiguity, the Department offers no legislative history to inform our interpretation of it. The district court relied on President Reagan's signing statement, but even if a presidential signing statement could establish an unmistakably clear *legislative* intent, President Reagan's opinion does not amount to an unmistakably clear statement of authorization for the Department's PCI regulations. *See* Statement of President Ronald Reagan upon Signing S. 1744, 22 Weekly Comp. Pres. Doc. 1565, 1566 (Nov. 14, 1986).[20] Ultimately, the Department is reduced **[*935]** to arguing that we can infer **[**37]** authorization from congressional silence — that Congress could not have meant to pull the rug out from under the states after inducing their transition to certificate of need programs, so Congress must have meant to leave undisturbed its authorization for certificates of need. As the district court's agreement demonstrates, that may be a reasonable inference. Congressional silence is not a clear statement, however. *See Sossamon v. Texas, ___ U.S. ___, 131 S. Ct. 1651, 1660, 179 L. Ed. 2d 700 (2011)*. Accordingly, we hold that the repealed NHPRDA does not provide congressional authorization for the 2008 PCI certificate of need regulation.

CONCLUSION

We hold that there is no antitrust preemption because the PCI regulations are a unilateral restraint of trade not subject to preemption. We also hold that Memorial has standing to raise a dormant *Commerce Clause* challenge under *Pike*, because the PCI regulations burden the free flow of commerce to Memorial's financial detriment. We reverse judgment on the dormant *Commerce Clause* claim, however, because the Department failed to prove congressional authorization for its PCI certificate of need regulations. We remand for further proceedings on Memorial's dormant *Commerce Clause* claim consistent with this opinion. The parties shall bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

End of Document

Pub. L. No. 99-660, tit. VII, § 701, 100 Stat. 3743, 3799 (1986).

[20] President Reagan said:

> It is also with great pleasure that I can finally lay to rest the Federal health planning authorities. I have sought their repeal since I assumed office. These authorities, while perhaps well-intentioned when they were enacted in the 1970's, have only served to insert the Federal Government into a process that is best reserved to the marketplace. Health planning has proved to be a process that was costly to the Federal Government, in the last analysis without benefit, and even detrimental to the rational allocation of economic resources for health **[**38]** care.

Behrend v. Comcast Corp.

United States Court of Appeals for the Third Circuit

January 11, 2011, Argued; August 23, 2011, Filed

No. 10-2865

Reporter

655 F.3d 182 *; 2011 U.S. App. LEXIS 17524 **; 2011-2 Trade Cas. (CCH) P77,575; 80 Fed. R. Serv. 3d (Callaghan) 394

CAROLINE BEHREND; STANFORD GLABERSON; JOAN EVANCHUK-KIND; ERIC BRISLAWN v. COMCAST CORPORATION; COMCAST HOLDINGS CORPORATION; COMCAST CABLE COMMUNICATIONS, INC.; COMAST CABLECOMMUNICATIONS HOLDINGS, INC.; COMCAST CABLE HOLDINGS, LLC, Appellants

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by, Count dismissed at *Behrend v. Comcast Corp., 2012 U.S. Dist. LEXIS 51889 (E.D. Pa., Apr. 12, 2012)*

US Supreme Court certiorari granted by, in part *Comcast Corp. v. Behrend, 133 S. Ct. 24, 183 L. Ed. 2d 673, 2012 U.S. LEXIS 4754 (U.S., 2012)*

Reversed by *Comcast Corp. v. Behrend, 2013 U.S. LEXIS 2544 (U.S., Mar. 27, 2013)*

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 2-03-cv-06604). District Judge: Honorable John R. Padova.

Behrend v. Comcast Corp., 264 F.R.D. 150, 2010 U.S. Dist. LEXIS 1049 (E.D. Pa., 2010)

Core Terms

damages, overbuilding, district court, antitrust, geographic, prices, clustering, penetration, screen, franchise, calculation, class-wide, cable, class certification, Plaintiffs', merits, benchmark, methodology, predominance, overbuilt, market share, clearly erroneous, certification, anticompetitive, conditions, proven, anticompetitive conduct, national average, contends, class member

LexisNexis® Headnotes

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

HN1[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1*.

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

HN2[] **Scope, Monopolization Offenses**

See 15 U.S.C.S. § 2.

Communications Law > ... > Regulated Entities > Cable Systems > General Overview

HN3[] **Regulated Entities, Cable Systems**

"Clustering" refers to a strategy whereby cable Multi-System Operators (MSOs) concentrate their operations in regional geographic areas by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system swapping among MSOs. An "overbuilder" is a company that builds and offers customers a competitive alternative where a telecommunications company already operates.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN4[] **Class Actions, Appellate Review**

A circuit court of appeals reviews a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact. It reviews de novo whether an incorrect legal standard has been used.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN5[] **Standards of Review, Clearly Erroneous Review**

For a district court's finding of fact to be clearly erroneous, the standard is high. "Clearly erroneous" has been interpreted to mean that a reviewing court can upset a finding of fact, even if there is some evidence to support the finding, only if the court is left with the definite and firm conviction that a mistake has been committed. This means that it is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN6[] **Standards of Review, Clearly Erroneous Review**

The "clearly erroneous" standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23 allows a class action if certain requirements are met. First, the class must meet the prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy. Second, the class must fit one of the Rule 23(b) types of classes. Rule 23(b)(3) requires (1) that the questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Rule 23(b)(3). These requirements are known as predominance and superiority.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN8[] Class Actions, Certification of Classes

A district court must conduct a rigorous analysis of the evidence and arguments in making the class certification decision. The analysis requires a thorough examination of the factual and legal allegations and may include a preliminary inquiry into the merits. The requirements set out in Fed. R. Civ. P. 23 are not mere pleading rules. The court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied. An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. A merits inquiry that is not necessary to determine a Rule 23 requirement is precluded. Accordingly, at the class certification stage, courts are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination. Further, any findings for the purpose of class certification do not bind the fact-finder on the merits.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN9[] Class Actions, Certification of Classes

Plaintiffs bear the burden of establishing each element of Fed. R. Civ. P. 23 by a preponderance of the evidence. To certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN10[] Class Actions, Certification of Classes

A court must examine critically expert testimony on both sides and may be persuaded by either side as to whether a certification requirement has been met. Indeed, weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Fed. R. Civ. P. 23 demands.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] Prerequisites for Class Action, Predominance

Predominance tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. It is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws, but a court may not relax its certification analysis as to each element of *Fed. R. Civ. P. 23*. To assess whether common or individual issues predominate, a district court must examine the nature of the evidence and formulate some prediction as to how specific issues will play out.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Evidence > Burdens of Proof > Allocation

HN12[] Prerequisites for Class Action, Predominance

Individual injury, also known as antitrust impact, is critically important for the purpose of evaluating *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. At the class certification stage, a plaintiff's burden is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

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

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

HN13[] Relevant Market, Geographic Market Definition

The relevant geographic market is a component of substantive ***antitrust law***. For antitrust claims analyzed through the rule of reason, plaintiffs must demonstrate that the defendant possessed market power in the relevant geographic market. For per se claims, plaintiffs need not establish a geographic market. Some prohibited practices can be conclusively presumed to unreasonably restrain competition. Additionally, direct proof of monopoly power does not require a definition of the relevant market.

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

HN14[] Relevant Market, Geographic Market Definition

Defining the relevant geographic market is an issue of the merits. At the class certification stage, a court need only be satisfied that issues—including the definition of a geographic market—will be capable of proof through evidence common to the class. If the plaintiffs allege per se claims, they may still need to persuade the district court that, in the event defining the relevant geographic market becomes necessary, it is capable of common proof.

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

HN15[] Relevant Market, Geographic Market Definition

Identification of the relevant geographic market is a matter of analyzing competition. Defining it is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry being considered.

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

HN16[] Relevant Market, Geographic Market Definition

The geographic market selected must both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN17[] Private Actions, Sherman Act

Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN18[] Class Actions, Appellate Review

When facts are at issue, a district court exceeds its discretion in certifying a class only if its findings are clearly erroneous. The defendant bears a heavy burden in convincing a circuit court of appeals that the district court's factual findings were clearly erroneous. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it. It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN19[] Regulated Practices, Market Definition

Expert theory is not a substitute for market facts.

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

HN20[] **Regulated Practices, Monopolies & Monopolization**

Courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

HN21[] **Class Actions, Certification of Classes**

A district court may inquire into the merits only insofar as it is necessary to determine whether a class certification requirement is met. Any further inquiry is precluded. The question is not whether the plaintiff or plaintiffs will prevail on the merits, but rather whether the requirements of *Fed. R. Civ. P. 23* are met. Courts allow preliminary merits inquiries when necessary for *Rule 23* because of the potentially decisive effect on litigation of a certification decision, but those inquiries remain limited and non-binding on the merits at trial. Nothing requires plaintiffs to prove their case at the class certification stage; to the contrary, they must establish by a preponderance that their case is one that meets each requirement of *Rule 23*.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN22[] **Remedies, Damages**

If allowed to proceed to trial, the class must establish that the injury it suffered from the violation of the antitrust laws is measurable. Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury). The usual measure in an overcharge case is the difference between the illegal price that was actually charged and the price that would have been charged but for the violation multiplied by the number of units purchased. Given the inherent difficulty of identifying a "but-for world," courts do not require that damages be measured with certainty, but rather that they be demonstrated as a matter of just and reasonable inference. While the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN23[] **Remedies, Damages**

The inquiry for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. Some variation of damages among class members does not defeat certification. For antitrust class certification, it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate. Complex and individual questions of damages, however, weigh against finding predominance. At the class certification stage, the district court must ensure that the plaintiffs' presentation of their case will be through means amenable to the class action mechanism. Courts are looking here not for hard factual proof, but for a more thorough explanation of how the pivotal evidence behind plaintiff's theory can be established. If there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win.

Civil Procedure > Remedies > Damages > General Overview

HN24[] Remedies, Damages

The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN25[] Remedies, Damages

At the class certification stage courts do not require that plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure the court that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

HN26[] Antitrust & Trade Law, Sherman Act

Appeals taken pursuant to *Fed. R. Civ. P. 23(f)* do not furnish the proper vehicle to address the merits of a plaintiffs' antitrust claims.

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Judges: Before: FISHER, JORDAN and[*] ALDISERT, Circuit Judges. JORDAN, Circuit Judge, concurring in the judgment part and dissenting in part.

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[*] Subsequent to oral argument, Judge Aldisert replaced Judge Ambro on the panel. The case was not reargued because the replacement Judge exercised his right to decide the case on the basis of the brief, the record and a transcript of the original oral argument.

Opinion by: ALDISERT

Opinion

[*185] OPINION OF THE COURT

ALDISERT, Circuit Judge.

In **[**2]** 2008 this Court handed down the seminal case of *In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008)*, which outlines the standards a district court should apply in deciding whether to certify a class. This appeal by Comcast requires us to decide if the District Court for the Eastern District of Pennsylvania properly satisfied Hydrogen's directions in determining that questions of fact or law common to class members predominate sufficiently to satisfy *Rule 23(b)(3) of the Federal Rules of Civil Procedure*. Appellants contend that the District Court exceeded a proper exercise of discretion and that its findings of fact were clearly erroneous. For the reasons that follow, we hold that the Court did not exceed its permissible discretion in determining that Plaintiffs established by a preponderance of evidence that they would be able to prove through common evidence (1) class-wide antitrust impact (higher cost on non-basic cable programming), and (2) a common methodology to quantify damages on a class-wide basis. Accordingly, we will affirm.

I.

A.

> "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man **[**3]** of statistics and the master of economics."
>
> Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

Beginning in 1998, Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") engaged in a series of transactions that increased Comcast's share of the multichannel video programming distribution services offered in the Philadelphia Designated Market Area ("Philadelphia DMA").[1] Comcast contracted with competing cable providers to either acquire them or to "swap" cable systems it owned in areas outside the Philadelphia DMA for cable systems within the Philadelphia DMA. These transactions form the "Cable System Transactions," involving the "Transaction parties."[2] As a **[*186]** result of the Cable System

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[1] "A DMA is a specific **[**4]** media research area that is used by Nielsen Media Research to identify television stations whose broadcast signals reach a specific area and attract the most viewers. DMA boundaries are widely accepted and used by all types of companies to target and keep track of advertising." *Steak N Shake Co. v. Burger King Corp., 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004)*.

[2] The District Court set forth the Cable System Transactions:

- The April 1998 acquisition of Marcus Cable and its 27,000 cable subscribers located in Harrington, Delaware, which is part of the Philadelphia DMA.
- The June 1999 acquisition of Greater Philadelphia Cablevision, Inc., a subsidiary of Greater Media, Inc., and its 79,000 cable subscribers located in Philadelphia.
- The January 2000 acquisition of Lenfest Communications, Inc. and more than 1.1 million cable subscribers located in Berks, Bucks, Chester, Delaware, and Montgomery counties in Pennsylvania, and New Castle County in Delaware.

Transactions, Comcast's share of subscribers in the Philadelphia DMA allegedly increased from 23.9 percent in 1998 to 77.8 percent by 2002, settling at 69.5 percent in 2007. See Behrend v. Comcast Corp., 264 F.R.D. 150, 160 (E.D. Pa. 2010) (setting forth Plaintiffs' expert's calculations as to Comcast's market share).

Plaintiffs, six non-basic cable television programming services customers of Comcast, brought a class action antitrust suit against Comcast in 2003. They alleged violations of section 1 of the Sherman Act, 15 U.S.C. § 1, for "imposing horizontal territory, market and customer allocations by conspiring with and entering into and implementing unlawful swap agreements, arrangements or devices," and section 2 of the Sherman Act, 15 U.S.C. § 2, on theories of monopolization and attempted monopolization.[3] App. 00232-243 (Third Am. Compl.). The Complaint alleged anticompetitive conduct in the Philadelphia area and the Chicago area. As only the alleged conduct in Philadelphia is before us, we focus on the nature of the class and the allegations in Philadelphia.

The proposed class included: "All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 00217; see id. (excluding from the class "governmental entities, Defendants, Defendants' subsidiaries and **[*187]** affiliates and this Court"). The Philadelphia cluster is composed "of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey." See Behrend, 264 F.R.D. at 191.[4]

The Complaint alleged that Comcast had perpetrated an anticompetitive "clustering scheme." To clarify its contentions we pause to define two key terms. HN3[] "Clustering" refers to a "strategy whereby cable [Multi-System Operators ("MSOs")] concentrate their operations in regional geographic areas by acquiring cable systems

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- The January 2000 acquisition of Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 customers located in Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, and Salem counties in New Jersey, **[**5]** which is part of the Philadelphia DMA.
- The December 2000 swap agreement with AT & T, wherein Comcast obtained cable systems and approximately 770,000 subscribers, including subscribers located in Eastern Pennsylvania (Berks and Bucks counties) and New Jersey. In exchange, AT & T obtained cable systems and approximately 700,000 Comcast subscribers located in Chicago and elsewhere around the country.
- The January 2001 swap agreement with Adelphia Communications Corp., wherein Comcast obtained cable systems and approximately 464,000 subscribers located primarily in the Philadelphia area and adjacent New Jersey areas. In exchange, Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California.
- The April 2001 swap agreement with AT & T, wherein Comcast obtained cable systems and approximately 595,000 subscribers, including subscribers located in Pennsylvania and New Jersey.
- The August 2006 swap agreement with Time Warner in connection with the Adelphia bankruptcy, wherein Comcast obtained cable systems and approximately 41,000 subscribers in the Philadelphia DMA.
- The August 2007 acquisition of Patriot Media and its 81,000 cable subscribers **[**6]** located in New Jersey, within the Philadelphia DMA.

Behrend v. Comcast Corp., 264 F.R.D. 150, 156 n.8 (E.D. Pa. 2010).

[3] Section 1 of the Sherman Act states: HN1[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 2 states: HN2[] "Every person who shall monopolize, or attempt to monopolize, **[**7]** or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." Id. § 2.

[4] The "Philadelphia cluster" and the "Philadelphia DMA" are separate terms. The Philadelphia DMA includes the cluster counties as well as the counties **[**8]** of Lehigh and Northampton, Pennsylvania. See App. 03614, 03795.

in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system 'swapping' among MSOs." *Implementation of the Cable Television Consumer Prot. & Competition Act of 1992, 22 F.C.C. Rcd. 17791, 17810 n.134 (2007)* (citation omitted). An "overbuilder" is a company that builds and offers customers a competitive alternative where a telecommunications company already operates. According to the Complaint, Comcast eliminated competition by (1) acquiring competitors in the Philadelphia market and (2) swapping with competitors cable systems and subscribers outside of the Philadelphia market for cable systems and subscribers within the Philadelphia market. The Complaint also **[**9]** alleged that Comcast engaged in conduct intended to exclude competition from overbuilder RCN Telecom Services, Inc. ("RCN"), by denying it access to "Comcast Sportsnet," requiring contractors to enter non-compete agreements, and inducing potential customers to sign up for long contracts with special discounts and penalty provisions in the areas where RCN intended to overbuild. App. 00235-239.

As a result of its clustering, Comcast allegedly harmed the class by eliminating competition, raising entry barriers to potential competition, maintaining increased prices for cable services at supra-competitive levels, and depriving subscribers of the lower prices that would result from effective competition. App. 00241-242. In other words, Comcast subscribers allegedly pay too much for their non-basic video programming cable service.

B.

On May 3, 2007, after extensive motions practice, see App. 00148-172 (listing 194 docket entries prior to certification), the District Court certified the proposed class. App. 00354. It determined that Plaintiffs had met the requirements of *Rule 23(a) of the Federal Rules of Civil Procedure* (numerosity, commonality, typicality, and adequacy). App. 00366-372. It **[**10]** held also that Plaintiffs had met the predominance and superiority requirements of *Rule 23(b)*. App. 00373-387. We denied on June 29, 2007, Comcast's 23(f) petition seeking interlocutory review.

The Court also certified the Chicago class's claims, but stayed them pending the outcome of the Philadelphia class. App. 00177, 00179.[5]

[*188] Following our decision in *Hydrogen Peroxide, 552 F.3d 305*, the District Court granted in part Comcast's motion to reconsider its Philadelphia certification decision (the Court denied without prejudice consideration of the Chicago class certification, again pending the outcome in Philadelphia). App. 00437-439. It vacated only the portion of the certification decision that addressed *Rule 23(b)*'s predominance requirement. The Court scheduled a hearing on the issue of predominance as it related to (1) antitrust impact, and (2) methodology of damages.

The District Court held an evidentiary hearing on October **[**11]** 13-15 and 26, 2009. During the four-day hearing, the Court heard live testimony from fact and expert witnesses, considered 32 expert reports, and examined deposition excerpts, as well as many other documents. Following the hearing, the Court issued to the parties a series of questions related to antitrust impact and damages methodology, and heard argument on November 16, 2009, to address its specific questions.

On January 7, 2010, the District Court recertified the Philadelphia class, and issued an amended class certification order on January 13, 2010. The Court reaffirmed and incorporated its May 2007 certification as to numerosity, commonality, typicality, and adequacy (*Rule 23(a)*), as well as superiority (*Rule 23(b)(3)*). App. 00029. On the disputed issue of predominance, the Court held that Plaintiffs had demonstrated by a preponderance of the evidence that: (1) questions of law and fact common to the members of the class predominated; (2) the relevant geographic market could be the Philadelphia Designated Market Area; (3) the class could establish antitrust impact on the theory that Comcast's clustering through the swaps and acquisitions deterred overbuilder competition; (4) the **[**12]** models and analyses of Plaintiffs' damages expert, Dr. James McClave, were common evidence

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[5] Plaintiffs' counsel also filed a complaint in the District of Massachusetts on behalf of a "Boston cluster." That case was transferred to the Eastern District of Pennsylvania, and has been stayed pending resolution of the Chicago cluster claims. See App. 00179.

available to measure and quantify damages on a class-wide basis; and (5) the class could establish antitrust impact through common evidence applicable to all class members. App. 00030. In certifying the class, however, the District Court narrowed the class's various theories of class-wide impact to a single theory:

> Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.

App. 00032.

The Court accompanied its order with an 81-page memorandum opinion containing its analysis of the evidence presented at the evidentiary hearing. *Behrend v. Comcast Corp., 264 F.R.D. 150 (E.D. Pa. 2010)*. The Court summarized its opinion as follows:

> Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather **[**13]** than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

Id. at 154.

Comcast filed a *Rule 23(f)* petition to appeal on January 27, 2010. While that petition was pending, Comcast moved for summary judgment. The class responded, and Comcast filed a reply on June 4, 2010. We granted Comcast permission to appeal on June 9, 2010. The motion for summary judgment remains pending in the District Court.

[*189] II.

The District Court had jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1337*. We have jurisdiction pursuant to *28 U.S.C. § 1292(e)* and *Rule 23(f) of the Federal Rules of Civil Procedure*.

HN4[] "We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Hydrogen Peroxide, 552 F.3d at 312* (citation and quotations omitted). We review de novo whether an incorrect legal standard has been used. Id. (citation omitted).

HN5[] For a district court's finding of fact to be clearly erroneous, the standard is high. "Clearly erroneous" has been interpreted to mean that a reviewing **[**14]** court can upset a finding of fact, even if there is some evidence to support the finding, only if the court is "left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*. This means that "[i]t is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972)*. Especially pertinent to the issue before us, the Supreme Court has explained:

> ***HN6***[] This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. If the district court's account of the evidence is plausible in light of the record viewed **[**15]** in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (quotations and citations omitted); accord PA Prison Soc'y v. Cortes, 622 F.3d 215, 231 (3d Cir. 2010).

III.

Comcast raises three principal arguments on appeal, urging us to overturn the District Court's certification order on the grounds that: (1) the Court's finding that the class can establish class-wide antitrust impact through common evidence was incorrect for various reasons; (2) the District Court exceeded its discretion in accepting Plaintiffs' proposed methodology for damages calculation; and (3) the Court's certification of a per se antitrust claim was clear error. In response, Plaintiffs defend in all respects the District Court's certification decision. We first outline the Rule 23 legal framework and then analyze each of Comcast's contentions.

HN7[] Rule 23 of the Federal Rules of Civil Procedure allows a class action if certain requirements **[**16]** are met. First, the class must meet the "prerequisites" of Rule 23(a): numerosity, commonality, typicality, and adequacy. Second, the class must fit one of the Rule 23(b) types of classes. Here, Plaintiffs seek certification under Rule 23(b)(3), which requires (1) "that the questions of law or fact common to class members predominate over any questions **[*190]** affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). These requirements are known as predominance and superiority.

HN8[] The district court must conduct a "rigorous analysis" of the evidence and arguments in making the class certification decision. Hydrogen Peroxide, 552 F.3d at 318. The analysis requires "a thorough examination of the factual and legal allegations" and "may include a preliminary inquiry into the merits." Id. at 317 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166, 168 (3d Cir. 2001)). We explained in Hydrogen Peroxide the permissible extent of any inquiry into the merits:

> [T]he requirements set out in Rule 23 are not mere pleading rules. The court may delve beyond the pleadings **[**17]** to determine whether the requirements for class certification are satisfied. . . . An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. Some uncertainty ensued when the Supreme Court declared in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Only a few years later, in addressing whether a party may bring an interlocutory appeal when a district court denies class certification, the Supreme Court pointed out that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" [Coopers & Lybrand v.] Livesay, 437 U.S. [463,] 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 [(1978)] (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963)). As we explained in Newton, 259 F.3d at 166-69, Eisen is best understood to preclude only a merits inquiry **[**18]** that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed.

552 F.3d at 316-317 (quotations and citations omitted).[6] Accordingly, at the class certification stage, we are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination. Id. Further, any findings for the purpose of class certification "do not bind the fact-finder on the merits." Id. at 318.

HN9[] Plaintiffs bear the burden of establishing each element of Rule 23 by a preponderance of the evidence. Id. at 320 ("[T]o certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.") (citation omitted). **HN10**[] The court must also examine critically expert testimony on both sides and may be persuaded by either side as to **[**19]** whether a certification

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[6] The Supreme Court confirmed our interpretation of the Rule 23 inquiry in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). See id. at 2551, 2552 n.6 (stating that "[f]requently [the Rule 23] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim," but Eisen still prohibits "a merits inquiry for any other pretrial purpose").

requirement has been met. *Id. at 323*. Indeed, "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands." Id.

[*191] The parties dispute whether Plaintiffs have met the predominance requirement. ***HN11***[] Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. It "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws," *id. at 625*, but a court may not relax its certification analysis as to each element of *Rule 23*, see *Hydrogen Peroxide, 552 F.3d at 322*. To assess whether common or individual issues predominate, a district court must examine the nature of the evidence and "formulate some prediction as to how specific issues will play out . . . ." *Id. at 311* (quotations and citations omitted).

Reviewing a district court's certification of a class, we examine the elements of the class's claims "through the prism" of *Rule 23*. Id. (quoting *Newton, 259 F.3d at 181*). The elements of the claims before us are (1) a violation **[**20]** of the antitrust laws (here, *sections 1* and *2 of the Sherman Act*), (2) individual injury resulting from that violation, and (3) measurable damages. See id. ***HN12***[] Individual injury, also known as antitrust impact, "is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." Id. At the class certification stage, Plaintiffs' burden is "to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id. at 311-312*.

IV.

Comcast devotes much of its energy to contending that the District Court exceeded its discretion in holding that Plaintiffs had established common evidence of antitrust impact. It attacks this issue in two ways: first, that the District Court failed to apply the correct legal standard for determining the relevant geographic market, and, second, that the District Court made clearly erroneous factual findings by relying on Plaintiffs' expert for proof of class-wide antitrust impact. We address each contention in turn.

A.

Before the District Court, Plaintiffs **[**21]** contended that the relevant geographic market was the Philadelphia Designated Market Area, whereas Comcast countered that it was each individual's household. The District Court agreed with Plaintiffs. *Behrend, 264 F.R.D. at 160*. Plaintiffs' expert, Dr. Michael Williams, provided seven bases to support the conclusion that the relevant geographic market was the Philadelphia DMA. The District Court set forth each basis, as well as Comcast's counterarguments. *264 F.R.D. at 157-160*. The Court stated that Comcast's focus on the individual household was not supported by the record, and that setting such a small market would be "impractical and inefficient." *264 F.R.D. at 160*. Instead, the Court noted that the alleged conduct centered on Comcast's attempt to acquire substantially all of the cable systems in the Philadelphia DMA, and that the Federal Communications Commission aggregates relevant geographic markets in which customers face "similar competitive choices." *264 F.R.D. at 160*. The Court concluded, "[T]he record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct **[**22]** in the Philadelphia DMA." *264 F.R.D. at 160*.

Comcast contends that the Court failed to articulate or apply the correct legal **[*192]** standard. According to Comcast, the geographic market is defined in terms of consumer demand substitutability—the area in which a buyer may look for the goods or services he seeks. Because an individual can choose only among providers offering video programming services to his household, Comcast asserts that the geographic market must be the household. Comcast contends additionally that the Court improperly credited Dr. Williams's seven bases for the geographic market because it later rejected three of the seven theories, and that the Court's two stated reasons for accepting the geographic market were irrelevant and erroneous.

Plaintiffs respond at three levels. First, they contend that they need not define the relevant geographic market: per se claims do not require defining the geographic market, and they offered direct evidence of market power, thereby relieving them of the obligation to define the relevant geographic market. Second, Plaintiffs state that the District

Court used the commercial realities test to determine the relevant geographic market and did **[**23]** not ignore demand substitutability. Third, according to Plaintiffs, Comcast cannot demonstrate clear error in the Court's factual determination that "consumers throughout the [Philadelphia] DMA can face similar competitive choices." See *Behrend, 264 F.R.D. at 160*.

B.

We will affirm the District Court's conclusion that the Philadelphia DMA is a relevant geographic market "susceptible to proof at trial through available evidence common to the class." *264 F.R.D. at 160*.

HN13[] The relevant geographic market is a component of substantive ***antitrust law***. For antitrust claims analyzed through the rule of reason, plaintiffs must demonstrate that the defendant possessed market power in the relevant geographic market. See *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa., 745 F.2d 248, 260 (3d Cir. 1984)*. For per se claims, plaintiffs need not establish a geographic market. See *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316-317 (3d Cir. 2010)* (explaining that some prohibited practices can be conclusively presumed to unreasonably restrain competition). Additionally, "direct proof of monopoly power does not require a definition of the relevant market." See *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 n.3 (3d Cir. 2007)*.

HN14[] Defining **[**24]** the relevant geographic market, however, is an issue of the merits. See, e.g., *Borough of Lansdale v. Phila. Elec. Co., 692 F.2d 307 (3d Cir. 1982)* (addressing on appeal whether jury verdict should be set aside because of allegedly erroneous definition of relevant geographic market). At the class certification stage, a court need only be satisfied that issues—including the definition of a geographic market—will be capable of proof through evidence common to the class. See *Hydrogen Peroxide, 552 F.3d at 311*; IIA Phillip E. Areeda et al., ***Antitrust Law*** ¶ 398b (3d ed. 2007) (describing that at the class certification stage the plaintiffs' expert typically concludes that "any significant economic issues underlying the class representative's antitrust claims, including but not limited to issues regarding market definition . . . will be analyzed and proven through the use of common data and evidence that would be used to prove the claims of the other members of the proposed Class") (emphasis added). If the plaintiffs allege per se claims, they may still need to persuade the district court that, in the event defining the relevant geographic market becomes necessary, it is capable of common **[**25]** proof. See Areeda et al., supra, ¶ 398b.

The inquiry before the District Court, therefore, was whether Plaintiffs **[*193]** could demonstrate by a preponderance of the evidence that they would be able to establish a relevant geographic market capable of proof common to the class. The District Court concluded it was: "We conclude that Dr. Williams' geographic market definition is susceptible to proof at trial through available evidence common to the class." *264 F.R.D. at 160*. The parties dispute whether the District Court properly defined the relevant geographic market—Comcast contends it erred as a matter of law, and Plaintiffs respond they need not establish a geographic market. These are merits arguments, which are not properly before us. Our review is limited to whether the Court exceeded its discretion in determining that the class could establish through common proof that the relevant geographic market could be the Philadelphia DMA. We conclude it did not, legally or factually.

C.

First, we perceive no legal error in the District Court's reasoning. Procedurally, it conducted the required "rigorous analysis" by examining in depth the expert opinions on both sides and setting forth its conclusions. **[**26]** See *Hydrogen Peroxide, 552 F.3d at 317, 320*. Substantively, the Court determined that "the record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA." *264 F.R.D. at 160*. Comcast contends that the Court failed to apply the consumer demand substitutability test, which defines the relevant geographic market as "that area in which a potential buyer may rationally look for the goods or services he seeks." *Gordon v. Lewistown Hosp.., 423 F.3d 184, 212 (3d Cir. 2005)* (citing *Pa. Dental Ass'n, 745 F.2d at 260*). We determine otherwise: the Court's analysis of the relevant geographic market for purposes of class certification comported with our precedent.

HN15[] "[I]dentification of the relevant geographic market is a matter of analyzing competition." Borough of Lansdale v. Phila. Elec. Co., 692 F.2d 307, 311 (3d Cir. 1982). Defining it "is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry being considered." Gordon, 423 F.3d at 212 (quoting Borough of Lansdale, 692 F.2d at 311). In **[**27]** these decisions of our Court, one of which has commanded our attention for almost thirty years, we relied on two Supreme Court cases to develop this standard: United States v. Grinnell Corp., 384 U.S. 563, 576, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966), which held that the relevant geographic market under the Sherman Act was "not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business," and Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 332, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961), which defined the relevant geographic area for § 3 of the Clayton Act, 15 U.S.C. § 3, as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies" or as the area in which suppliers "effectively compete." In another Clayton Act case, the Supreme Court stated: HN16[] "The geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." Brown Shoe Co. v. United States, 370 U.S. 294, 336-337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) **[**28]** (quotations and citations omitted); see Grinnell, 384 U.S. at 572 **[*194]** (citing Brown Shoe as analogous to determining the relevant market for the Sherman Act).

D.

The District Court's determination—that consumers "face similar competitive choices" in the Philadelphia DMA as a result of Comcast's alleged clustering conduct—is consistent with the above standards because it considers both where a buyer may rationally look for goods and the commercial reality of the industry. Comcast's insistence that the geographic market must be the individual household (as the only place where a consumer can "comparison shop") ignores that the geographic market must be "economically significant," Brown Shoe Co., 370 U.S. at 336-337, and may be premised on "the commercial realities of the industry being considered," Borough of Lansdale, 692 F.2d at 311, the area where suppliers "effectively compete," Tampa Electric Co., 365 U.S. at 332, or the broader market reflecting the reality of conducting business, Grinnell, 384 U.S. at 576.[7] We therefore discern no legal error in the District Court's analysis.

E.

Second, we recognize ample evidence in the record supporting the District Court's factual **[**30]** findings underpinning its market determination, which precludes us from reversing those findings as clearly erroneous. See, e.g., EBC, Inc. v. Clark Bldg. Sys. Inc., 618 F.3d 253, 273 (3d Cir. 2010) ("We will not reverse '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety' even if we would have weighed that evidence differently." (quoting Anderson, 470 U.S. at 573-574)). The Court cited Dr. Williams's seven bases for drawing the geographic market as the Philadelphia DMA. Behrend, 264 F.R.D. at 157-160. Although it rejected three of those bases, the remaining four tended to show that Comcast's clustering had anticompetitive effects in the Philadelphia DMA by deterring overbuilders from entering the Designated Market Area, and that the industry itself used DMAs to focus its competition. Additional evidence in the record, reviewed in detail below, demonstrated that

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[7] We note additionally the tension between the concept of a "geographic market" and Comcast's conclusion that "the **[**29]** relevant geographic market . . . is each class member's residence." Appellants' Br. 15. As of 2009, Philadelphia County alone had over 560,000 households. See U.S. Census Bureau, Philadelphia County QuickFacts, http://quickfacts.census.gov/qfd/states/ 42/42101.html. Nationwide, in 2010 there were over 117 million households. See U.S. Census Bureau, America's Families and Living Arrangements: 2010, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (Table AVG1). Taken at face value, Comcast's assertion that there are millions of geographic markets in the Philadelphia DMA (or over one hundred million geographic markets nationwide for multichannel video programming distributors) renders the phrase "geographic market" nonsensical. Perhaps for this reason, our research revealed no case—nor does Comcast provide one—in which a geographic market has been set at the individual household level. Cf. Brown Shoe, 370 U.S. at 337 ("Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.").

clustering results in fewer competitors and higher cable prices for the entire market. This evidence belies Comcast's claim that there is no change at the individual level when Comcast aggregates surrounding franchises.

Simply put, the District Court determined by a preponderance **[**31]** of the evidence that, when addressed on the merits, the class may be able to prove through common evidence that the relevant geographic **[*195]** market is the Philadelphia DMA. This determination did not exceed the Court's permissible discretion. To the extent Comcast reads the Court's opinion as actually fixing the relevant geographic market, we note that its determination was made solely for the purposes of class certification and will not be binding on the merits. See *Hydrogen Peroxide, 552 F.3d at 318*.[8]

V.

Comcast hinges **[**33]** its next line of arguments on the District Court's final certification: "Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. 00032. According to Comcast, the District Court made clearly erroneous findings of fact by relying on Plaintiffs' expert, Dr. Williams, in support of the certified theory of antitrust impact.

The District Court considered in great detail the arguments presented by both sides. It rejected three of Plaintiffs' four theories of class-wide impact. *Behrend, 264 F.R.D. at 166* (rejecting theory of direct broadcast satellite ("DBS") foreclosure); *id. at 177-178* (rejecting benchmark theory); *id. at 181* (rejecting bargaining power theory). Nonetheless, it accepted that Plaintiffs could establish class-wide antitrust impact on the theory of clustering and its impact on overbuilder competition. After detailing the evidence put forth by both sides, *id. at 166-174*, the Court concluded that "the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition **[**34]** is capable of proof at trial through evidence that is common to the class," *id. at 174*. The Court found that through the model of Plaintiffs' expert, Dr. Williams, and the empirical studies conducted by governmental agencies and private researchers, the class had shown that the presence of an overbuilder constrains cable prices, and that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA. *Id. at 174*. It found unpersuasive the conclusions of Comcast's expert, Dr. David J. Teece, that overbuilding is not a successful business model. *Id. at 174-175*.

[*196] A.

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[8] The Concurring and Dissenting Opinion ("Concurrence-Dissent") faults the parties, the District Court and this Opinion for using "equivocally" the phrase "relevant geographic market." Slip Concurring-Dissenting Op. at 8. Specifically, it asserts that this Opinion "assumes . . . that the class is properly defined to cover the Philadelphia DMA . . . ." Id. at 10. The Concurrence-Dissent misunderstands an important distinction: as noted supra footnote 4, Plaintiffs have alleged a "class region" (to borrow from the Concurrence-Dissent's terminology) of a "Philadelphia cluster," which is distinct from the contested relevant geographic market of the "Philadelphia DMA." Our "assumption" concerning **[**32]** the "class region" is an uncontested piece of Plaintiffs' case: Comcast appeals only the precise issue of whether the District Court applied a correct legal standard in determining that the substantive antitrust geographic market could be established by evidence common to the class, not whether the "Philadelphia cluster" is an appropriate "class region." See Appellants' Br. at 15 (labeling the issue as: "The District Court Failed To Apply The Correct Legal Standard In Its Ruling On Plaintiffs' Geographic Market Definition"); id. at 20 (summarizing that "the alleged geographic market accepted by the district court is wholly divorced from the legal standard for determining the correct geographic market"). Accordingly, when the Concurrence-Dissent states, "A compelling argument could be made . . .," Slip Concurring-Dissenting Op. at 11 (emphasis added), it goes beyond our role as a reviewing court by raising and addressing an argument not before us. See, e.g., *AT & T v. F.C.C., 582 F.3d 490, 495 (3d Cir. 2009)* ("An appellant waives an argument in support of reversal if he does not raise that argument in his opening brief."), rev'd on other grounds, *131 S. Ct. 1177, 179 L. Ed. 2d 132 (2011)*.

On appeal, Comcast constructs a four-tiered argument to support its objections. First, it contends that Plaintiffs cannot show class-wide antitrust impact based on potential overbuilding by any of the "Transaction parties."[9] According to Comcast, the evidence demonstrated there was no actual competition between the Transaction parties; Plaintiffs therefore must show that the challenged conduct eliminated potential competition. In Comcast's view, the record evidence reflects that no Transaction parties had taken any affirmative steps to overbuild and, consequently, there was no potential competition **[**35]** to eliminate. Second, Comcast contends that Plaintiffs identified only RCN Telecom Services, Inc., as attempting to overbuild in the Philadelphia DMA. The evidence establishes, according to Comcast, that RCN was not going to overbuild as a result of its own financial woes, not as a result of any alleged activity on the part of Comcast. Third, as the argument goes, because there was no record evidence demonstrating actual or potential competition, the theoretical opinions indicating otherwise rendered by Plaintiffs' expert, Dr. Williams, were clearly erroneous. Comcast disputes at many levels Dr. Williams's methodology and results in his "market structure" and "market performance" opinions. Summed up, Comcast contends that theoretical expert opinions are no replacement for market facts, the record evidence showed no actual or potential overbuilding (as addressed in the first two contentions), and therefore any reliance on the expert opinions for evidence of anticompetitive behavior was clearly erroneous. Fourth, Comcast adds that any evidence of anticompetitive conduct specific to Delaware County could not serve as evidence of class-wide impact for the Philadelphia cluster.

B.

Plaintiffs respond to each level of Comcast's position. First, citing many portions of the record, they assert that there is "overwhelming" record evidence that Comcast's clustering of the Philadelphia DMA deterred and reduced overbuilding competition, resulting in antitrust impact (higher cable prices) for all class members. According to the class, the record demonstrates: clustering deters overbuilding, the swaps and acquisitions eliminated competition, Multi-System Operators ("MSOs") actually do overbuild one another, Comcast and other MSOs look to one another's prices to set their own, and the MSOs chose affirmatively not to compete. The class adds that Comcast is raising a merits argument by asking the Court to consider the "potential competition" doctrine. Second, Plaintiffs contend that Comcast raises a merits issue by asking the Court to examine whether Comcast's conduct in fact prevented RCN **[**37]** from overbuilding in more areas than it did. In any event, they state that the record evidence demonstrates RCN had the intent and capital to overbuild the Philadelphia market. Third, Plaintiffs state that Dr. Williams's theoretical model plainly shows common evidence of class-wide impact; Comcast's contention that Dr. Williams's opinions do not prove antitrust impact is one for the jury to decide on the merits. Fourth, the evidence related to Delaware County "adds to and illustrates" the common evidence of Comcast's anticompetitive clustering conduct.

[*197] VI.

We begin the analysis of these contentions by focusing on the precise inquiry:

> ***HN17***[] Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Hydrogen Peroxide, 552 F.3d at 311-312 (emphasis added). Many of Comcast's contentions ask us to reach into the record and determine whether Plaintiffs actually have **[**38]** proven antitrust impact. This we will not do. Instead, we inquire whether the District Court exceeded its discretion by finding that Plaintiffs had demonstrated by a preponderance of the evidence that they could prove antitrust impact through common evidence at trial.

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[9] As detailed **[**36]** supra note 2, the "Transaction parties" are the parties that Comcast acquired or with which it swapped cable systems, which include: Marcus Cable; Greater Philadelphia Cablevision, Inc.; Lenfest Communications, Inc.; AT&T; Adelphia Communications Corp.; Time Warner; and Patriot Media.

This dispute therefore is evidentiary. ***HN18***[] When facts are at issue, the District Court exceeds its discretion in certifying a class only if its findings are clearly erroneous. *Id. at 312*. Comcast bears a heavy burden in convincing us that the District Court's factual findings were clearly erroneous. See *Anderson, 470 U.S. at 573-574* ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it . . . ."); *Krasnov, 465 F.2d at 1302* ("It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.").

Comcast has not carried its burden. Plaintiffs provided evidence at the certification hearing that tended **[**39]** to show that Comcast's clustering (through swaps and acquisitions) reduced competition, deterred the entry of overbuilders, and resulted in higher cable prices for the entire class. This evidence displays "some hue of credibility" and bears a rational relationship to the Court's finding. See *Krasnov, 465 F.2d at 1302*.

For example, one of Plaintiffs' experts, Dr. Williams, concluded after a detailed analysis that, inter alia, Comcast's clustering increased its market share and, consequently, its market power, thereby raising barriers to entry for other multichannel video programming distributors and resulting in higher cable rates for all members of the class. App. 03599-3600; see also *Behrend, 264 F.R.D. at 166-171* (providing in great detail the analyses, evidentiary support, and conclusions of Dr. Williams). Dr. Williams also cited to Federal Communications Commission reports, Government Accountability Office reports, and academic research, all of which indicated that reducing competition by clustering leads to higher cable rates. App. 03663-3668. Another expert, Dr. Hal Singer, used extensive record evidence to analyze how Comcast's clustering denied overbuilders access to the Philadelphia **[**40]** DMA. App. 03501-3529. Dr. Singer concluded that Comcast's actions allowed it to foreclose competitors and elevate prices. App. 03450. He also referenced multiple studies—both governmental and private, some of which overlapped with those referenced by Dr. Williams—that concluded that cable prices are lower when overbuilder competition is present. App. 03537-3548. Also in the record are specific instances of Multi-System Operators attempting to overbuild one another around the country. See Appellees' Br. 27 n.17 (citing 13 distinct examples in the record of MSOs overbuilding one another).

[*198] All of this evidence demonstrates that Comcast's alleged clustering conduct indeed could have reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of its subscribers in the Philadelphia Designated Market Area. Based on this evidence, we determine that the antitrust impact Plaintiffs allege is "plausible in theory" and "susceptible to proof at trial through available evidence common to the class." *Hydrogen Peroxide, 552 F.3d at 325*; see also *In re Linerboard Antitrust Litig., 305 F.3d 145, 158 (3d Cir. 2002)* (holding that common issues predominated **[**41]** sufficient for class certification when plaintiffs allegedly "were all affected by the increased price" they paid for linerboard). We are satisfied that the District Court's findings were supported by the evidence and were not clearly erroneous.

Comcast protests that the record demonstrates that there was no actual or potential competition among the Transaction parties. In light of the above record evidence, however, Comcast's interpretation of the evidence does not render the District Court's findings clearly erroneous. Comcast remains free to make these arguments to the jury.

VII.

Comcast's other contentions are equally unpersuasive. There is conflicting evidence as to the role Comcast played in RCN Telecom Services, Inc.'s decision to not overbuild further in the Philadelphia DMA. Plaintiffs highlight record evidence that RCN had the intent and capital necessary to overbuild the Philadelphia market. Appellees' Br. 34-35. Comcast contends instead that RCN faced financial woes, as a result of which it abandoned its plans to overbuild. Appellants' Br. 24-28. The District Court credited Plaintiffs' explanation: "What Dr. Teece considers 'unlikely,' Dr. Singer considers to be the common **[**42]** evidence of antitrust impact, namely that RCN was stymied in its efforts by Comcast's predatory behavior." *Behrend, 264 F.R.D. at 175*. Again, we are satisfied that the District Court's finding was not clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson, 470 U.S. at 574*. Here there are two permissible views of the evidence and we will not disturb the District Court's finding.

Similarly, Comcast contends that Dr. Williams's analysis and methodology was flawed for various reasons, including the allegation that it was unsupported by any actual evidence. We disagree. As detailed above, there was ample evidence that clustering conduct can deter entry of overbuilders and result in higher cable prices. Dr. Williams and Dr. Singer examined evidence specific to Comcast's activities in the Philadelphia market, as well as numerous independent studies on the effects of cable clustering, to reach their conclusions. Comcast cites various cases for the proposition that ***HN19***[] "expert theory is not a substitute for market facts." See, e.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* **[**43]** (expert opinion rendered unreasonable by indisputable record facts); *In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 27 (1st Cir. 2008)* (expert analysis unfinished and "purely conclusory"); *In re Baby Food Antitrust Litig., 166 F.3d 112, 135 (3d Cir. 1999)* ("An expert opinion based on . . . meager superficial information . . . is highly speculative, unreliable, and of dubious admissibility."). Although expressing a correct legal precept, those cases addressed situations in which the experts largely failed to tie their theories to any evidence; the precept therefore does not apply to this case in **[*199]** which the experts' theories were based on and correlated to other record evidence.

Comcast also asserts that every individual had one or two options from which to choose cable and that consequently only the name of the provider changed, not the number of options. This assertion completely overlooks the nature of the claims of the class: by clustering, Comcast was able to deter the entry of overbuilders, which resulted in higher prices for all non-basic Comcast subscribers. And Plaintiffs provided evidence that clustering can have this effect. In short, the District Court's **[**44]** task was to weigh expert testimony and make a determination, *Hydrogen Peroxide, 552 F.3d at 323*, and we discern no error in the Court's determination that Dr. Williams's analysis demonstrated that class-wide antitrust impact was susceptible to common proof.

As to Comcast's remaining contention that the District Court erred by crediting as evidence of class-wide impact the alleged conduct targeted at RCN Telecom Services, Inc., in Delaware County, we agree with the class that the alleged conduct is relevant to establishing class-wide impact. We have explained that ***HN20***[] "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003)* (en banc) (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962))*. Alleged specific conduct aimed at preventing the entry of an overbuilder anywhere in the Philadelphia DMA supports Plaintiffs' allegations of Comcast's ability to maintain supra-competitive prices for the entire market.

VIII.

At bottom, Comcast misconstrues our role at this stage of the litigation. Comcast would have us decide on the merits whether there was actual or potential **[**45]** competition among the Transaction parties, the reason RCN Telecom Services, Inc., abandoned the Philadelphia market, and whether Plaintiffs' experts proved antitrust impact. We are not the jury. Although in Hydrogen Peroxide we heightened the inquiry a district court must perform on the issue of class certification, nothing in that opinion indicated that class certification hearings were to become actual trials in which factual disputes are to be resolved. Indeed, as we explained in Hydrogen Peroxide, ***HN21***[] a district court may inquire into the merits only insofar as it is "necessary" to determine whether a class certification requirement is met. *552 F.3d at 316*. Eisen still precludes any further inquiry. See *Eisen, 417 U.S. at 178* ("[T]he question is not whether the plaintiff or plaintiffs . . . will prevail on the merits, but rather whether the requirements of *Rule 23* are met." (quoting Judge Wisdom's holding in *Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 (5th Cir. 1971))*); *Hydrogen Peroxide, 552 F.3d at 317* ("Eisen is best understood to preclude only a merits inquiry that is not necessary to determine a *Rule 23* requirement."). We allow preliminary merits inquiries when necessary for **[**46]** *Rule 23* because of the potentially "decisive effect on litigation" of a certification decision, *Newton, 259 F.3d at 167*, but those inquiries remain limited and non-binding on the merits at trial, *Hydrogen Peroxide, 552 F.3d at 318*. Nothing in Hydrogen Peroxide requires plaintiffs to prove their case at the class certification stage; to the contrary, they must establish by a preponderance that their case is one that meets each requirement of *Rule 23*. To require more contravenes Eisen and runs dangerously close to stepping on the toes of the *Seventh Amendment* **[*200]** by preempting the jury's factual findings with our own.[10]

In sum, we hold that the District Court's determination—that Plaintiffs have demonstrated by a preponderance of the evidence that they can establish class-wide antitrust impact through common evidence—did not exceed its discretion.

IX.

To satisfy another portion of the predominance requirement, Plaintiffs must establish that the alleged **[**48]** damages are capable of measurement on a class-wide basis using common proof. See *Hydrogen Peroxide, 552 F.3d at 311, 325-326*; cf. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187 (3d Cir. 2001)* (stating that the "Herculean task" of calculating individual damages from hundreds of millions of different transactions "counsels against finding predominance"). The District Court concluded that Plaintiffs, through their expert Dr. McClave, provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis. *264 F.R.D. at 191*. Comcast assails that determination as an abuse of discretion.

A.

The District Court examined the methodology, conclusions, and criticisms of the experts on both sides, before providing its conclusions. *264 F.R.D. at 181-191*. (Comcast does not contest that the Court performed the "rigorous analysis" required by Hydrogen Peroxide.) Because on appeal Comcast renews the arguments it made to the District Court, we set forth each side's position in the District Court and the Court's response.

Plaintiffs' damages expert, Dr. McClave, concluded that the prices in the Philadelphia market were consistently **[**49]** and substantially higher than the prices in areas of effective competition. *264 F.R.D. at 181*. His econometric analysis demonstrated that the alleged antitrust impact was class-wide, because the prices were elevated above competitive levels across all class members and for the entire time period. Id. For his methods, Dr. McClave constructed "but-for" prices against which to compare the prices Comcast charged in the Philadelphia DMA. "But-for" prices are those that would have existed absent the alleged anticompetitive conduct. To construct the "but-for" prices, he first selected comparable "benchmark" counties around the country by applying two "screens" to determine whether the counties **[*201]** represented a level of competition similar to what Comcast would have faced in the Philadelphia market absent its alleged anticompetitive conduct. It is important to understand these two screens. The first screen—the "market share screen" or "40% screen"—required that the county have a Comcast subscriber penetration rate of less than 40%. App. 03410. Dr. McClave chose 40% because it represented the approximate midpoint of Comcast's penetration rate in the Philadelphia DMA (between approximately 20% **[**50]** in 1998 and 60% from 2003 through 2008). He chose this number also because it allowed for growth during the class period but focused on markets where Comcast was likely to have less market power than it does in the Philadelphia market. Id. The second screen—the "Direct Broadcast Satellite screen", or "DBS screen"—required that the county be in a Designated Market Area where the penetration level for Alternative Delivery Systems (which essentially

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[10] Indeed, recent scholarship uniformly has expressed concern over the trend towards converting certification decisions into mini trials. See Joshua P. Davis & Eric L. Cramer, Antitrust, Class Certification, and the Politics of Procedure, *17 Geo. Mason L. Rev. 969, 970 (2010)* (contending that the "judicial tendency to impose requirements at class certification" serves no legitimate purpose and risks violating the *Seventh Amendment*); Michael J. Kaufman & John M. Wunderlich, The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions, *43 U. Mich. J.L. Reform 323, 323 (2010)* **[**47]** (stating that judicial resolution of merits at the certification stage precludes victims from obtaining redress, infringes on the *Seventh Amendment*, and serves no legitimate policy concerns); Steig D. Olson, "Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus, *43 U.S.F. L. Rev. 935, 940 (2009)* (intensifying the *Rule 23* analysis is inconsistent with the Rule itself and highly inefficient); J. Douglas Richards & Benjamin D. Brown, Predominance of Common Questions ? Common Mistakes in Applying the Class Action Standard, *41 Rutgers L.J. 163, 169 (2009)* (contending, inter alia, that requiring the district court to determine by a preponderance whether plaintiffs' proposed proof is actually correct or incorrect would "substitute a court's own evaluation of key merits questions for that of the jury").

includes DBS, but also master antenna systems and multipoint distribution systems) was at or higher than the national average of Alternative Delivery Systems penetration rates in Comcast markets.[11] Using data from the counties that fit the two screens, Dr. McClave performed a multiple regression analysis to compare actual prices in the Philadelphia DMA to the estimated "but-for" prices. He then applied the overcharge percentage to the relevant revenue obtained by Comcast for expanded basic service in the Philadelphia market during the class period to reach a final conservative estimated overcharge value: $875,576,662.

Comcast's experts, Dr. Teece and Dr. Tasneem Chipty, contested several parts of Dr. McClave's methodology, and questioned his results. *264 F.R.D. at 183*. First, they challenged both benchmark screens used by Dr. McClave. Regarding the "DBS screen," Dr. Teece asserted that Dr. McClave erroneously chose the higher national Direct Broadcast Satellite penetration rate, instead of the lower regional rate predicted by Plaintiffs' experts Dr. Singer and Dr. Williams. The District Court rejected the critique, stating that Dr. McClave "used his national average DBS penetration screen as a descriptor of typical competitive market conditions," and was not attempting to predict the Direct Broadcast Satellite penetration rate of the Philadelphia DMA. *Id. at 184*. **[**52]** Regarding the "market share screen," Dr. Chipty contended that because Comcast was present in only a few counties in 1999, its actual market share was much higher in the counties where it was and 0% where it was not; as a result, the less-than-40% penetration rate provided an inappropriate screen. App. 03833. The District Court rejected the criticism as unsupported by the record, stating that Dr. Chipty should have presented evidentiary data to show that 40% was an incorrect midpoint estimate or average rate. *264 F.R.D. at 184*. The Court also noted that the 40% screen was supported by the evidence as Comcast's approximate share of the Philadelphia DMA at the midpoint of the class period. *Id. at 184 n.43*.

Second, Dr. Chipty faulted Dr. McClave's model for failing to consider properly demographic variables among the **[*202]** counties: specifically, for omitting the variables of population density and the number and type of households. The District Court credited as well-supported Dr. McClave's response as to why he omitted population density: it is correlated with medium household income (which he included) and using it as well as household income would create confounding and unreliable results. **[**53]** *264 F.R.D. at 185-186*. Additionally, according to Dr. McClave, adding it would mask the effects of anticompetitive influences because higher population density results in lower costs per subscriber. *Id. at 185*. The Court noted that Dr. Chipty's use of population density as a variable resulted in it being positive and statistically significant in one model but negative and statistically significant in another. *Id. at 186*. Moreover, the Court added that Federal Communications Commission and Government Accountability Office studies included population density but found it was not a statistically significant variable. Id.

Third, Dr. Chipty criticized Dr. McClave's model for comparing list prices for expanded basic cable in the Philadelphia DMA against the benchmark counties. She opined that Dr. McClave's model did not take into account the significant number of promotions and discounts offered to Comcast customers. *Id. at 187*. Dr. Chipty offered several rebuttal models that included population density and discounted prices, which resulted in significantly lower or even negative damages. The Court rejected Dr. Chipty's models as "suffer[ing] significant flaws." *Id. at 188, 189*. It stated **[**54]** that Dr. McClave's model accounted for discount prices in the formula (not model) when he multiplied anticompetitive overcharge by Comcast's relevant revenues (because Comcast receives revenue only for prices charged, the revenue side of the formula by definition includes discount prices). Accordingly, by adding discount prices to the model as well, Dr. Chipty's model doubly counted the discount. The Court also noted that, as Dr. McClave explained, more than 80% of Comcast's customers pay list price for expanded basic cable, and discounts from list prices are temporary (after which they return to list price). As to another of Dr. Chipty's models, which calculated damages through direct calculations instead of multiple regression, the Court rejected it in the words of Dr. McClave as a "novel and non-standard formula for calculating damages." *Id. at 189*.

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[11] Dr. McClave used Alternative Delivery Systems penetration rates as a proxy to measure Direct Broadcast Satellite penetration **[**51]** rates. App. 03410 n.11. Comcast's expert, Dr. Chipty, referred to the screen as the "DBS screen," and as measuring DBS penetration rates. App. 03834. The parties and District Court have continued using the DBS terminology. Although the screen technically measured Alternative Delivery Systems penetration rates, we will use the parties' terminology and refer to it as the "DBS screen" and as measuring Direct Broadcast Satellite penetration rates.

Fourth, the District Court rejected Dr. Chipty's attempt to impeach Dr. McClave's model by using it to calculate damages for basic cable prices, instead of expanded basic cable. *Id. at 190*. The Court explained that Dr. McClave's model aimed to analyze only expanded basic cable, because Comcast alters its prices at the expanded level, **[**55]** so "any application of the McClave model to [basic cable prices] explains nothing." Id. Comcast does not contest that ruling.

Fifth and finally, the Court asked the parties after the hearing how to interpret Dr. McClave's damages model if it credited at least one, but not all, of Dr. Williams's four theories of antitrust impact. Id. It determined that Dr. McClave's damages model was still viable, even if it rejected some theories of antitrust impact, explaining that Dr. McClave selected benchmarks to isolate the effect of anticompetitive conduct, and that his use of the DBS screen was "entirely unrelated" to Dr. Williams's DBS foreclosure theory. Id. The Court concluded that Dr. Williams's theories of antitrust impact were not relevant to Dr. McClave's methods of choosing benchmarks because "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties." *Id. at 191*.

[*203] B.

Comcast contends that the District Court exceeded its discretion in accepting Plaintiffs' proposed damages calculation methodology. Its arguments are recast versions of those rejected by the District Court. First, Comcast contends that Dr. McClave's damages theory **[**56]** was based on all of Plaintiffs' alleged anticompetitive effects, but the District Court rejected three of Plaintiffs' four theories. Because Dr. McClave stated that his model was based on the cumulative effect and could not isolate damages for individual theories of harm, according to Comcast the District Court erred in accepting the damages model. Second, Comcast asserts that the economic assumptions underlying the damages model lack foundation in the record evidence. According to Comcast, both screens employed by Dr. McClave are factually unsupported and economically unsound: the "DBS penetration screen" because the Court rejected Dr. Williams's Direct Broadcast Satellite foreclosure theory, and the "market share screen" because it bears no relation to the conditions that would have existed in the Philadelphia region but for the complained-of conduct. Third, Comcast contends that the damages model is flawed because it fails to include population density as a variable, and because it calculates damages based on list prices, which fails to consider the discounted prices that some subscribers actually pay.[12]

Plaintiffs remind us that the District Court already thoroughly considered and rebutted each of the points that Comcast now raises. As to the specific contentions, first, the class asserts that the District Court explicitly held that Dr. McClave's model was suitable for calculation of damages on all or individual theories of liability. Second, the class emphasizes that the damages model provides a methodology that can establish damages on a class-wide basis using common proof, and that Comcast ignores the proper inquiry at class certification and instead prematurely attacks the merits of the model. As a result, Comcast's arguments concerning the benchmarks miss the point. Third, the class asserts that Dr. McClave had ample justification to omit population density as a variable, and that the damages model **[**58]** incorporates discount prices.

X.

We pause to identify the forest for the trees. ***HN22***[] If allowed to proceed to trial, the class must establish that the injury it suffered from the violation of the antitrust laws is measurable. See *Hydrogen Peroxide, 552 F.3d at 311*; see also *Newton, 259 F.3d at 188* ("Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)."). The usual measure in an overcharge case "is the difference between the illegal price that was actually charged and the price that would have

[12] Following the Supreme Court's decision in Wal-Mart, Comcast added that Dr. **[**57]** McClave's damages model, like the expert model in Wal-Mart, could be "safely disregard[ed]." See *Wal-Mart, 131 S. Ct. at 2554*. We disagree. The factual and legal underpinnings of Wal-Mart—which involved a massive discrimination class action and different sections of *Rule 23*—are clearly distinct from those of this case. Wal-Mart therefore neither guides nor governs the dispute before us.

been charged 'but for' the violation multiplied by the number of units purchased." Areeda et al., supra, ¶ 392a. Given the inherent difficulty of identifying a "but-for world," we do not require that damages be measured with certainty, but rather that they be demonstrated as "a matter of just and reasonable inference." *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, **[*204]** 51 S. Ct. 248, 75 L. Ed. 544 (1931)* ("[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference . . . ."); see also **[**59]** *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1273 (3d Cir. 1995)* (citing Story Parchment and explaining that "damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts").

HN23[] The inquiry for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. See *Hydrogen Peroxide, 552 F.3d at 325*. Some variation of damages among class members does not defeat certification. See 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1781 (3d ed. 2005) (stating for antitrust class certification that "it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate."). Complex and individual questions of damages, however, weigh against finding predominance. Compare *Newton, 259 F.3d at 187* (reasoning that having to examine proof of the circumstances of hundreds of millions of individual transactions counseled against finding predominance), with *Linerboard, 305 F.3d at 157-158* **[**60]** (determining that, in contrast to Newton, all purchasers were affected by the increased price). As the Court of Appeals for the First Circuit explained:

> It is true that the validity of plaintiffs' theory is a common disputed issue. It will be for the fact finder to decide whether this theory is persuasive. At the class certification stage, however, the district court must still ensure that the plaintiffs' presentation of their case will be through means amenable to the class action mechanism. We are looking here not for hard factual proof, but for a more thorough explanation of how the pivotal evidence behind plaintiff's theory can be established. If there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win.

In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 29 (1st Cir. 2008) (citation omitted); see also Areeda et al., supra, ¶ 331 (explaining for the issue of damages that "courts will not permit class actions unless they can devise a practical means for their litigation").[13]

[*205] On appeal, the inquiry narrows. Because the District Court held that Plaintiffs had established they could measure damages through common proof, we examine whether that determination was beyond the Court's discretion. Having identified the forest of law, we proceed to scrutinize the timber that Comcast faults as rotted.

A.

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[13] In response to the Concurrence-Dissent's position that *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, applies at **[**61]** the stage of class certification, see Slip Concurrence-Dissent Op. at 16, we make two observations. First, as the Opinion acknowledges, "in neither the District Court nor before us" did Comcast raise this issue, *id. at 17 n.18*, and it is therefore not properly before us. Second, although the Supreme Court recently hinted that Daubert may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial. *Wal-Mart, 131 S. Ct. at 2553-54*. We understand the Court's observation to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage. This is consistent with our jurisprudence which requires that at class certification stage, we evaluate expert models to determine whether the theory of proof is plausible. *Hydrogen Peroxide, 552 F.3d at 324*. "[I]f such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering **[**62]** all relevant evidence." *Id. at 325*. When plaintiffs present multiple models created by expert witnesses that can show common evidence and those models are based on data, a district court does not have to determine which model should be used at the time of class certification. *Linerboard, 305 F.3d at 155*. Here, the District Court likely determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with Daubert.

Comcast contends that Dr. McClave's model cannot isolate damages for individual theories of harm, and that it therefore cannot distinguish between lawful and unlawful competition. Comcast cites *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975)*, and *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000)*. In both cases, following adverse jury verdicts, **[**63]** the courts held that the experts' theories of damages were "speculation"—not "just and reasonable inferences"—because the models did not distinguish between the effects of lawful and unlawful competition. In Coleman, we quoted the guidepost of Story Parchment: ***HN24***[] "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Coleman, 525 F.2d at 1353* (quoting *Story Parchment, 282 U.S. at 562*).

We are not persuaded by Comcast's argument. To measure damages, Dr. McClave used screens to select and average benchmark counties against which to compare the actual Philadelphia market. The screens themselves were not intended to calculate damages, but instead to construct an estimated competitive "but-for" Philadelphia market (a market absent the alleged anticompetitive conduct). For example, although the screens incorporated Direct Broadcast Satellite penetration rates, those rates were included to estimate typical competitive market conditions, not to calculate liability for the foreclosure of DBS competitors.[14] The model **[**64]** then calculates damages by comparing actual prices to the constructed "but-for" market. Differences between actual prices and "but-for" prices reflect anticompetitive impact. In other words, the model calculates supra-competitive prices regardless of the type of anticompetitive conduct. Further, the model uses standard econometric methodology to calculate damages. See generally Areeda et al., supra, ¶ 394 (detailing the basic steps in calculating antitrust damages). Indeed, as Dr. McClave highlighted, Comcast's expert Dr. Chipty employed the same methodological approach—identify a suitable benchmark and employ multiple regression analysis to control for differences—to estimate damages on a class-wide basis. App. 04041 ("Dr. Chipty and I agree that the application of multiple regression analysis to compare Philadelphia to a suitable benchmark is an appropriate methodology that can be applied on a classwide basis to quantify the amount of economic damages in this case.").

As a result, if the class proves at trial that Comcast engaged in anticompetitive **[*206]** behavior, it can use the constructed "but-for" market to measure the anticompetitive impact on the class members. ***HN25***[] At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations. Cf. *Newton, 259 F.3d at 187*. We are satisfied that Plaintiffs' damages model meets this burden.[15]

Additionally, the cases that Comcast offers are distinguishable on multiple grounds. Most to the point, those cases considered the merits of experts' theories following adverse jury verdicts; here, we address only whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis. We have not reached the stage

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[14] The Concurrence-Dissent misreads this observation as addressing the on-the-merits validity of the DBS screen. Slip Concurring-Dissenting Op. at 25-27. We address Comcast's contention regarding the merits of the DBS **[**65]** screen, however, infra Part X. This observation indicates simply that the exclusion of the DBS foreclosure theory of liability does not render Dr. McClave's damages methodology incapable of calculating damages on a class-wide basis if the class can prove that Comcast engaged in anticompetitive behavior.

[15] The Concurrence-Dissent states that Dr. McClave's damages theory can establish damages only in the five counties where RCN attempted to overbuild. This concern misses the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly **[**66]** maintained higher prices across the entire market area. Dr. McClave's damages model appropriately reflected a "but-for" world by accounting for overbuilding only in the five counties where RCN attempted to overbuild, and his resulting calculations showed that—taking the limited actual overbuilding into account—"the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination." App. 03412. Additionally, the Concurrence-Dissent apparently takes up the mantle of an additional Comcast expert and raises multiple arguments against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal. We must limit our review to the issues presented by Appellants and Appellees. We are not permitted to embark on an intellectual adventure of our own.

of determining **[**67]** on the merits whether the methodology is a just and reasonable inference or speculative. And, to the extent Comcast worries about distinguishing between lawful and unlawful conduct, Dr. McClave's damages methodology does not suffer from the defects present in those cases because it constructs a competitive "but-for" world that includes lawful competition, not a hypothetical one bereft of both lawful and unlawful competition. See *Concord, 207 F.3d at 1056-1057* (model was "mere speculation" because it ignored inconvenient evidence, failed to account for external market events, and did not incorporate economic reality of market); *Coleman, 525 F.2d at 1352-1353* (model premised on hypothetical world without even lawful competition).[16]

B.

Comcast's remaining arguments contest specific parts of Dr. McClave's damages methodology. These contentions are a renewal of those it made to the District Court, each of which the Court rejected. For those determinations to be beyond the Court's discretion, Comcast must convince us that the Court's acceptance of the pieces of Dr. McClave's methodology was clearly erroneous.

At the outset, we agree with the class that the heart of Comcast's arguments are **[*207]** attacks on the merits of the methodology that have no place in the class certification inquiry. Even if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology—i.e., modify both of Dr. McClave's screens,[17] add population density as a variable, and incorporate Dr. Chipty's proposed method for calculating discounts—only the final amount of estimated damages would change. See App. 03082 (Hr'g Ex.) (chart demonstrating differing damages amounts based on different model specifications, including Dr. Chipty's **[**69]** suggested specifications); App. 04557 (Dr. McClave Supplemental Decl.) (damages remain class-wide and substantial even using Dr. Chipty's proposed methodology, after correcting for two obvious errors). Comcast's assertions do not impeach the District Court's ultimate holding that damages are capable of common proof on a class-wide basis. See *Behrend, 264 F.R.D. at 191*; see also *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 535 (6th Cir. 2008)* ("Indeed, we have never required a precise mathematical calculation of damages before deeming a class worthy of certification."). All of the cases Comcast proffers examine damages models on their merits following adverse jury verdicts. For reasons explained above, these cases do not address the question at the class certification stage. Because Comcast's contentions do not cast doubt on the District Court's holding that Plaintiffs will be able to measure class-wide damages through a common methodology, we decline to consider them further. See *Hydrogen Peroxide, 552 F.3d at 317* (describing the Supreme Court's rule prohibiting consideration of the merits if not "necessary" for purposes of *Rule 23*) (citing *Eisen, 417 U.S. at 177*).

Plaintiffs have provided a common methodology to measure and quantify damages on a class-wide basis. The District Court acted within its discretion in so finding.[18]

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[16] Comcast adds that because overbuilding occurs at the franchise level, Dr. McClave's county-to-county metric cannot calculate damages if the jury finds that only some (if any) franchises were impacted. First, Dr. McClave indicated that franchises within counties often have identical or nearly identical pricing, which assuages Comcast's concern. See App. 03409. Second, Comcast is attempting again to redefine the relevant market: inasmuch as Plaintiffs have **[**68]** established that the relevant geographic market can be the Philadelphia DMA, see supra Part IV.A, their damages model passes muster at this stage of the proceedings.

[17] The Concurrence-Dissent—unlike **[**70]** Comcast's experts, Comcast's lawyers and the District Court—identifies a "third screen." Slip Concurring-Dissenting Op. at 22. Again, this "screen" was not raised by the parties before us and we do not address it (we doubt additionally that it is a screen: the two screens were used to select benchmark counties, whereas the presence of overbuilders was an identification attached to the already-selected benchmark counties for purposes of performing a multiple regression analysis, see App. 03412, 03421 (Corrected McClave Decl.)).

[18] The Concurrence-Dissent expresses its additional concern over using mathematical averages across the Philadelphia DMA, given the potential variation among the franchise areas. Once again, this concern is notably absent from Comcast's briefing (except as already addressed above regarding the screens and demographic variables). Nor does the Concurrence-Dissent grapple with the abuse-of-discretion standard of review we must apply to the District Court's acceptance of Dr. McClave's damages model. We also **[**71]** note in passing that the Concurrence-Dissent overstates the degree of dissimilarity among the franchise areas. It recognizes that Dr. McClave's model examines actual prices on a county-by-county level, see Slip

[*208] XI.

The District Court certified the class for resolution of four claims. Comcast contends that the District Court erred by certifying the following claim:

> Whether Defendants conspired with competitors, and whether Defendants entered into and implemented agreements with competitors, to allocate **[**73]** markets, territories, and customers for cable television services; and whether such conduct is a per se violation, or whether it constitutes a restraint of trade in violation of *Section 1 of the Sherman Act*, *15 U.S.C. § 1*.

App. 00031 (emphasis added). According to Comcast, the District Court lacked any legal authority to certify a per se claim based on the class's allegations.

This is a merits issue beyond the scope of our *Rule 23(f)* jurisdiction. Comcast misconstrues the District Court's certification order. The Court certified the class and stated that one of the questions to be litigated is whether there has been a per se violation. It did not declare that a per se violation had occurred. ***HN26***[] Appeals taken pursuant to *Rule 23(f)* do not furnish the proper vehicle to address the merits of Plaintiffs' antitrust claims. See *McKowan Lowe & Co. v. Jasmine, Ltd., 295 F.3d 380, 390 (3d Cir. 2002)* (describing the "scrupulous" limits of *Rule 23(f)* jurisdiction). Comcast appeals from the District Court's determination that questions of law or fact common to class members predominate, which was the only issue before the District Court. See App. 00029 (District Ct. Certification Order) ("The only **[**74]** class certification element that remained in dispute was the requirement of *Fed. R. Civ. P. 23(b)(2)* that common issues of law and fact predominate."). Comcast itself stipulated as much. See App. 00436 (Comcast Letter to the District Ct., Mar. 25, 2009) ("With respect to the issues to be addressed in a new class certification motion, Comcast is prepared to stipulate that the only issues to be resolved are those of antitrust impact and methodology of damages . . . ."). Comcast's request to have us declare on the merits that Plaintiffs cannot establish a per se antitrust violation is beyond the scope of the certification decision from which Comcast appeals pursuant to *Rule 23(f)*. Accordingly, we do not reach this contention.

* * * *

We have considered carefully all the contentions presented by the parties. Plaintiffs have demonstrated that this case can proceed as a class action. Comcast has not carried its burden to convince us otherwise. Accordingly, we will AFFIRM in all respects the District Court's Order certifying the class.

Concur by: JORDAN (In Part)

Dissent by: JORDAN (In Part)

Concurring-Dissenting Op. at 39-40 n.36, but fails to note, as Dr. McClave explained: "Many franchises within counties often have identical or nearly identical pricing. More price variability, and thus from an econometric perspective more information about prices and their determinants, is obtained by aggregating prices at the county level." App. 03409 (Corrected McClave Decl.). Not even Comcast's expert contested this reasoning. See App. 03831 (Chipty Decl.); App. 03954 (Chipty Rebuttal Report). Finally, to the extent the Concurrence-Dissent questions the appropriateness of using county-level statistics to measure damages across the entire Philadelphia DMA, we observe that this question was contested strenuously and repeatedly by the experts on both sides at the District Court level. See App. 03410 (Corrected McClave Decl.) (explaining choice of market share screen); App. 03833 (Chipty Decl.) (contesting market share screen); App. 04066 (McClave Rebuttal Decl.) (defending market **[**72]** share screen); App. 03961 (Chipty Rebuttal Report) (disputing screen again); App. 04262 (McClave Reply Decl.) (responding to Dr. Chipty's criticisms of screen). After reviewing the reports and hearing careful examination of the experts on this point, the District Court found that Dr. McClave's 40% county-level market-share screen was "supported by the evidence" and that Dr. Chipty's rebuttal was not supported by appropriate data. *264 F.R.D. at 184*. Through a clearly erroneous lens, we may not reverse a District Court's factual finding if we would weigh the evidence differently; instead, the Court's finding must be implausible in light of the record, *Anderson, 470 U.S. at 573-574*, or completely devoid of minimum evidentiary support displaying some hue of credibility, *Krasnov, 465 F.2d at 1302*. The Concurrence-Dissent breezes past this formidable standard of review to reach its own factual finding.

Dissent

JORDAN, Circuit Judge, concurring in the judgment part and dissenting in part

I agree with the Majority's conclusion, though not **[**75]** its reasoning, with respect to the question of antitrust impact, and I therefore join in holding that the District **[*209]** Court did not abuse its discretion when it determined that Plaintiffs could establish antitrust impact through evidence common to a class comprising Comcast cable television customers in the Philadelphia DMA.[1] But because I conclude that damages cannot be proven using evidence common to that entire class, I would vacate the certification order to the extent it provides for a single class as to proof of damages, and I would remand the case to the District Court to consider whether the class can be divided into subclasses for the purpose of proving damages. I therefore respectfully dissent in part.[2]

As the Majority explains, Plaintiffs' claims have three elements, (1) an antitrust violation, (2) antitrust impact, and (3) damages (*see* Slip Op. at 17 (citing *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008))*.[3] In pursuing its motion to decertify the initial class, however, Comcast effectively conceded that there was predominance with respect to the element of an antitrust violation, stipulating that it was contesting only "the *Rule 23(b)* issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages." (App. at 438.) When the District Court granted Comcast's **[**77]** motion,[4] it accepted that stipulation and instructed the parties that, moving forward, they "need only address these discrete issues." (*Id*.) On appeal, after the District Court once more certified a class, Comcast has again limited its arguments to addressing predominance as to impact and damages. We are therefore faced with two related questions: First, whether the District Court abused its discretion by holding that, as required by *Federal Rule of Civil Procedure 23(b)(3)*, common issues of law or fact predominate with respect to the question of antitrust impact, and, second, whether the District Court abused its discretion by likewise holding that common issues of law or fact predominate with respect to the question of damages.[5]

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[1] I adopt the defined terms, such as "DMA," as used in the Majority opinion.

[2] Although the Majority opinion decides the question of certification for a single class comprising Comcast customers in the Philadelphia DMA, it should be noted that its decision will become a template for resolving similar class certification questions pending in cases involving the Chicago and Boston media markets (*see* Slip Op. at 10 & n.5), and in all likelihood it will be cited in other lawsuits against **[**76]** cable television service providers (*cf*. App. at 3652 (Williams Dec.) (explaining that, as part of Comcast's swaps and acquisitions, "Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California")). Thus, the problems in the Majority's reasoning will have practical repercussions far beyond this case. I therefore write not only because I cannot join the Majority in permitting Plaintiffs to pursue damages on a class-wide basis, but also to provide a counterpoint to the Majority's analysis for future consideration.

[3] Plaintiffs make separate claims for violation of both *§ 1* and *§ 2 of the Sherman Act*, but each of those claims contains the three elements described above, with only the nature of the particular antitrust violation differing. *Compare Hydrogen Peroxide, 552 F.3d at 311* (listing the elements of a *§ 1* claim as "(1) a violation of the antitrust laws — here, *§ 1* of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages"), **[**78]** *with Am. Bearing Co. v. Litton Indus., 729 F.2d 943, 948 (3d Cir. 1984)* (listing the elements of a *§ 2* claim as "(1) an antitrust violation, in this case a violation of *section 2 of the Sherman Act*; (2) fact of damage or injury; and (3) measurable damages").

[4] Because Comcast had moved to decertify the class entirely before stipulating to all issues other than the predominance questions described above, the District Court, which construed the motion to decertify as a motion for reconsideration, granted the motion only with respect to those predominance issues and denied it with respect to all other issues. (App. at 437.)

[5] While not expressed, the requirement that there must be predominance with respect to both antitrust impact and damages appears to be accepted by the parties and the Majority, and I likewise accept that predominance is issue specific. *See, e.g., Hydrogen Peroxide, 552 F.3d 305 at 311* ("We examine the elements of plaintiffs' claim through the prism of *Rule 23*," to determine whether "proof of the essential elements of the cause of action requires individual treatment." (internal quotation marks omitted)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001)* **[**79]** ("To determine whether the claims alleged by the putative class meet the requirements for class certification, we must first examine the

[*210] The Majority opinion skillfully **[**80]** lays out the legal requirements for predominance and the standard under which we must review the District Court's decision, and there is no need to repeat that legal background. I emphasize, however, the instruction from *Hydrogen Peroxide* that the question of predominance hinges on whether the elements of a class claim are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *552 F.3d at 311-12*. With that requirement in mind, I address the contested elements in turn.

I. Whether Antitrust Impact Can Be Proven Using Evidence Common To The Class

In seeking class certification, Plaintiffs initially presented four theories of antitrust impact.[6] The District Court rejected three of them,[7] leaving Plaintiffs with only a single theory of antitrust impact: that Comcast's clustering reduced overbuilding[8] and, therefore, increased prices. **[*211]** Like the Majority, I see no abuse of discretion in the District Court's holding that antitrust impact may be proven using evidence that clustering reduced overbuilding and so caused increased prices. Thus, I agree with my colleagues in the Majority that the element of antitrust impact is at least capable **[**81]** of proof on behalf of some class of consumers. The more complicated question, as I see it, is whether antitrust impact is capable of proof for a class encompassing all Comcast customers in the Philadelphia DMA, through the use of common evidence.[9] On that issue too I agree with the Majority's holding that the District Court was within its discretion to conclude that the Philadelphia DMA is the appropriate geographic region within which antitrust impact can be proven with common evidence. I do not agree, however, with the Majority's reasoning in support of that conclusion.

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underlying cause of action ... . If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.") Of course, where only some elements of a claim require individual treatment, while others can be litigated collectively, it may be appropriate to certify a class for those elements that can be treated collectively, while certifying subclasses or requiring individual treatment for those that cannot. *See, e.g.*, *Fed. R. Civ. P. 23(b)(4)*, advisory committee's notes (explaining that application of *Rule 23(c)(4)*'s provision allowing "that an action may be maintained as a class action as to particular issues only" may be appropriate where, for instance, liability can be proven class wide, but damages cannot); *In re Nassau Cnty. Strip Search Cases, 461 F.3d 219, 231 (2d Cir. 2006)* (remanding to district court with instructions to certify a class for liability and to consider whether to also certify for damages or to, alternatively, certify subclasses for damages).

[6] Those theories were: (1) that Comcast's high market share resulting from clustering made it profitable for Comcast to deny Comcast SportsNet to DBS providers, which lowered DBS penetration rates and allowed Comcast to raise prices; (2) that Comcast's clustering reduced "benchmark competition" (the ability of customers to compare service and prices among competing providers), which allowed Comcast to raise prices; (3) that Comcast's market power increased its bargaining power vis-à-vis content providers, which allowed it to raise prices for its services; and (4) that Comcast's clustering deterred competition from overbuilders, **[**82]** allowing Comcast to raise prices.

[7] The District Court rejected the theory that clustering reduced DBS penetration because it found that Comcast's denial of Comcast SportsNet to DBS providers predated and was unrelated to clustering. It rejected the theory that clustering reduced benchmark competition because Plaintiffs had provided no evidence that television consumers actually engaged in benchmark competition. It rejected as "wholly unsupported" the theory that increased bargaining power vis-à-vis content providers increased prices.

[8] "Overbuilding," as the Majority explained, is where a second cable provider — the "overbuilder" — "builds and offers customers a competitive alternative where a telecommunications company already operates." (Slip Op. at 9.) The existing provider is often referred to as the "incumbent" provider.

[9] The geographic scope of the class is actually defined as Comcast's Philadelphia cluster, which, as noted by the Majority, excludes the DMA counties of Lehigh and Northampton. As Dr. Chipty explains, those are the two counties in which Comcast has no presence (*see* App. at 3795 & n.12 (Chipty Reply Dec.)), and, therefore, they would be excluded from the class regardless **[**83]** of its geographic scope. For ease of reference, I refer to the class as encompassing the Philadelphia DMA, rather than the Philadelphia Cluster, recognizing that those DMA counties in which there are no Comcast customers are not included in the class.

Much confusion has been caused in this case by the conflation of two distinct concepts: the antitrust concept of "relevant geographic market," which has traditionally been defined as the smallest area within which a monopolist can exercise market power,[10] and the class action concept of a "class definition," which gives the parameters of a set of plaintiffs as to whom the elements of a claim can be proven using common evidence.[11] Because, in this case, the class definition includes a geographic component, the term "relevant geographic market" has been used equivocally by the parties, the District Court, and the Majority to describe both the area affected by antitrust impact and the area within which potential class members reside — the latter area being what I will call, for lack of a better term, the "class region."[12] The problem with that equivocal usage is that **[*212]** the relevant geographic market and the class region are not necessarily **[**84]** coterminous. Even if we assume that, within the Philadelphia DMA, there are many distinct geographic markets that are relevant for antitrust purposes, as Comcast argues, that does not mean that Plaintiffs cannot prove, by common evidence, that Comcast's acts caused antitrust impact within all of them. As a theoretical matter, class proof can cover multiple relevant geographic markets, and, indeed, other Courts of Appeals have so held. *See, e.g., In re Sugar Antitrust Litig., 559 F.2d 481, 483-84 (9th Cir. 1977)* (rejecting the argument that a class could not be certified "where the antitrust claims involve a variety of geographic and product markets"); *Windham v. Am. Brands Inc., 539 F.2d 1016, 1018 (4th Cir. 1976)* (holding that a district court abused its discretion in refusing to certify an antitrust class that encompassed "11 different geographic markets").

While the relevant geographic market and the class region are conceptually distinct,[13] the Majority, like the District Court, initially attempts to identify the class region in terms of the relevant geographic market. Unlike the District Court, however, the Majority decides that because "[d]efining the relevant geographic market ... is an issue of the merits," the question of the relevant geographic market is "not properly before us." (Slip Op. at 20-21.)

The Majority is correct **[**87]** that defining the relevant geographic market is not a task we need to undertake at this stage, but that is not because the task takes us into the merits. It is rather because, regardless of whether there are one or many relevant geographic markets associated with the Philadelphia DMA, the question before us at this juncture is whether there is some class, in this case defined geographically, that can be shown, through common evidence, to have experienced elevated prices as a result of reduced overbuilding because of Comcast's clustering. Should that region include only those franchise areas involved in the Cable System Transactions?[14] Should it

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[10] For example, the Federal Trade Commission defines "relevant geographic market" as the region in which a hypothetical monopolist "would impose at least a [small but significant nontransitory price increase] on some customers in that region" without "this price increase [being] defeated by substitution away from the relevant product **[**85]** or by ... customers in the region travelling outside it to purchase the relevant product." FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 14-15 (2010). *Cf.* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ***ANTITRUST LAW*** § 5-30 (2010) ("[T]he relevant inquiry" for identifying a geographic market is "how far [customers] are willing to travel in order *to avoid* paying the defendant monopoly prices.").

[11] *See In re DVI, Inc. Secs. Litig., 639 F.3d 623, 639 n.22 (3d Cir. 2011)* (explaining that, pursuant to *Rule 23(c)(1)(B)*, the class definition describes both "which individuals and entities are included" and the "claims, issues or defenses to be treated on a class basis"). While *Rule 23(c)(1)(B)* does not expressly state that the class should include only those for whom the defined claims can be proven by common evidence, it is apparent that any class must be defined in a manner consistent with all *Rule 23* requirements, including commonality and predominance. *Cf. id. at 639 & n.22* (explaining that the question of whether there was predominance when it was alleged that some members of a proposed class "would be unable to demonstrate loss causation," was an issue of "which individuals **[**86]** and entities are included in the putative class ... primarily relevant to class definition").

[12] The class region will not necessarily be the same with respect to each element of a class's claims. In fact, even in this case, the class region differs with respect to antitrust impact and damages because, for the reasons I identify *infra* Part II(B), antitrust impact can be proven using common evidence across a wider region than damages can be.

[13] That is not to say that a class region and a relevant geographic market will always be different. An antitrust violation may often affect people in only a single geographic market, in which case the relevant geographic market and the class region would be in essence the same.

include only those franchise areas in which RCN was licensed to overbuild, but did not? Should it encompass the Philadelphia DMA or some lesser or greater area? The Majority does not ask those questions, but, instead, after determining that Plaintiffs can attempt to prove that the relevant geographic market is the Philadelphia DMA, the Majority assumes that that also means that the class is properly defined to cover the Philadelphia DMA and, therefore, that Plaintiffs can prove by common evidence that clustering reduced overbuilding and increased **[**88]** prices throughout the DMA. (*See, e.g*., Slip Op. at 51-52 n.16 (dismissing Comcast's argument that overbuilding should be analyzed at the franchise level because "Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA").) Fortunately, what the Majority assumes, namely that the Philadelphia DMA is the appropriate class region for proving antitrust impact, is supportable.

A compelling argument could be made that the class should consist only of those people living in franchise areas where RCN was licensed to overbuild, because **[*213]** only those franchise areas that would otherwise have been overbuilt could have been affected by the elimination of that overbuilding.[15] Because RCN was licensed to overbuild only five of the eighteen Philadelphia DMA counties (*see, e.g*., App. at 3640 (Williams Dec.); App. at 4284-85 (Singer Reply Dec.)), **[**89]** that would suggest limiting the class region to those five counties.[16] Nonetheless, both Dr. Williams and Dr. Singer opined that, had RCN successfully overbuilt the five counties in which it was already licensed, it would have continued overbuilding into the remainder of the Philadelphia DMA. (App. at 4285 (Singer Reply Dec.) ("[H]ad RCN entered the five counties that it intended to ... it is likely that RCN would have expanded its footprint beyond those five counties into geographically contiguous areas throughout the Philadelphia DMA."); App. at 4306 (Williams Reply Dec.) ("RCN likely would have continued to pursue its strategy of building into other areas in the Philadelphia DMA adjacent to its existing cable infrastructure, beyond the five counties.").) The District Court relied on those statements in holding that Plaintiffs had shown that the anticompetitive effects of clustering could be proven throughout the Philadelphia DMA. *Behrend v. Comcast Corp., 264 F.R.D. 150, 174-75 (E.D. Pa. 2010)*. Though one may be skeptical that RCN would have overbuilt even the five counties in which it was licensed, let alone the remainder of the Philadelphia DMA, it was not clearly erroneous for **[**90]** the District Court to accept that the prospect of overbuilding throughout the DMA was capable of proof. Consequently, it was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering throughout the Philadelphia DMA. Accordingly, while I do not agree with the Majority's reasoning, I agree that the District Court was within its discretion in determining that an appropriate class region for proving antitrust impact is the Philadelphia DMA.[17]

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[14] The Cable System Transactions are, as described by the Majority, the transactions through which Comcast "clustered" its franchise areas by "contract[ing] with competing cable providers to either acquire them or to 'swap' cable systems it owned in areas outside the Philadelphia DMA for cable systems within the Philadelphia DMA." (Slip. Op. at 5.)

[15] At least, Plaintiffs have provided no evidence that persons outside of franchise areas that would otherwise have been overbuilt can be affected by the elimination of that overbuilding. Dr. Williams opines that, where some parts of a franchise area are overbuilt, the overbuilding can affect prices in other parts of that same franchise area that are not overbuilt. (App. at 3704-14 (Williams Dec.) (explaining that where competing cable companies have "alternating franchise areas," overbuilding by one company into portions of the competitor's adjacent franchise area can affect prices in the portion of the overbuilt franchise area "that remain monopolized").) As a theoretical **[**91]** matter, it is also plausible that, when one franchise area has been overbuilt, the threat of further expansion by that overbuilder could put downward pressure on prices in nearby franchise areas. If such an effect is described in the multitude of expert opinions, however, the parties have not identified it. Moreover, even if there is such an effect, it would likely be attenuated by distance. It seems doubtful that overbuilding in, for instance, Bucks County, Pennsylvania would influence prices in Kent County, Delaware.

[16] Given that the Class's whole theory is rooted in the premise that Comcast's clustering deterred overbuilding, it is no small matter that RCN — the only entity licensed to overbuild anywhere in the Philadelphia DMA — was licensed to overbuild in just five of the eighteen counties.

[17] The Majority responds to my efforts to identify the class region by stating that I have "misunderst[ood] an important distinction," namely that Plaintiffs have identified a "'class region' ... of a 'Philadelphia cluster' which is distinct from the contested relevant geographic market of the '"Philadelphia DMA."' (Slip Op. at 26 n.8.) I do acknowledge that distinction. However, that does not **[**92]** speak to the point because, in spite of that distinction, there remains an equivocal use of the term "relevant geographic market." That equivocation is evidenced by the Majority's statement — in response to Comcast's suggestion that franchise areas

[*214] II. Whether Damages Can Be Proven Using Evidence Common To The Class

I part ways with the Majority entirely, however, when it comes to class-wide proof of **[**96]** damages. The only evidence supporting Plaintiffs' claim that damages can be proven using evidence common to the class is the expert opinion of Dr. McClave. But, as detailed hereafter, Dr. McClave's testimony **[*215]** is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA. Consequently, his testimony is irrelevant and should be inadmissible at trial, pursuant to *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, as lacking fit. Thus, it cannot constitute common evidence of damages.[18]

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might be the appropriate class region for damages — that "Comcast is attempting to redefine the relevant market: inasmuch as Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA ... their damages model passes muster." (Slip. Op. at 51-52 n.16.)

The Majority also asserts that there is no question about the class region because Comcast does not dispute the class region but disputes only the relevant geographic market. (Slip Op. at 26 n.8) That is not correct. While Comcast does not use the term "class region," Comcast and its experts plainly argue that the scope of the class is too broad, and they dispute the District Court's conclusion that antitrust impact can be proven by common evidence across the Philadelphia DMA. (*See, e.g*, App. at 3923 (Teece Reply Dec.) ("[E]ven if RCN would have overbuilt all five counties entirely in the but-for world, this would not be sufficient to conclude that the impact **[**93]** of the challenged conduct would have affected all Comcast customers in the Philadelphia DMA."); *id*. at 3922 ("I have seen no evidence that RCN ever intended to build out the entire Philadelphia DMA."); Appellants Br. at 33 (arguing that Dr. Williams's models do not show that clustering "deterred overbuilding ... in a manner affecting all class members"); *id*. at 24-25 (noting that RCN was licensed in only five counties and arguing that Plaintiffs cannot prove that RCN would have entered the Philadelphia DMA). While I do not agree with Comcast's effort to define the class region by reference to the relevant geographic market (any more than I agree with the Majority's conflating of those concepts), to say that Comcast does not dispute the contours of the class region is not accurate, as the foregoing citations indicate.

However, even if Comcast had not disputed the class region, it would still be appropriate for us to address it. The Majority faults me for, in its view, addressing problems not raised by Comcast, which the Majority asserts are, therefore, waived. (*See, e.g*., slip op. at 43-44 n.15 ("[T]he Concurrence-Dissent ... raises multiple arguments ... not addressed by Comcast's expert **[**94]** ... . We must limit our review to the issues presented by Appellants and Appellees."). But "there can be no waiver ... of the Judge's duty to apply the correct legal standard. ... This is particularly true in the class action context, where "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members."' *In re Cmty. Bank of N. Virginia, 622 F.3d 275, 302 n.20 (3d Cir. 2010)* (quoting *United States v. Ali, 508 F.3d 136, 144 n.9 (3d Cir. 2007)* *and* *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995))*. Thus, where Comcast has raised the issues of whether there is predominance with respect to antitrust impact and damages, we are required to "apply the correct legal standard," — which is to determine whether those elements can, in fact, be proven using evidence common to the class — even if that requires us '"to conduct [our] own thorough *[R]ule 23[b]* inquiry."' *Id*. (quoting *Stirman v. Exxon Corp., 280 F.3d 554, 563 n.7 (5th Cir. 2002))*. By disregarding the problems I have endeavored to identify, the result is an overly broad class definition and, to the extent any legitimate claims are proven, **[**95]** a likely dilution of recovery. Our fiduciary responsibility to absent class members requires that we ensure compliance with the provisions of *Rule 23*, especially those '"designed to protect absentees by blocking unwarranted or overbroad class definitions."' *Id. at 291* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*; *cf.* *Tri-M Group, LLC v. Sharp, 638 F.3d 406, 416 (3d Cir. 2011)* ("[T]he waiver principle is only a rule of practice and may be relaxed whenever the public interest or justice so warrants.").

Moreover, we must be cognizant of "the pivotal status of class certification in large-scale litigation," which is "often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *Hydrogen Peroxide, 552 F.3d at 310* (internal quotation marks omitted). Pointing out analytical problems central to the certification question is no frolic and detour. It is our obligation.

[18] Although we have never explicitly held that expert testimony must satisfy *Daubert* at the class certification stage, it is implicit in both Supreme Court precedent and our precedent. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court recently expressed its "doubt" about a district court's conclusion that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." *131 S. Ct. 2541, 2553-54, 180 L. Ed. 2d 374 (2011)*. In *Hydrogen Peroxide*, we explained that "opinion testimony should not be uncritically accepted as establishing a *Rule 23* requirement merely because the court holds the testimony should

[*216] Our precedent explains that Rule 702 and *Daubert* impose three requirements for admission of expert testimony: the expert must be qualified, the expert's methodology must be reliable, and the expert's proffered testimony must fit the particular case. *See* United States v. Schiff, 602 F.3d 152, 172 (3d Cir. 2010). Testimony fits when it "'is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" Id. at 173 (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)). Like any relevancy determination, the question of fit is reviewed for abuse of discretion. United States v. Ford, 481 F.3d 215, 217-18. Here, Dr. McClave's opinion fails the requirement of "fit" because it is disconnected from Plaintiffs' only viable theory of antitrust impact, i.e., reduced overbuilding, and, thus, the proffered expert testimony cannot help the jury determine whether reduced overbuilding caused damages.[19] It was, consequently, an abuse of discretion for the District Court to consider Dr. McClave's opinion as demonstrating that damages could be proven using evidence common to **[**101]** the class.

As explained by the Majority, Dr. McClave arrived at his damages calculation by comparing actual cable prices in the Philadelphia DMA to prices in benchmark counties outside the Philadelphia DMA. By making those comparisons, Dr. McClave sought to identify the "but for" price of cable — that is the price that would have prevailed in the Philadelphia DMA but for the alleged anticompetitive conduct of Comcast. (App. at 3407 (McClave Dec.).) For that comparison to be relevant, however, Dr. McClave's benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA in the absence of any impact from that conduct. (*Cf*. App. at 719 (McClave Cross) (stating that the goal of his bechmarking model was to identify "counties that reflect characteristics that one would find absent ... the effects of [Comcast's alleged anticompetitive] conduct").) And because the only

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not be **[**97]** excluded, under *Daubert* or for any other reason." 552 F.3d at 323. Inherent in that statement is the conclusion that a court could, at the class certification stage, exclude expert testimony under *Daubert*.

Even without the guidance of *Dukes* and *Hydrogen Peroxide*, simple logic indicates that a court may consider the admissibility of expert testimony at least when considering predominance. A court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything.

I recognize, of course, that in neither the District Court nor before us did Comcast describe its challenge to certification as a challenge to the admissibility of Dr. McClave's testimony. Nonetheless, while it did not use the language of *Daubert*, the substance of Comcast's challenge was that Dr. McClave's damages testimony was irrelevant and, therefore, did not fit the case. (*See, e.g*., Appellants' Br. at 37 ("Dr. McClave admitted that his damages model takes all of the anticompetitive effects of all of the complained-of conduct as a whole, and therefore cannot isolate damages attributable to specific **[**98]** conduct or effects."); *id*. at 42 ("Dr. McClave's DBS penetration screen is substantively invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region."); *id*. at 43 ("Dr. McClave's 'market share' screen is likewise invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region."). The Majority protests my invocation of *Daubert*, but, regardless of whether we frame the issue as a question of fit under *Daubert* or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question. I have chosen the terminology of *Daubert* because it is particularly apt for describing the difficulty created by the change in Plaintiffs' theory of impact and the consequent disconnect between that altered theory and Dr. McClave's expert report. The short of it is, Dr. McClave's model no longer fits the case. This observation is not, as the Majority fears, either an invitation or a demand for mini-trials in conjunction with class certification motions.

I note here as well my disagreement with the Majority's claim that, at the **[**99]** class certification stage, we need only "evaluate expert models to determine whether the theory of proof is plausible." (Slip Op. at 47 n.13.) The Majority supports that position by quoting *Hydrogen Peroxide's* statement that "'if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class.'" (*Id*. (quoting Hydrogen Peroxide, 552 F.3d at 325).) That quotation is better understood, however, if one includes the first half of the quoted sentence, which states that "*the question at class certification is whether*, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class." 552 F.3d at 325 (emphasis added). Thus, *Hydrogen Peroxide* does not suggest that we need only "evaluate expert models to determine whether the theory of proof is plausible," as the Majority claims. To the contrary, *Hydrogen Peroxide* instructs that, even where a theory is plausible, "the question at class certification is whether" that plausible theory is susceptible to common proof. *Id*. If the only common proof offered is inadmissible expert testimony, then Plaintiffs have not met their burden **[**100]** of showing that the theory — plausible or not — is capable of common proof.

[19] I need not, and do not, question whether Dr. McClave is qualified as an expert or whether his methodology is reliable.

surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions **[**102]** that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify "damages" that are not the result of reduced overbuilding, or, in other words, that "are not the certain result of the wrong." *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*; *see also, e.g., Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975)* ("'The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong.'" (quoting *Story Parchment, 282 U.S. at 562*)); *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1494 (8th Cir. 1992)* (same); *Broan Mfg. Co. v. Associated Distrib., Inc., 923 F.2d 1232, 1235 (6th Cir. 1991)* (same).

Dr. McClave's benchmark counties fail in that regard because he formulated his model at a time when Plaintiffs had four separate theories of antitrust impact, and so he did not select his benchmark counties to isolate the impact of reduced overbuilding. He chose them, as one would expect, to reflect the impact **[**103]** of other conditions in addition to reduced overbuilding. Consequently, as described in greater detail **[*217]** below, once the District Court rejected Plaintiffs' other theories of antitrust impact — leaving only the reduced-overbuilding theory — Dr. McClave's model no longer fits Plaintiffs' sole theory of antitrust impact and, instead, produces damages calculations that "are not the certain result of the wrong." *Story Parchment, 282 U.S. at 562*.[20]

A. Dr. McClave's Benchmark Counties Do Not Reflect "But For" Conditions in the Philadelphia DMA

To identify his benchmark counties, Dr. McClave used three "screens." First, he screened for counties where Comcast's market share was "less than 40%," because that figure identified "markets where Comcast is likely to have less market power than it has acquired in the Philadelphia market." (App. at 3410 (McClave Dec.).) Second, he screened for counties where DBS penetration[21] was "at or above the national average" because "DBS ... penetration was allegedly constrained by the anticompetitive **[**104]** behavior of Comcast." (*Id.*) Third, having identified counties in which Comcast's share was less than 40 percent and DBS penetration was above the national average, Dr. McClave screened for overbuilding, identifying "each of the benchmark counties ... as either overbuilt or not overbuilt." (App. at 3411-12 (McClave Dec.).) While those screens might, if properly employed, have helped identify relevant benchmark counties in a case involving antitrust impacts beyond limited overbuilding, they fail to identify the "but for" conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct, namely the deterrence of overbuilding. They, therefore, cannot help identify damages caused by that impact. I examine the screens in reverse order.

1. The Overbuilt Counties Screen

While there are several problems in Dr. McClave's **[**105]** opinion that reflect the lack of fit, nothing demonstrates it with more certainty than this: For thirteen of the eighteen counties in the Philadelphia DMA, Dr. McClave's opinion does not even attempt to show that there were elevated prices resulting from reduced overbuilding. In fact, he assumes that there was no such effect.

As noted above, after identifying his benchmark counties using the market share and DBS penetration screens, Dr. McClave used a third screen to divide those counties into two groups, identifying "each of the benchmark counties ... as either overbuilt or not overbuilt."[22] (App. **[*218]** at 3411-12 (McClave Dec.).) Having done so, Dr. McClave

[20] Whether Dr. McClave's opinion would have fit had the District Court allowed Plaintiffs to pursue all four of their theories of antitrust impact is irrelevant at this point.

[21] As noted by the Majority, "DBS" stands for "direct broadcast satellite" television service. (Slip Op. at 27.) Dr. McClave actually used penetration rates for all alternative delivery systems ("ADS"), rather than just DBS systems. He opined, however, and the parties seem to agree, that "ADS is a proxy for DBS penetration rates." (App. at 3410.)

estimated "but for" competitive prices, by comparing, on a county by county basis, prices in the eighteen actual Philadelphia DMA counties to prices in either the "overbuilt" or "not overbuilt" benchmark counties, and — crucially — he did so "assum[ing] that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt." (App. at 3412 (McClave Dec.).) At the outset, therefore, it is clear that Dr. McClave assumed that elevated prices resulting from reduced overbuilding would be present in only **[**106]** five of the eighteen Philadelphia counties. Dr. McClave then explained that, after making his calculations, "the overbuilt factor indicate[d] lower prices [in his model] *in counties where the overbuilding factor [was] present*." (App. at 3422 (McClave Dec.) (emphasis added).) Thus, Dr. McClave's model assumes that elevated prices from reduced overbuilding could be present only in the five counties "that RCN indicated it planned to enter," and the model did, in fact, identify elevated prices from reduced overbuilding only in those counties. (App. at 3412, 22 (McClave Dec.).) For the remaining counties, while there may be some uncertainty as to what exactly caused any elevated prices, this much is certain: the elevated prices identified by Dr. McClave in those thirteen counties were, according to Dr. McClave himself, the result of something other than reduced overbuilding. Consequently, any "damages" identified by Dr. McClave with respect to those thirteen counties are "uncertain damages ... [that] are not the certain result of [reduced overbuilding]," and "may be substantially attributable to lawful competition." *Coleman Motor, 525 F.2d at 1353* (quoting *Story Parchment, 282 U.S. at 562*).

Because Plaintiffs have been limited by the District Court to an overbuilding **[**108]** theory of antitrust impact, any price elevation resulting from a source other than reduced overbuilding is simply irrelevant. Thus, not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show, for thirteen counties in the Philadelphia DMA, that damages can be proven using any evidence whatsoever — common or otherwise. Perhaps, in those other counties, there is a way to show damages resulting from reduced overbuilding, but, if so, Plaintiffs have not identified it. As the burden lies with Plaintiffs to establish predominance, that alone should compel us to vacate the District Court's certification order with respect to class-wide proof of damages.[23]

[*219] *2. The DBS Penetration Screen*

Dr. McClave screened for counties where DBS penetration was at or above the national average because "DBS ... penetration was allegedly constrained by the anticompetitive behavior of Comcast." (App. at 3410 (McClave Dec.).)

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[22] The **[**107]** Majority notes that the overbuilding screen is not mentioned by the parties or the District Court. (Slip Op. at 52 n.17.) While it is true that the parties do not use the terminology "overbuilding screen," the District Court did indeed describe the concept to which I have given that label. *See* *Behrend, 264 F.R.D. at 182* ("Once a county qualified as a benchmark for a particular year by satisfying [the DBS penetration and market share screens], it was examined to determine whether or not it had been significantly overbuilt."). Whether one uses the "screen" terminology is not what is important. Dr. McClave, in fact, does not describe any of the benchmarking criteria as "screens," which is a term that appears to have been only later applied to his methods.

Regardless of the terminology, the fact remains that Dr. McClave did screen for overbuilding in an attempt to account for elevated prices resulting from reduced overbuilding. Thus, that screen cannot be ignored in any "rigorous analysis," *Hydrogen Peroxide, 552 F.3d at 318*, of whether damages resulting from reduced overbuilding can be proven by common evidence.

[23] The Majority states that, in criticizing Dr. McClave's model for identifying overbuilding damages in only five counties, I have "misse[d] the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the entire market area." (Slip Op. at 50-51 n.15.) This misperceives my reasoning. I understand Plaintiffs' theory but have pointed out that the theory, as altered by the District Court's **[**109]** ruling, no longer matches Dr. McClave's opinion. More precisely, Plaintiffs' claim is that by reducing overbuilding "Comcast allegedly maintained higher prices across the entire market area," (*id*.) whereas Dr. McClave attempts to show that, by reducing overbuilding, Comcast maintained higher prices in only the "five counties that RCN indicated it planned to enter as an overbuilder," (App. at 3412 (McClave Dec.)). The Majority notes that this particular problem with Dr. McClave's damages theory was not identified by Comcast, but we ought note overlook significant problems with the class certification simply because they are ones we have identified rather than ones to which our attention has been directed.

Using that screen would have been appropriate if, as Plaintiffs originally argued and as Dr. McClave was originally informed, DBS penetration had been constrained by Comcast's anticompetitive conduct. But, as the District Court explicitly **[**110]** held, Plaintiffs failed to tie "Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration." *Behrend, 264 F.R.D. at 165*. Consequently, there is no evidence in the record suggesting that DBS penetration in the Philadelphia DMA was in any way affected by Comcast's allegedly anticompetitive conduct. Rather, the District Court found that, while DBS penetration in Philadelphia was well below the national average, the cause of that reduced penetration — Comcast's refusal to distribute Comcast SportsNet through DBS providers — "occurred prior to the class period," is "unrelated to clustering," is "based upon valid business considerations" and is "specifically permitted" by the FCC. *Id*.

Therefore, while DBS penetration in the Philadelphia DMA is below the national average, the cause of that reduced rate predated and is unrelated to Comcast's clustering and, thus, even in the absence of Comcast's allegedly anticompetitive conduct, DBS penetration in the Philadelphia DMA would be no different than the below average rate that has actually prevailed. As a result, any benchmark county used to identify "but for" conditions should use the actual DBS penetration rate from the **[**111]** Philadelphia DMA. Dr. McClave, nonetheless, used the much higher national average rate,[24] which identified benchmark counties in which cable prices were lower than in counties having DBS penetration similar to that in the Philadelphia DMA.[25] Because Dr. McClave then calculated damages by comparing prices in those benchmark counties (with national average DBS penetration and, therefore, lower prices) to actual prices in the Philadelphia counties (with below national average DBS penetration and, therefore, higher prices), at least a portion of Dr. McClave's damages calculation results from the Philadelphia DMA having below national average DBS penetration. Since the cause of the below national average DBS penetration in the Philadelphia DMA is "unrelated to clustering," is "based upon valid business considerations," and is "specifically permitted" by the FCC, *id*., that reduced DBS penetration is the result of lawful competition, and, it follows, "[t]he damage figures advanced by [Dr. McClave] may be substantially attributable to lawful competition." *Coleman Motor, 525 F.2d at 1353*.

The Majority responds to this flaw only by stating that the DBS penetration screen was "included to estimate typical competitive market conditions, not to calculate liability for the foreclosure of DBS competitors." (Slip Op. at 49.) That explanation misses the mark. In identifying benchmark counties for use in a damages analysis, the goal is not to identify "typical competitive market conditions." The goal is, and must be, to identify the conditions that would have existed "but for" Comcast's alleged anticompetitive conduct. In this case, even in the "but for" hypothetical **[*220]** world, the Philadelphia DMA would not have been typically competitive. Rather, given the District Court's findings, there is no question that, as a result of Comcast's *lawful* competition, DBS penetration in the Philadelphia DMA would have been well below that present in a typical competitive market. Thus, by comparing Philadelphia to benchmark counties having **[**113]** the much higher national average DBS penetration, Dr. McClave's model wrongly "calculate[s] liability for the foreclosure of DBS competitors," (*id*.) imposing damages based on the prices that would have prevailed had Comcast not lawfully foreclosed DBS competition.

3. The Market Share Screen

Dr. McClave screened for counties where Comcast's market share was "less than 40%," because that figure represented the midpoint between Comcast's 20 percent share before the class period and its 60 percent share during the class period and so identified "markets where Comcast is likely to have less market power than it has acquired in the Philadelphia market." (App. at 3410 (McClave Dec.).) Under Plaintiffs last viable theory of antitrust impact, however, while Comcast's market share is relevant to the question of whether there has been any reduction

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[24] According to Dr. McClave, national average DBS penetration during the six year period for which he calculated **[**112]** damages averaged 24.17%, whereas actual DBS penetration in the Philadelphia DMA averaged 12.77%. (App. at 3411 (McClave Dec.).)

[25] The District Court discussed extensively the evidence that "DBS competition constrains cable prices." *Behrend, 264 F.R.D. at 163-65*.

in overbuilding, it is not relevant — at least not in isolation — to determining the damages caused by that reduction. Instead, the relevant market share is the share that would have been held by any incumbent in the "but for" hypothetical world.

As an illustration of that point, consider a hypothetical county with two equally sized franchise areas. Assume **[**114]** that, prior to the class period, Comcast had a 100 percent share of one franchise area and that AT&T had a 100 percent share of the other, so that each had a 50 percent share of the county as a whole. Assume further that, as part of its clustering efforts, Comcast acquired AT&T's franchise area so that, today, Comcast has a 100 percent share of the entire county. To test the theory that clustering reduces overbuilding, a comparison between Comcast's current 100 percent share of the county and the 50 percent share that Comcast would have had but for its clustering would surely be relevant in determining whether clustering effected any reduction in overbuilding.

Next, assume that, after making that comparison, Plaintiffs could show that, had no clustering taken place, RCN would have overbuilt 20 percent of each of the two franchise areas, so that, in the "but for" world, RCN would have a 20 percent share in each franchise area, and Comcast and AT&T would each have an 80 percent share in their respective franchise area. Pursuant to Plaintiffs' only theory — that increased overbuilding decreases prices — any damages in that scenario arise solely from the difference between RCN's 20 percent **[**115]** share in the "but for" franchise areas and RCN's zero percent shares in the current franchise areas. The damages resulting from that foregone overbuilding are the same whether, in the "but for" world, the remaining 80 percent of the franchise in question would have been controlled by Comcast or by AT&T. It follows, therefore, that once the antitrust impact of Comcast's clustering — i.e., the reduction in overbuilding — has been identified and accounted for as part of an overbuilding screen, any market share screen applied to isolate the "but for" conditions that would have prevailed in the Philadelphia DMA should screen not just for Comcast's share, but for the share of whatever incumbent would have been present but for the clustering.[26]

[*221] Because Dr. McClave's model already assumes that there has been a reduction in overbuilding and screens for it, the relevant market share for damages purposes is the share of the market maintained by any incumbent — regardless of the identity of the particular incumbent. By calculating the appropriate market share screen using only Comcast's average share throughout the **[**117]** Philadelphia DMA, Dr. McClave has ignored any market share that, in the "but for" hypothetical world, would have been maintained by an incumbent other than Comcast. For franchise areas where Comcast was not present prior to the class period, Dr. McClave should have calculated damages by comparing Comcast's current share to the "but for" share that would have been held by any incumbents Comcast replaced. Because he instead effectively calculated damages by comparing Comcast's current share to Comcast's zero percent share prior to the class period,[27] he unfairly suppressed the relevant incumbent share and artificially inflated the damages calculation.

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[26] Again, this is not to say that Comcast's market share, in particular, will never be relevant. As just discussed, it is highly relevant for determining antitrust impact. Moreover, it might have been relevant to damages had the District Court not excluded three of Plaintiffs' theories of antitrust impact. In fact, the market share screen appears to be another relic of the Plaintiffs' having initially presented four theories of impact. One of those theories **[**116]** was that Comcast's increased market share increased its bargaining power and allowed it to reduce prices, *Behrend, 264 F.R.D. at 178-81*, and a second was that Comcast's increased market share reduced the ability of consumers to engage in benchmark pricing by comparing Comcast's prices to the prices of other cable providers in the region, *id. at 175-78*. Had either of those theories survived the class certification process, it might have made sense for Dr. McClave to screen for Comcast's market share, because, under those theories, Comcast's market share directly impacted price. But the District Court rejected those theories, allowing Comcast to proceed only on a theory that clustering reduced overbuilding. Under that theory, what is relevant is the market share of all incumbent cable providers vis-a-vis overbuilders.

[27] I say he "effectively calculated damages" that way because Dr. McClave did not actually make a franchise by franchise comparison, which, as discussed *infra* Part II(B), is itself problematic. He instead calculated Comcast's market share by averaging its share throughout the Philadelphia DMA. But, because he included in that average Comcast's zero percent share in the franchises in which it had not been present prior to the class period, instead of including the share held by the incumbent Comcast replaced, it is fair to say that he effectively **[**118]** calculated damages by comparing Comcast's actual share in those franchise areas to Comcast's zero percent share prior to the class period.

Because none of Dr. McClave's screens reflect the conditions that would have prevailed in the Philadelphia DMA "but for" any reduction in overbuilding, the damages Dr. McClave calculated are "not the certain result of the wrong," *Story Parchment, 282 U.S. at 562*. Accordingly, Dr. McClave's opinion cannot help a jury determine damages, and so would be inadmissible at trial for lacking fit. Because Dr. McClave's opinion is the only evidence Plaintiffs have offered to meet their burden of showing that damages can be proven using evidence common to the class, I would vacate the District Court's class certification with respect to class-wide proof of damages.[28]

[*222] B. Damages Are Not Capable of Being Proven By Evidence Common to the Entire Class

While my thoughts thus far have focused on why Plaintiffs have not met their burden of showing that damages can be proven using evidence common to the class, none of the problems I have noted are necessarily irreparable. That is, Dr. McClave could conceivably redesign his model to address overbuilding throughout the Philadelphia DMA, to use actual DBS penetration rates, and to screen for the market share of all incumbents, not just Comcast. Nevertheless, there remains an intractable problem with any model purporting to calculate damages for all class members collectively.

Central to Dr. McClave's damages model is the conclusion that the price of cable television service in any given franchise area is affected by the relative market shares of at least three entities: overbuilders, DBS providers, and incumbent cable providers. All else being equal, for example, areas that are overbuilt will have lower prices than areas **[**121]** that are not overbuilt, and areas with high DBS penetration will have lower prices than areas with low DBS penetration. For that reason, Dr. McClave's model identifies benchmark counties by screening for the relative market shares of those three entities.[29] While I do not accept the manner in which Dr. McClave has measured the relative shares of those entities in the "but for" Philadelphia DMA, I accept the premise that the relative shares have significant influence on the price of cable television service.

If price does vary with the changes in relative share within a franchise area, however, it is hard to see how those 650 franchise areas[30] can simply be treated as average for purposes of proving damages. The record indicates that, on the contrary, the "but for" market shares of overbuilders, DBS providers, and incumbent providers would vary, sometimes significantly, from franchise area to franchise area.

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[28] The Majority suggests that any problems with Dr. McClave's screens are "attacks on the merits of the methodology that have no place in the class certification inquiry," because, "[e]ven if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology — i.e., modify both of Dr. McClave's screens ... only the final amount of estimated **[**119]** damages would change." (Slip Op. at 52.) I disagree. First, the problems I have identified with Dr. McClave's screens call into question not only the amount of damages but also whether there are any means of proving damages at all in thirteen of the eighteen Philadelphia DMA counties. *See supra* Part II(A)(1). Second, if Dr. McClave's model does not presently constitute a relevant means of calculating class-wide damages, to say that the model might be fixed, for example by "modify[ing] both of Dr. McClave's screens," (Slip Op. at 52), is no better than saying that Plaintiffs have made "a threshold showing" of predominance or shown a sufficient "intention to try the case in a manner that satisfies the predominance requirement" — both of which are insufficient under *Hydrogen Peroxide, 552 F.3d at 321* (internal quotation marks omitted). Plaintiffs have the burden of establishing predominance and, until they have actually proffered a model that shows how damages can be calculated on a class-wide basis, they have not met that burden — particularly when the only evidence they have offered should be entirely inadmissible. The Majority's willingness to overlook the debilitating flaws in Dr. **[**120]** McClave's model in an effort to avoid an "attack on the merits," is precisely the kind talismanic invocation of "concern for merits-avoidance" that *Hydrogen Peroxide* forbids. *Id. at 317 n.17*.

[29] Or, at least, he screens for overbuilders, DBS providers, and a single incumbent provider — Comcast. I have already identified, *supra* Part II(A)(3), why he should instead screen for incumbent share.

[30] Dr. Besen, one of Comcast's experts, reports that there are 649 unique franchise **[**122]** areas in the Philadelphia DMA. (App. at 3782 (Besen Reply Dec.).)

Addressing overbuilding first, RCN — the only party licensed to overbuild any part of the Philadelphia DMA — was licensed to overbuild in only five counties. (App. at 3640 (Williams Dec.); App. at 4284-85 (Singer Reply Dec.).) While Plaintiffs' experts have opined that, had RCN successfully overbuilt those five counties, it would have continued overbuilding elsewhere, (App. at 4284-85 (Singer Reply Dec.)), any overbuilding into the other parts of the Philadelphia DMA would, it seems clear, have come later than the overbuilding of the five licensed counties. Thus, while some franchise areas might have been overbuilt early in the class period, other franchise areas would **[*223]** likely never have been overbuilt at all or have been overbuilt only later in the class period. There might, for instance, in the "but for" world be some franchise areas that were 50 percent overbuilt for the entire class period and other franchise areas that were only 5 percent overbuilt and only for a single year, or perhaps not overbuilt at all. That means that, both throughout the Philadelphia DMA and throughout the class period, there would probably **[**123]** be very significant variation in the "but for" level of overbuilding from franchise area to franchise area.

Consider next DBS penetration. Dr. McClave testified that the DBS penetration rate he used for the Philadelphia DMA was an average for the DMA, but he also said that it was his understanding that "DBS penetration varies across the cluster here" and that it was "possible that some of the counties in the Philadelphia DMA in fact have penetration that's above the national median." (App. at 729-30 (McClave Cross).) Thus, according to Dr. McClave, not only does DBS penetration vary across the Philadelphia DMA, but the variation is pronounced enough that some parts of the Philadelphia DMA have above national average DBS penetration despite the fact that the Philadelphia DMA, as a whole, has DBS penetration at only half the national average. Because DBS penetration was unaffected by Comcast's alleged anti-competitive conduct, *see supra* Part II(A)(2), DBS penetration in the "but for" Philadelphia DMA would likewise vary significantly from one franchise area to another.

Finally, with respect to the incumbents' market share, the record gives little information regarding what the share of **[**124]** any non-Comcast incumbent would be in the "but for" world. We do know, though, that Comcast's share prior to clustering varied markedly from franchise area to franchise area. (*See, e.g.*, App. at 3833 (Chipty Dec.) (stating that Comcast "had a zero percent share of housing units in the majority of counties" and, therefore, that "Comcast's share in the counties in which it was present was substantially higher than [its average market share]"); App. at 733 (McClave Cross) (testifying that, at the beginning of the class period, Comcast was present in "maybe half, maybe less of the counties" and that its share "in the counties where [it was] present" was probably higher than its average share)). And, where the other two components of market share — DBS penetration and overbuilding[31] — vary from one franchise area to another, it becomes a near mathematical certainty that the remaining portion of the franchise held by incumbent cable providers must likewise vary.[32]

The wide variation in the relative market shares evidenced by the record makes it hard to imagine a means of calculating class-wide damages. Even if Dr. McClave's benchmarks were not problematic, to say that Comcast's "but for" share of the market throughout the Philadelphia DMA would be, on average, 40% is about as meaningful as saying that "with one foot on fire and the other on ice, I am, on average, comfortable."[33] Given that the three major factors identified as influencing **[*224]** price — overbuilding, DBS penetration, and incumbent share — vary widely within the franchise areas across the DMA, and given further that Comcast prices its cable service at the franchise level, (*see* App. at 716), I have difficulty accepting that it is appropriate to ignore those differences and take an average across the counties of the DMA.[34]

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[31] While there may be other "alternative delivery systems" that have a limited share of the market, Dr. McClave includes those providers in his DBS penetration screen, *see supra* note 21, and they are, therefore, accounted for.

[32] It **[**125]** is possible, of course, that the variation in DBS and overbuilder shares could be such that the combined total of the two is the same in different franchise areas, and, therefore, it is not a true mathematical certainty that incumbent share must also vary. That that would occur across the 650 franchise areas, however, seems implausible in the extreme.

[33] Sometimes attributed **[**126]** to Mark Twain, the actual source of this quote is unknown.

[34] The Majority asserts that "concern over using mathematical averages across the Philadelphia DMA ... is notably absent from Comcast's briefing ...." (Slip Op. at 53-54 n.18.) But it is not absent. In fact, Comcast criticizes Dr. McClave's screens by explaining that:

This primary flaw in Dr. McClave's methodology — using a single set of assumptions for the entire Philadelphia DMA — cannot **[**127]** be fixed merely by altering his model. It seems to me that no model can calculate class-wide damages because any damages — such as they may be — are not distributed on anything like a similar basis throughout the DMA.[35] Rather, where some class members might reside in a franchise area that would have been 50 percent overbuilt for the entire class period and other class members might reside in a franchise area that would have been only 5 percent overbuilt and only for a single year, or not overbuilt at all, it strains credulity to believe that the damages suffered by those individuals would all be the same as a result of reduced overbuilding. Yet Dr. McClave's model treats them as though they are the same,[36] **[*225]** as would any model attempting to calculate damages on an average class-wide basis.

The variation in conditions within the nearly 650 franchise areas in the Philadelphia DMA means that the issue of damages is more fractured than a single class can accommodate. I do not suggest that there necessarily would need to be 650 subclasses. It may well be that subclasses could be created encompassing groups of multiple franchise areas having similar demographics. *See, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968)* (explaining that where "differences among the class members bear only on the computation of damages," it "can be adequately handled ... [by] divid[ing] the class into appropriate subclasses"). Whether that would necessitate the creation of so many subclasses as to defeat the benefit of class treatment is something I do not

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> prior to the Transactions[,] Comcast did not operate in the majority of franchise areas in the DMA. By contrast, in the franchise areas where Comcast *did* operate, it is undisputed that Comcast's market share was significantly *higher* than 40%. Thus, the pre-class "20%" market share Dr. McClave employed in the creation of his screen is a mirage, arrived at solely through the artifice of averaging Comcast's greater-than-40% share of markets where it did operate with its "0% share" in hundreds of markets where it was not even present.

(Appellants Br. at 43.) That criticism precisely mirrors my own. Because of the significant variation in the market makeup from franchise area to franchise area, DMA-wide averages are not reliable. *See also infra* n.35.

[35] This is not simply a case where there might be some variation in the amount of damages from one class member to another that can be ignored in order to gain the benefit of class treatment. Instead, due to the wide variations in the market makeup of the franchise areas across the DMA, proving damages will require some factual inquiry into the relative market shares of overbuilders, DBS providers, **[**128]** and incumbents in individual franchise areas (or perhaps, as subsequently noted in this dissent, groups of franchise areas). The Majority, quoting Wright's Federal Practice and Procedure, suggests that those differences in damages should not affect the certification process because "'it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.'" (Slip. Op. at 45-46 (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1781 (3d ed. 2005)).) I agree with the quoted statement, but would point also to the following quote from the same treatise: "Rather, the question of damages can be severed from that of liability and tried on an individual basis." *Id*. Thus, neither Wright — nor any authority I can find — suggests that where there are wide differences in damages from one class member to another, those differences can be ignored. Wright suggests instead that those differences can be accounted for by considering liability on a class-wide basis but damages on a more individualized basis — consistent with what I propose.

[36] I recognize that Dr. McClave's model does not treat all franchise **[**129]** areas exactly the same, because he uses actual prices on a county-by-county level and, as a result, calculates a separate "but for" price for each county. (App. at 3424-26 (McClave Dec.).) But, while he uses actual prices on a county-by-county level, he calculates the "but for" prices using the same benchmark counties for the entire Philadelphia DMA (again, excepting Lehigh and Northampton, where Comcast has no presence). He treats the DMA as though the "but for" conditions would have been the same throughout.

The Majority states that this criticism "overstates the degree of dissimilarity among the franchise areas" because I fail to note that "[m]any franchise areas within counties often have identical or nearly identical pricing." (Slip Op. at 54 n.18 (quoting App. 3409 (McClave Dec.).) It may well be that there are similarities allowing for grouping of franchise areas, as I note in suggesting the possibility of subclasses. More fundamentally, however, the problem with Dr. McClave's opinion is not that it fails to account for variations in actual prices in the Philadelphia DMA, but that it fails to account for variations in the "but for" conditions that would have existed within the **[**130]** Philadelphia DMA. By so doing, the model is unable to distinguish between persons living in areas that may have been highly overbuilt and who, thus, would have suffered substantial damages, and persons living in areas that may never have been overbuilt and who, thus, would have suffered no damages.

venture to conclude on this record. But I would remand the case to the District Court for consideration of the feasibility of **[**131]** subclasses.

III. Conclusion

For the foregoing reasons, I would vacate the District Court's certification order to the extent it provides for a single class as to proof of damages and remand the case for the District Court to address whether Dr. McClave's model could, in fairness, be revised to accurately reflect the conditions that would have existed in the Philadelphia DMA in the absence of any reduction in overbuilding caused by clustering. I would further ask the District Court to consider whether the class certified for proving antitrust impact can be divided into appropriate subclasses for purposes of proving damages.

End of Document

[Eastman Kodak Co. v. Epson Imaging Devices Corp. (In re TFL-LCD Antitrustlitigation)]

United States District Court for the Northern District of California

August 23, 2011, Decided; August 23, 2011, Filed

No. M 07-1827 SI; MDL No. 1827; No. C 10-5452 SI

Reporter

2011 U.S. Dist. LEXIS 95053 *; 2011-2 Trade Cas. (CCH) P77,580

IN RE: TFT-LCD (FLAT PANEL) ANTITRUSTLITIGATION;This Order Relates To: EASTMAN KODAK COMPANY, Plaintiff, v. EPSON IMAGING DEVICES CORPORATION, et al., Defendants.

Subsequent History: Motion granted by *SB Liquidation Trust v. AU Optronics Corp. (In re TFT-LCD Antitrust Litig.), 2011 U.S. Dist. LEXIS 95054 (N.D. Cal., Aug. 23, 2011)*

Prior History: *In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 U.S. Dist. LEXIS 90730 (N.D. Cal., Aug. 12, 2011)*

Core Terms

allegations, defendants', motion to dismiss, conspiracy, purchases

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For IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

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Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS KODAK'S FIRST AMENDED COMPLAINT

Now before the Court is defendants' joint motion to dismiss the first amended complaint ("FAC") of plaintiff Eastman Kodak Company ("Kodak"). Pursuant to *Civil Local Rule 7-1(b)*, the Court finds this matter suitable for decision without oral argument and therefore VACATES the hearing currently scheduled for August 26, 2011. Having considered the arguments presented in the moving papers, the Court hereby GRANTS IN PART defendants' motion.

BACKGROUND

Kodak sells digital still cameras to customers throughout the United States, including cameras that utilize thin-film transistor liquid crystal display panels ("LCD panels"). FAC at ¶1. Through this antitrust action, Kodak seeks to recover for an international price-fixing conspiracy that had "the purpose and effect of fixing, raising, stabilizing, and maintaining prices for LCD panels." FAC at ¶2. **[*20]** Kodak's FAC includes claims under the Sherman Act, *15 U.S.C. § 1*, and the antitrust laws of California, Nevada, and New York. FAC at ¶¶96-128. It names as defendants entities from three corporate families: Epson,[1] Toshiba,[2] and AU Optronics ("AUO").[3] FAC at ¶16-26.

On July 22, 2011, defendants filed a joint motion to dismiss Kodak's FAC under *Federal Rule of Civil Procedure 12(b)(6)*. Defendant's motion raises just two grounds for dismissal. First, defendants claim that Kodak's FAC fails to provide an adequate description of the involvement of each defendant in the price-fixing conspiracy. Second, defendants claim that Kodak's claim under California's Cartwright Act must be dismissed to the extent Kodak's purchases were not made in California.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint that fails to state a claim upon which relief may be granted. To survive a *Rule 12(b)(6)* **[*21]** motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the Court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

DISCUSSION

As mentioned above, defendants' motion challenges only two aspects of Kodak's complaint: (1) Kodak's **[*22]** use of "group pleading"; and (2) and Kodak's attempt to recover under California ***antitrust law*** for LCD panel purchases that it made outside of California.

I. Adequacy of Group Pleading

Defendants claim that Kodak's FAC should be dismissed because it does not allege facts particular to each defendant. They argue that the complaint fails to allege "which defendant sold TFT-LCD Panels in what locations, or how any particular defendants' 'business activities' substantially affected interstate commerce." Motion at 5. Further, defendants assert that the FAC impermissibly groups defendants together by corporate family, and does

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[1] Epson Imaging Devices Corporation and Epson Electronics Corporation America, Inc.

[2] Toshiba Corporation, Toshiba America Electronics Components, Inc., and Toshiba Mobile Display Technology Co., Ltd.

[3] AU Optronics Corporation and AU Optronics Corporation America, Inc.

not sufficiently allege "that each individual defendant joined the conspiracy and played some role in it." *Id.* at 6; *see also, e.g.,* FAC at ¶18 ("Defendants AUO and AUOA are referred to collectively herein as 'AU Optronics.'"); FAC at ¶¶ 21, 25.

This Court has previously evaluated a similar challenge to "group pleading" allegations in this multi-district litigation. In *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal. 2009)*, the Court found that the direct-purchaser plaintiffs and the indirect-purchaser plaintiffs had both stated valid claims **[*23]** against defendants, despite their use of group pleading. *Id. at 1184*.

Kodak's FAC, filed well after the Court issued the above order, bears a predictable resemblance to the direct- and indirect-purchaser complaints. The FAC alleges that the conspiracy was organized at the highest level of the defendant organizations and carried out by both executives and subordinate employees. FAC at ¶36; *see also* *In re TFT LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1184-85*. The FAC alleges that the conspiracy was implemented by subsidiaries and distributors within a corporate family, and that "individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families." FAC at ¶ 26; *In re TFT LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1184-85*. Kodak also alleges that "the individual participants in conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a corporate family." FAC at ¶26; *In re TFT LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1184-85*.

In addition to these general allegations, Kodak's **[*24]** FAC contains substantial detail concerning the subsidiary corporations' actions in furtherance of the conspiracy. For example, the FAC alleges that Epson Imaging Devices "participated in the conspiracy through meetings, conversations, and communications with competitors in Japan and the United States." FAC at ¶61. It also alleges that Epson's American subsidiary, Epson Electronics Corporation America, "was an active, knowing participant in the alleged conspiracy," both by acting as Epson Imaging Device's agent and by "engag[ing] in bilateral discussions with other defendants and co-conspirators." FAC, ¶63; *see also* FAC at ¶65-66 (alleging that "AUO senior level employees instructed AUOA employees in the United States to contact employees of other LCD Panel manufacturers" to discuss pricing); FAC at ¶71 (alleging that Toshiba Corporation instructed Toshiba's American subsidiary to communicate with competitors in the United States).

The Court finds that the allegations in Kodak's FAC are sufficient to put the defendants on notice of the charges against them. Accordingly, it DENIES defendants' motion to dismiss based on Kodak's use of group pleading.

II. Cartwright Act Claims

Kodak's FAC **[*25]** includes two claims under the Cartwright Act: its second claim for relief seeks to recover under the Cartwright Act for all U.S. purchases of price-fixed LCD products; while its third claim for relief only seeks to recover for those purchases made in California. FAC ¶¶102-17. Defendants argue that Kodak's second claim must be dismissed because due process forbids application of California ***antitrust law*** to purchases that occurred outside of California.

In June 2010, this Court addressed this issue in the context of claims brought by AT&T Mobility LLC. *See* Order Granting Defendants' Joint Motion to Dismiss and Granting Plaintiffs Leave to Amend, Master Docket No. 1823 (June 28, 2010). The Court concluded that, "in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the occurrence or transaction giving rise to the litigation' – plaintiffs' purchases of allegedly price-fixed goods – occurred in the various states." *Id.* at 5.

Kodak acknowledges this Court's prior ruling; it seeks only to preserve this claim in the event the Ninth Circuit reverses this Court's order in the pending interlocutory appeal. Accordingly, the Court GRANTS defendants' motion to **[*26]** dismiss Kodak's second claim for relief.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART and DENIES IN PART defendants' motion to dismiss the first amended complaint. Docket No. 25 in 105452; Docket No. 3251 in 07-1827.

IT IS SO ORDERED.

Dated: August 23, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

End of Document

Ethypharm S.A. France v. Abbott Labs.

United States District Court for the District of Delaware

August 23, 2011, Decided

Civ. No. 08-126-SLR

Reporter

805 F. Supp. 2d 59 *; 2011 U.S. Dist. LEXIS 93879 **

ETHYPHARM S.A. FRANCE, Plaintiff, v. ABBOTT LABORATORIES, Defendant.

Subsequent History: Vacated by, in part, Remanded by *Ethypharm S.A. Fr. v. Abbott Labs., 2013 U.S. App. LEXIS 1567 (3d Cir. Del., Jan. 23, 2013)*

Prior History: *Ethypharm SA France v. Abbott Labs., 271 F.R.D. 82, 2010 U.S. Dist. LEXIS 120544 (D. Del., 2010)*

Core Terms

patents, Products, minutes, fenofibrate, rights, sham, dissolution, license, antitrust, argues, Granulate, Entities, infringement, counterclaims, inequitable conduct, anticompetitive, sublicense, parties, sales, summary judgment, data set, pharmaceutical company, testing, summary judgment motion, matter of law, divestiture, ambiguous, immunity, capsule, genuine

LexisNexis® Headnotes

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

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

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

A court shall grant summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party bears the burden of proving that no genuine issue of material fact exists. Facts that could alter the outcome are material, and disputes are genuine if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct. If the moving party has demonstrated an absence of material fact, the nonmoving party then must come forward with specific facts showing that there is a genuine issue for trial. *Rule 56(e)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

HN2[] **Summary Judgment, Evidentiary Considerations**

In deciding a motion for summary judgment, a court will view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion. The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN3[] **Settlements, Consent Judgments**

A district court analyzing the anticompetitive effects of a settlement agreement may begin its analysis under either ***antitrust law*** (by applying a rule of reason approach to evaluate the agreement's anticompetitive effects) or patent law (by analyzing the right to exclude afforded by the patent); the essence of either inquiry is whether the Settlement Term Sheet restricts competition beyond the exclusionary zone of the patents. A patent is, of course, a carefully-crafted exception to the general rule against monopolies.

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

Contracts Law > Contract Interpretation > General Overview

HN4[] **Entitlement as Matter of Law, Appropriateness**

Disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law. Clear and unambiguous language in a contract should be given its ordinary and usual meaning.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN5[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Where contract language is ambiguous, parol evidence is properly considered to determine the intent of the parties. In construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing.

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

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > Intent

HN6[] **Entitlement as Matter of Law, Appropriateness**

Issues of intent and contract interpretation, when arising out of the ambiguous use of language, are rarely amenable to summary judgment.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] **Private Actions, Sherman Act**

Antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The antitrust-injury requirement helps ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for damages.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN8[] **Remedies, Damages**

It is not necessary to show with total certainty the amount of damages sustained, just that an antitrust violation caused an antitrust injury suffered by the plaintiff. Damage issues in antitrust cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The factfinder may conclude as a matter of just and reasonable interference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

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

HN9[] **Noerr-Pennington Doctrine, Sham Exception**

A patent owner asserting its rights through patent infringement litigation is generally immune from antitrust liability. Commonly referred to as the Noerr-Pennington doctrine, this immunity extends to persons who petition all types of government entities, including legislatures, administrative agencies, and courts. Noerr-Pennington immunity, however, is subject to an exception for sham litigation. In this regard, the U.S. Supreme Court outlines a two-part test to determine whether the sham litigation exception applies. As an objective first part, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit does not qualify as sham litigation and is immunized under the Noerr-Pennington doctrine. The subjective second part of the definition arises only if the challenged litigation is objectively meritless. In such a case, the court must decide whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor. To invoke the sham exception, plaintiffs must prove, by clear and convincing evidence, that defendant's activities were not really efforts to vindicate its rights in court.

Patent Law > Infringement Actions > Doctrine of Equivalents > General Overview

HN10[] **Infringement Actions, Doctrine of Equivalents**

The doctrine of equivalents is not unlimited, and it cannot be used to ignore the actual language of a patent. However, the doctrine of equivalents may apply to claims containing specific numeric ranges, regardless of whether the claim also contains words of approximation. The proper inquiry is whether the accused value is insubstantially different from the claimed value.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN11[] **Inequitable Conduct, Burdens of Proof**

To prove inequitable conduct, a plaintiff must ultimately show, by clear and convincing evidence, that the defendant knew information, knew that it was material, and made a deliberate decision to withhold this information from the Patent and Trademark Office.

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Judges: Sue L. Robinson, United States District Judge.

Opinion by: Sue L. Robinson

Opinion

[*60] MEMORANDUM OPINION

/s/ Sue L. Robinson

ROBINSON, District Judge

I. INTRODUCTION

Plaintiff Ethypharm S.A. France ("Ethypharm") brought this action against defendant Abbott Laboratories ("Abbott") on March 3, 2008. (D.I. 1) Both parties are manufacturers of pharmaceutical drugs, more specifically, fenofibrate. Ethypharm alleges that Abbott has interfered with Ethypharm's licensee from **[**2]** marketing and selling Ethypharm's fenofibrate product under an exclusive licensing agreement with a United States distributor. Ethypharm brought antitrust claims under *Sections 1* and *2* of the Sherman Act, as well as several common law claims and a claim for sham litigation. On February 20, 2009, the court granted Abbott's motion to dismiss with respect to Ethypharm's common law restraint of trade claim (count six) and denied Abbott's motion to dismiss all other counts of the amended complaint. (D.I. 39) Discovery has been completed and trial is scheduled to commence on September 30, 2011. Currently before the court are Abbott's motions for summary judgment: (1) on counts one through five regarding its alleged "anticompetitive conduct" (D.I. 176); and (2) on count seven and Ethypharm's allegations of "sham litigation" (D.I. 180).

II. BACKGROUND

Ethypharm is a privately-held French pharmaceutical company that develops, formulates and manufactures numerous drug products, including a fenofibrate product called Antara®. (D.I. 26 at ¶¶ 4, 6, 37) Antara® is not a generic product; it is a branded drug marketed directly to **[*61]** physicians. (*Id.* at ¶ 53) Ethypharm does not directly sell or distribute **[**3]** Antara® in the United States; it contracted with an American company, Reliant Pharmaceuticals, Inc. ("Reliant"), to market and distribute the drug. (*Id.* at ¶¶ 5, 6)

Abbott is a pharmaceutical company that manufactures, markets and sells a brand name fenofibrate drug product called TriCor® in the United States. (*Id.* at ¶ 2) Abbott licenses the exclusive rights to manufacture and sell TriCor® in the United States from a French company called Laboratoires Fournier ("Fournier"). (*Id.*) Abbott and Fournier have been involved in extensive antitrust litigation in this district regarding TriCor®. Civ. No. 02-1512 (lead case).

Ethypharm gave Reliant an exclusive license in 2001, termed the "Development, License, and Supply Agreement" ("the DLS Agreement"), through which Reliant licensed Ethypharm's intellectual property rights and agreed to seek FDA approval for Antara® and market Antara® in the United States. (D.I. 179, pt.1 at ex. 2)

Reliant did not file a Paragraph IV certification[1] for the patents that Abbott had identified in the Orange Book for TriCor®. Rather, Reliant elected to market Antara® immediately upon FDA approval. In light of the risk of exposure to infringement claims by Abbott, **[**4]** Reliant filed suit in this court on June 1, 2004, seeking a declaration of non-infringement vis a vis four Fournier fenofibrate patents: U.S. Patent Nos. 6,074,670 ("the '670 patent"); 6,277,405 ("the '405 patent"); 6,589,552 ("the '552 patent"); and 6,652,881 ("the '881 patent"). Civ. No. 04-350 ("the Abbott/Reliant action") Reliant also sought a declaration that the foregoing TriCor® patents are unenforceable due to inequitable conduct.[2] Abbott filed a counterclaim for infringement of the '405 and '881 patents. According to Ethypharm, the counterclaims were a sham and further restrained Antara®'s sales prospects in the United States.

Reliant's NDA for Antara® was filed pursuant to *Section 505(b)(2) of the Federal Food Drugs and Cosmetics Act*. That is, Reliant did not present its own safety and efficacy studies for Antara®, but presented **[**5]** data showing that patients taking Antara® would attain similar blood concentrations of fenofibrate as would patients taking TriCor® 200, and relied on Abbott's studies showing the safety and efficacy of TriCor® 200. (D.I. 179, pt. 1 at ex. 3) Antara® received FDA approval in November of 2004, and Reliant began marketing Antara® in February 2005.

Ethypharm states that Antara®'s net sales totaled $23.5 million in 2005. (D.I. 1 at ¶ 55) According to Reliant documents, sales of Antara® exceeded expectation in April and May 2005, but came short of projection in June 2005. (D.I. 192, pt. 2 at ex. 9, RLNTE00062604) Notwithstanding, sales of Antara® increased during this period, while sales of TriCor® decreased.[3] (*Id.* at RLNTE00062604, RLNTE00062608) According to the complaint, Antara® earned $18.9 million in net sales in the first half of 2006. (D.I. 1 at ¶ 56)

[*62] On April 3, 2006, Abbott and Reliant settled the Abbott/Reliant action and executed a "Settlement Term Sheet" embodying the terms of their agreement (the "STS").[4] The STS permits Reliant to sell Antara® without the risk of infringement. **[**6]** That is, the STS grants Reliant a nonexclusive license to the '670, '405, '552, and '881 patents (the "Stamm patents"), as well as U.S. Patent No. 4,895,726 ("the '726 patent"), another Fournier

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[1] *See* *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*. The filing of a Paragraph IV certification under the Hatch-Waxman Act is itself an act of patent infringement. *See* *35 U.S.C. § 271(e)(2)(A)*.

[2] At this time, Abbott was simultaneously defending another charge of inequitable conduct in the context of litigation in this court with Impax Laboratories, Inc. (Civ. No. 03-120)

[3] Other competitors in the market included Lofibra®, Triglide®, gemfibrozil, Lopid® and fenofibrate.

[4] The STS is docketed at D.I. 179 (pt. 1), ex. 1; hereinafter, the court will cite "STS §_" for ease of reference. The parties did not subsequently negotiate a definitive agreement.

fenofibrate patent (collectively hereinafter, the "Fournier patents"). (STS §§ 1(q); 2) The Reliant products subject to the license were defined as

> the 43 mg, 87 mg and 130 mg fenofibrate capsule products that are the subject of Reliant's New Drug Application 21-695, as supplemented and/or amended from time to time. Reliant Products do not include (i) any pharmaceutical products where fenofibrate is not the sole active ingredient, (ii) any combination therapy products or (iii) any products in a form other than a 43 mg, 87 mg or 130 mg fenofibrate capsule.

(STS § 1(o)) The license also extended to "any continuations, continuations-in-part or divisional applications and patents thereof and any reissued or reexamined version(s)" of the Stamm patents. (STS § 1(q))

As consideration, Reliant agreed to a 7% royalty on net **[**7]** sales of the Reliant Products. (STS § 3(a)) The royalty would increase, however, to 10% of net sales under specified conditions relating to a change of control, e.g., acquisition of Reliant or any portion of its business relating to the Reliant Products. (STS §§ 3(a), (d), (e)) The parties dispute the proper interpretation of Section 8(ii) of the STS, providing as follows.

> **Other Licensing Terms.** The license would contain additional customary terms and conditions including, without limitation, the following: (i) reports and audits and (ii) no assignment, sublicense or other transfer of any rights relating to the Reliant Products (including the right to market and promote the Reliant Products) except: . . . (e) to acquirers . . . of any portion of Reliant [or its business] relating to the Reliant Products other than pursuant to a Change of Control, provided that any assignment, sublicense or other transfer of rights granted pursuant to Section 8(ii)(e), (A) to a Restricted Entity or Affiliate thereof, shall require the prior written consent of Abbott and (B) to any entity other than a Restricted Entity or Affiliate thereof shall be limited to [the '726, '670, '405, '552 and '881 patents] **[**8]** unless Abbott consents to the assignment, sublicense or other transfer (in which case, Reliant's rights to all of the Stamm Patents may be included).

Schedules I and II to the STS identify the Restricted Entities under that agreement: about 20 large pharmaceutical companies, 10 generic companies and a few specialty pharmaceutical companies. Reliant was also permitted under the STS to "authorize Contract Sales Organizations[5] to market the Reliant products" on its behalf. (STS § 8(ii)(b))

[*63] On or about July 24, 2006, Reliant sold the exclusive rights to market and sell Antara® to Oscient Pharmaceutical Company ("Oscient"), a smaller, specialty pharmaceutical company not listed in schedules I or II of the STS. (D.I. 179, pt.1 at ex. 27; D.I. 192, pt. 5 at ex. 66) Oscient paid $78 million plus the cost of the existing Antara® **[**9]** inventory. (D.I. 179, pt.1 at ex. 6, § 3.1) The DLS provided Ethypharm a right of first offer with respect to the divestiture of Antara®. (*Id.,* ex. 2 at § 12.4) Ethypharm executed a document approving the sale. (*Id.,* ex. 4) Abbott did not consent to the transfer of Reliant's rights to any later-issued patents in the Stamm patent family, and Reliant and Oscient entered into a separate agreement addressing any risk that Abbott may sue Oscient in this regard. (*Id.,* ex. 40)

In the summer of 2009, Oscient discontinued its sales force promotion of Antara® and filed for bankruptcy. (D.I. 192, pt. 5 at exs. 76, 77) This is, in Ethypharm's characterization, directly related to Reliant's sale of Antara® to Oscient, a company with "limited resources and a relatively small sales force" that "[did] not have the capacity to promote and develop Antara® in the marketplace to compete with TriCor® effectively." (D.I. 1 at ¶ 11) Ethypharm asserts that the 7% royalty to Abbott weakened the profitability of Antara® and raised the cost of its promotion, sales and distribution. (*Id.* at ¶ 74) Ethypharm argues that the STS restricts its abilities to develop new fenofibrate formulations or combination products, **[**10]** or by adding to the indications for which physicians can prescribe Antara®. (*Id.* at ¶ 75) Ethypharm characterizes the STS as equivalent to an "output restraining agreement" in these regards. (*Id.* at ¶ 78)

Ethypharm brings antitrust claims under *Sections 1* and *2* of the Sherman Act, and also alleges violations of the common laws of unfair competition; tortious interference with contract; tortious interference with prospective

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5 Defined as "a pharmaceutical sales and marketing organization that is not a Restricted Entity [listed on schedules I and II to the STS] and whose principal business is the marketing and sale of pharmaceutical products for third parties (for example, Innovex), engaged by a Reliant Licensed Entity to detail the Reliant Products on a fee-for-service basis." (STS § 1(f))

economic advantage; that Abbott committed a common law restraint of trade; and that Abbott's infringement counterclaim in the Abbott/Reliant action constituted sham litigation in violation of *15 U.S.C. § 1*. On Abbott's motion to dismiss, the court found that Ethypharm had standing vis a vis its Sherman Act claims.[6] *See* *Ethypharm S.A. France v. Abbott Labs., 598 F. Supp. 2d 611, 618 (D. Del. 2009)*. The court also held that Ethypharm articulated the essential elements of its unfair competition and tortious interference claims under Delaware law. *Id. at 619-20*. The court granted Abbott's motion with respect to Ethypharm's common law restraint of trade claim, however, insofar as such actions (pursuant to *6 Del. C. § 2103*) may only be brought by Delaware's Attorney General. **[**11]** *Id. at 620*.

III. STANDARD

HN1[] A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party bears the burden of proving that no genuine issue of material fact exists. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10, 106 S. Ct.* ***[*64]*** *1348, 89 L. Ed. 2d 538 (1986)*. "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995)* **[**12]** (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita, 475 U.S. at 587* (quoting *Fed. R. Civ. P. 56(e)*). ***HN2***[] The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995)*. The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

IV. DISCUSSION

A. Counts Relating to Reliant's Alleged "Anticompetitive Agreement"[7]

Abbott moves to dismiss Ethypharm's claims on several bases. First, Abbott argues that it has the right to refuse to license a patent. (D.I. 177 at 11-13) Secondly, Abbott argues that the STS did not prohibit Reliant's divestiture of Antara® to anyone it saw fit; only the Stamm patent rights were subject to a condition precedent (Abbott's consent). (D.I. 177 at 13, 15) Finally, Abbott argues that Ethypharm has no direct evidence of antitrust injury, insofar as it cannot demonstrate (with any reasonable certainty) that another company (other than Oscient) would have bought Antara® and made that product a commercial success. (*Id.* at 17-20)

1. Scope of the patent test

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[6] The court characterized the question posed by Abbott's motion as "whether a foreign name-brand drug manufacturer, which does not itself market and distribute its product in the United States but does so through an exclusive United States distributor, is entitled to avail itself of the protection of the antitrust laws for the purpose of challenging the conduct of a manufacturer of a competing brand name drug."

[7] All asserted claims but for Ethypharm's allegations that Abbott **[**13]** engaged in sham litigation.

The first inquiry at bar is the legality of the STS. The Federal Circuit has stated that ***HN3***[] a district court analyzing the anticompetitive effects of a settlement agreement may begin its analysis under either ***antitrust law*** (by applying a rule of reason approach to evaluate the agreement's anticompetitive effects) or patent law (by analyzing the right to exclude afforded by the patent); the essence of either inquiry is "whether the [STS] restrict[s] competition beyond the exclusionary zone of the [Stamm **[**14]** patents]."[8] *In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1336 (Fed. Cir. 2008)*. The parties at bar present their arguments under the "scope of the patent" framework (D.I. 141 at 11; D.I. 177 at 11), and the court agrees that it must discern whether the STS grants greater rights than those conferred under the Stamm patents. *Cf. King Drug Co. of Florence, Inc. v. Cephalon, Inc., 702 F. Supp. 2d 514 (E.D. Pa. 2010)*.

2. Contract interpretation

The parties dispute the interpretation of the STS. Ethypharm argues that Section **[*65]** 8(ii) of the STS is a general prohibition on Reliant's divestiture of **Antara®.** (D.I. 191 at 1) Abbott, on the other hand, reads the STS as prohibiting the future transfer of the **intellectual property** rights licensed under the STS absent Abbott's consent. (D.I. 177 at 13)

The threshold inquiry is whether the contract is ambiguous. *See, e.g., GB Biosciences Corp. v. Ishihara Sangyo Kaisha, Ltd., 270 F. Supp. 2d 476, 481 (D. Del. 2003)* (***HN4***[] "[D]isputes involving the interpretation of unambiguous contracts are resolvable as a matter of law"); *Johnston v. Tally Ho, Inc., 303 A.2d 677, 679 (Del. Super. 1973)* **[**15]** (clear and unambiguous language in a contract should be given its ordinary and usual meaning). The court answers this question in the affirmative.

Section 2 of the STS provides that "Abbott and Fournier would grant Reliant a non-exclusive license (subject to the provisions of Section 8) under the Stamm Patents (the "License") to exploit the Reliant Products in the United States and its territories and possessions[.]" (STS § 2) While the STS also contemplates that the future License would contain "additional customary terms and conditions," these specifically include "**no** assignment, sublicense or other transfer of **any rights** relating to the **Reliant Products** (including the right to market and promote the Reliant Products)." (STS § 8)(emphasis added) As noted above, Reliant Products are narrowly defined as the 43 mg, 87 mg and 130 mg fenofibrate capsule products that are the subject of Reliant's NDA, and exclude all other product forms, including "any combination therapy products" or other products having fenofibrate as their sole active ingredient. (STS § 1(o)) The restriction on permissible activities is broad, however, encompassing "any rights" relating to these named products. (STS § 8)

The **[**16]** inquiry does not end here, however. In its subsections, STS § 8 subsequently flip-flops in focus from the Reliant Products to intellectual property rights. STS § 8(ii)(e), containing exceptions to the "no transfer" clause, provides that an exception is made if a "transfer of rights" "relating to the Reliant Products" is made to a Restricted Entity with Abbott's consent. Alternatively, this section provides that transfer of rights under the '726, '670, '405, '552 and '881 patents may be made without Abbott's consent, while transfer to "all of the Stamm patents" may only occur with Abbott's consent. (STS § 8(ii)(e)(B)) In sum, the STS is ambiguous insofar as it inconsistently restricts the right to sell Reliant Products with the right to sublicense rights under Abbott's patents.

The remaining question is whether, in view of the parole evidence of record, a genuine issue of material fact exists as to the parties' interpretation of the STS. *See, gen., Nova Chemicals, Inc. v. Sekisui Plastics Co., Ltd., 579 F.3d 319, 323 (3d Cir. 2009)* (***HN5***[] where contract language is ambiguous, parol evidence is properly considered to determine the intent of the parties) (citation omitted); *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1233 (Del. Supr. 1997)* **[**17]** ("In construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing."). In this regard, Abbott argues that all of Reliant's witnesses have testified that they neither understood nor intended STS § 8 to have the meaning Ethypharm now ascribes to it. For example, Reliant's "architect" of the STS, Joe

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[8] A patent is, of course, a carefully-crafted exception to the general rule against monopolies.

Zakrzewski ("Zakrzewski"), testified that he read the STS to mean that Reliant "had the ability to deal with anybody on [the Restricted Entity] list [ ] with or without Abbott's consent." (D.I. 179, pt. 2, ex. K at 167:9-168:5, 341:20-343:14) John Poulos **[*66]** ("Poulos"), Abbott's counterpart "architect" of the STS (D.I. 191 at 7), testified that Abbott did not want sublicensing, while Reliant did, and STS § 8(ii)(e) was the resulting compromise. (D.I. 179, pt. 2, ex. E at 181:3-182:16) Poulos stated that the deal "had nothing to do with restricting [the right to sell] Antara® or the sale of the company[; t]his was only . . . on a sublicense right of the Stamm patents. We weren't restricting [the right to sell] Antara® or the sale of the company at all." (*Id.*) Fournier's 30(b)(6) witness **[**18]** testified that his personal understanding of the purpose of including Restricted Entities was that, "in the event Reliant decide[d] to sublicense its rights to one of these compan[ies] and if one of these compan[ies] want[ed] to have our license on our Stamm patents or on the patents covered by this agreement, they would have to ask us for consent." (*Id.,* ex. L at 69:7-16)

In response, Ethypharm points to a presentation from a June 2006 Reliant Board of Directors Meeting contrasting Reliant's divestiture of a drug called InnoPran EL, for which Reliant stated it was "contacting more than 100 pharma/biotech companies," with Antara®, for which Reliant was "surgically approaching select companies." (D.I. 192, pt. 4, ex. 60) Ethypharm argues that Reliant's approach of contacting "a small handful of companies on a discrete basis" evidences Reliant's view that it was severely restricted by the STS. (*Id.*) Ethypharm also points to a July 10, 2006 email from Poulos to Mary Szela of Abbott indicating that Abbott was concerned with "Oscient's financial status." (*Id.,* ex. 81) Poulos stated that, if Abbott consents, it "should strengthen the change of control provision that Oscient will assume." **[**19]** (*Id.*) In July 2006, Zakrzewski expressed concern about Abbott's response to the potential divestiture of Antara® as follows:

> I think the verbatim goes that Poulos gave us his word Abbott would not stand in [the] way of [a] small company when we did [the] deal in April.
>
> Now [a] small company is a problem and it really doesn't feel right. They state concerns about what [a] small company would do to [the] market. I think we hit them frontal with the antitrust implications.

(*Id.,* ex. 65)[9]

The foregoing parol evidence does not resolve the "product" versus "patent" differentiation at the core of the contract dispute. While Poulos testified that he did not believe the STS restricted Reliant's right to divest Antara®, this interpretation is directly contrary to certain language used in the STS itself. ***HN6***[] Issues of intent and contract interpretation, when arising out of the ambiguous use of language, are rarely amenable to summary judgment. *See Peck v. Donovan, Civ. No. 07-5500, 2010 U.S. Dist. LEXIS 118269, 2010 WL 4628198, *2 (D.N.J. Nov. 4, 2010)*. The court would not take the decision of whether the STS exceeds the scope of the patents away from the jury **[**20]** on this record.

3. Injury

The court next addresses Abbott's argument that judgment should be entered in its favor because Ethypharm has not sufficiently alleged antitrust injury.

a. Standards

HN7[] Antitrust injury is "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 **[*67]** L. Ed. 2d 701 (1977)*. "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* "The antitrust-injury requirement helps ensure 'that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for . . . damages.'" *West*

[9] This is an email from Zakrzewski to an Ernest Mario dated July 25, 2006.

Penn Allegheny Heath Sys. Inc. v. UPMC, 627 F.3d 85, 101 (3d Cir. 2010) (citing *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*.

b. Discussion

The court agrees with Abbott that Ethypharm has not proffered evidence of a "causal connection between the [alleged] antitrust violation and actual damage suffered." *See* *Callahan v. A.E.V., Inc., 182 F.3d 237, 250 (3d Cir. 1999)* **[**21]** (citations and internal brackets omitted). In its opposition papers to Abbott's motion, Ethypharm describes its injury (without citation to record evidence) as follows:

> First, Abbott itself licensed Ethypharm's technology for just this purpose [of competing against TriCor®] in Latin America. Second, Ethypharm initially approached certain Restricted Entities who expressed interest in purchasing Antara®. Third, AstraZeneca, one of the Restricted Entities, partnered with Abbott in an effort to develop a fenofibrate/statin combination just after the STS. Ethypharm's product was equally, if not better, positioned with a lower dose of fenofibrate to do so. Finally, a jury is entitled to exercise its common sense and ask: if Abbott did not believe these 36 companies would be interested in purchasing the Antara® Rights, what possible reason did Abbott have to include them on a Restricted Entities list?

(D.I. 191 at 20) At oral argument, Ethypharm directed the court to a 2009 Abbott Latin America "Executive Summary" on fenofibrate licensing, describing the competitive landscape for ControLip®, the Latin American version of Antara®. (D.I. 192, pt. 3, ex. 36) That document states that "[Ethypharm's] **[**22]** ControLip® 130mg would provide Abbott with a new and innovative next generation fenofibrate product[,] thus staying one step ahead of the generic competition and protecting its fenofibrate market from possible new competitors." (*Id.*) Ethypharm also pointed to a 2006 Abbott presentation regarding TriCor® competition; in the context of Reliant's sale to Oscient, Abbott stated that "[t]he sale of Antara® was not a surprise, however Oscient is[.]" (*Id.,* ex. 26 at 17) Abbott believed at that time that "Oscient's lack of resources, coupled with a small, non-specialty sales force, are unlikely to pose significant competition to TriCor®." (*Id.*)

Ultimately, it is Ethypharm's position that "Abbott can't restrict 36 companies from bidding on the Antara® Rights and then argue that Ethypharm has no specific proof that any of these 36 companies was interested." (D.I. 191 at 19) It is true that ***HN8***[] "[i]t is not necessary to show with total certainty the amount of damages sustained, just that the antitrust violation caused the antitrust injury suffered by the plaintiff." *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 483 (3d Cir. 1998)*. As the Supreme Court has held,

> damage issues in [antitrust] cases are **[**23]** rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. . . [T]he factfinder may conclude as a matter of just and reasonable interference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the **[*68]** decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 565, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (internal quotations omitted)). Ethypharm, however, does not cite evidence from which a jury could infer a "decline in [ ] profits and values, not shown to be attributable to other causes." *Id.*

The crux of Ethypharm's argument is that Oscient did not have the ability to effectively compete from the outset. (D.I. 191 at 19-20) Even if the court were to assume that the Restricted Entities were better equipped to market Antara® (due to, for example, having larger sales forces and more expendable resources), there is no factual basis from which the court (or a jury) could **[**24]** infer that such a company would have had success with Antara® where Oscient failed. Put simply, there are many market influences that may have contributed to Oscient's failure with Antara®. Ethypharm's arguments are speculative and, absent more, Ethypharm has not evidenced any causal connection to an antitrust injury. Abbott's motion for summary judgment is granted on this ground.

B. Sham Litigation

Ethypharm asserts two sham litigation theories, focusing on: (1) Abbott's counterclaims of infringement (as to the '405 and '881 patents in the Reliant action); and (2) Abbott's supposed knowledge of inequitable conduct by a Fournier employee (Reginault). Abbott moves for summary judgment on each claim.[10]

1. Standard for Noerr-Pennington immunity

HN9[] A patent owner asserting its rights through patent infringement litigation is generally immune from antitrust liability. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; **[**25]** *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. Commonly referred to as the *Noerr-Pennington* doctrine, this immunity extends to persons who petition all types of government entities, including legislatures, administrative agencies, and courts. *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. *Noerr-Pennington* immunity, however, is subject to an exception for "sham" litigation. In this regard, the Supreme Court has outlined a two-part test to determine whether the "sham litigation" exception applies. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Ind., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. As an objective first part, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id. at 60*. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit does not qualify as sham litigation and is immunized under the *Noerr-Pennington* doctrine. *Id.* The subjective second part of the definition arises only if the challenged litigation is objectively meritless. In such a case, the court must decide **[*69]** whether the "baseless **[**26]** lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor.'" *Id. at 60-61*. To invoke the "sham" exception, plaintiffs must prove, by clear and convincing evidence, that defendant's activities were not really efforts to vindicate its rights in court. *See C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1368-69 (Fed. Cir. 1998)* ("sham litigation requires more than a failed legal theory") (quoting *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984))*; *MCI Communications v. Am. Telephone and Telegraph Co., 708 F.2d 1081, 1155 (7th Cir. 1983)*.

2. Sham litigation based on infringement

Claim 1 of the '405 patent and claim 37 of the '881 patent are representative of the asserted claims in the Abbott/Reliant action:

> 1. A composition comprising a hydrosoluble carrier and micronized fenofibrate having a dissolution of **at least 10% in 5 minutes, 20% in 10 minutes, 50% in 20 minutes and 75% in 30 minutes,** as measured using the rotating blade method at 75 rpm according to the European Pharmacopoeia, in a dissolution medium constituted by water with 2% by weight polysorbate 80 or with 0.025M sodium lauryl sulfate.
>
> 37. A granulate comprising **[**27]** micronized fenofibrate, wherein the granulate has a dissolution **of at least 10% in 5 minutes, 20% in 10 minutes, 50% in 20 minutes and 75% in 30 minutes,** as measured using the rotating blade method at 75 rpm according to the European Pharmacopoeia, in a dissolution medium constituted by water with 2% by weight polysorbate 80 or a dissolution medium constituted by water with 0.025 M sodium lauryl sulfate.

(emphasis added) It is not disputed that, before filing its counterclaims, Abbott received from Reliant the full Antara® NDA, which included testing data showing that Antara® does not dissolve close to the "at least 10% in 5

[10] Abbott also moved for judgment on Ethypharm's former allegation that Abbott lacked a reasonable basis to believe that any Stamm patent was valid; Ethypharm expressly abandons this theory in their answering brief. (D.I. 189 at 1, n.2) Judgment, therefore, should be entered for Abbott on this particular claim.

minutes" level required by the patents. (D.I. 189 at 3; D.I. 181 at 8; D.I. 190 at ex. 7, p.3) Specifically, the Antara® NDA shows that Antara®'s dissolution at 5 minutes is 1.2-2.5%.

a. Abbott's infringement theories

Abbott argues that its counterclaims were premised upon two theories of infringement with respect to Antara®: the "Granulate Theory;" and the "10% in 6 minutes" DOE theory. As noted above, claim 37 of the '881 patent claims "[a] granulate comprising micronized fenofibrate, wherein the granulate has a dissolution of at least 10% in 5 minutes, 20% in 10 **[**28]** minutes, [etc.]" The Granulate Theory is that the granulates within Antara® literally meet the "at least 10% in 5 minutes" limitation. The Granulate Theory is based on the belief of Abbott's expert, Dr. Robert O. Williams III ("Williams"), that, because granulates dissolve more quickly than the capsule product, one can "reasonably expect" that the granulates achieve 10% dissolution at or near five minutes.[11] (D.I. 181 at 11-12; D.I. 190, ex. 10 at ¶ 39) Abbott argues that, because Reliant's NDA does not disclose the dissolution rate for the granulates within capsules of Antara®, there is no data contradicting its theory.

The "10% in 6 minutes DOE Theory" is also supported by Williams, who opines that reaching 10% in 6 minutes is equivalent **[*70]** under the DOE to 10% in 5 minutes. Abbott argues that Antara® reaches a dissolution rate of at least 10% in 6 minutes and, therefore, infringes under the doctrine of equivalents. The parties do not dispute that the NDA shows a rapid **[**29]** rise in dissolution for Antara® between 5 and 10 minutes. For example, one batch went from 3% at 5 minutes to 64.5% in 10 minutes. Thus, Abbott argues, Antara® must "pass through" the 10% point sometime between 5 and 10 minutes.[12] (D.I. 197 at 3; D.I. 190, ex. 10 at ¶ 43)

b. Discussion

Neither party to the Reliant action did scientific testing to either verify or discredit the Granulate Theory or 10% in 6 minutes DOE Theory. After Abbott proffered its counterclaims on the '405 and '881 patents on January 7, 2005, the parties entered into settlement discussions which culminated in a settlement agreement in April 2006. The Reliant action was dismissed on April 19, 2006 prior to the close of discovery.

Ethypharm argues that Abbott's DOE theories were shams in two regards. First, Ethypharm asserts that, because Williams did not rely on actual testing, his opinion cannot be reasonable.[13] However, Ethypharm does not cite, and the court is not aware of, caselaw suggesting that Williams was required to do actual testing (as compared to mathematical estimation) **[**30]** in support of his DOE theory before Abbott filed its compulsory counterclaims.

Ethypharm also argues that Abbott's theory is invalid as a matter of law, insofar as it vitiates the "at least 10% in 5 minutes" limitation. It is certainly true that ***HN10***[] the doctrine of equivalents is not unlimited, and it cannot be "used to ignore the actual language of the patent." *See* *K-2 Corp. v. Salomon S.A., 191 F.3d 1356, 1366-67 (Fed. Cir. 1999)* (cited by Ethypharm at D.I. 189 at 15). However, the Federal Circuit has specifically determined that the doctrine of equivalents may apply to claims containing specific numeric ranges, regardless of whether the claim also contains words of approximation. *See* *Adams Respiratory Therapeutics, Inc. v. Perrigo Co., 616 F.3d 1283, 1291, 1293 (Fed. Cir. 2010)* (vacating district court's grant of summary judgment of noninfringement on the doctrine of equivalents, as plaintiff introduced sufficient evidence **[**31]** from which the jury could conclude that a mean

[11] Ethypharm's 30(b)(6) witness admitted that, if the granulates were tested without the capsule, the dissolution results "could be slightly superior probably" over testing the intact capsule. (D.I. 182, ex. 19 at 117:7-23)

[12] Ethypharm's expert stated it is not "impossible" that Antara® dissolves at 10% in 6 minutes. (D.I. 181 at 10) (further citation omitted)

[13] Williams estimated the dissolution at 6 minutes by "approximat[ing] by interpolation" the 5- and 10-minute data in the Antara® NDA, and relied on his beliefs that granulates dissolve more quickly than do capsules. (D.I. 189 at 12; D.I. 190, ex. 9 at 104:5-9; 96:14-97:14)

response (AUC) value of 3493.38 hr*ng/mL is insubstantially different from the claimed value of "at least 3500 hr*ng/mL"). "The proper inquiry is whether the accused value is insubstantially different from the claimed value." *Id.*

Because the Reliant action settled expeditiously, neither the court nor the jury is in the position to judge the veracity of Abbott's position in this regard. Ethypharm does not point to anything in the prosecution history of the '405 and '881 patents that would preclude Abbott's arguments, which are not demonstrably invalid as a matter of law. For these reasons, there is insufficient evidence of record from which a reasonable jury could conclude that Abbott's DOE theories were a sham, and the court grants Abbott's motion for summary judgment of no sham **[*71]** litigation on its infringement counterclaims.

3. Sham litigation based on inequitable conduct

Ethypharm also argues that Abbott lacked a reasonable basis to believe that the Stamm patents were enforceable because Abbott was aware that Fournier committed inequitable conduct before the PTO. Ethypharm's theory of inequitable conduct in this regard is that Fournier's **[**32]** chief scientist, Philippe Reginault ("Reginault"), violated his duty of candor by not informing the PTO in 2003 that a curve corresponding to "Lot 2177" of Fournier's Lipanthyl 200 fenofibrate product, which Fournier relied on to show the improved dissolution of its new fenofibrate formulation, was "inherently unreliable." (D.I. 189 at 17) The Lot 2177 data set was incorporated into the '405 and '881 patents as figure 1 of those patents, wherein it provided a contrast to the dissolution percentage of the tablet of the "invention."

It is Ethypharm's position that Abbott relied exclusively on the Lot 2177 data during prosecution of the Stamm patents without confirmation of the data from other sources, and despite 16 other Lipanthyl 200 dissolution data sets using either of the two dissolution media included in the patents (0.025M SLS or "Tween"). (*Id.* at 7-8) These 16 data sets were: (1) obtained in 1997; (2) "homogenous" (D.I. 190, ex. 16 at 88:11); (3) indicative of a faster dissolution of Lipanthyl 200 than that reported to the PTO by the Lot 2177 curve (*id.,* ex. 10, ¶ 61);[14] (4) incorporated into a 2005 declaration to the PTO; but (5) not disclosed to the PTO during prosecution of **[**33]** the Stamm patents.

The court need only address one aspect of Ethypharm's theory to resolve the motion at bar: specific intent. In this regard, Ethypharm stresses Reginault's testimony that the results of a single **lot** are not indicative of a sample's dissolution **range,** which can be comprised of variable results.[15] (D.I. 189 at 17 (citing D.I. 190, ex. 16 at 86:22-87:12, 93:3-94:16)) Ethypharm also argues that Abbott's characterization of the Lipanthyl 200 testing in prior litigation with Teva Pharmaceuticals USA, Inc. ("Teva") demonstrates Abbott's understanding that the Lot 2177 curve was inconsistent with other Lipanthyl 200 data. (D.I. 189 at 19) Specifically, Abbott previously dismissed Teva's argument that it committed inequitable conduct by failing to identify the 16 Lipanthyl 200 data sets to the PTO, by arguing that two inconsistent data sets were insufficient to demonstrate the falsity of the data supplied **[**34]** to the PTO against a backdrop of hundreds of tests overall. *See Teva Pharmaceuticals USA, Inc. v. Abbott Labs., 580 F. Supp. 2d 345, 366 (D. Del. 2008)* (hereinafter, *"Teva*").[16] At oral argument, Ethypharm argued that the number of withheld results – 16, rather than "hundreds" – also demonstrates specific intent by Reginault. (D.I. 205 at 44-46)

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[14] In other words, the 16 other data sets provide a similar dissolution profile to the invention, rendering the contrast between the plot for the invention and for Lipanthyl 200 moot. Ethypharm provides a colored chart of these plots in its opposition papers. (D.I. 189 at 8)

[15] Reginault stated that "the regularity standards for these tests are that the range is 20 percent minimum. So traditionally, it is known that results will vary, and this applies to any product." (D.I. 190, ex. 16 at 96:14-19)

[16] With respect to inequitable conduct, this court in *Teva* ultimately held that the record lacked evidence that Reginault recalled, and knowingly withheld, the two inconsistent data sets three years after receiving the data. *580 F. Supp. 2d at 345*.

[*72] On this record, Ethypharm cannot clear the high hurdle of proving that Abbott's counterclaims were objectively baseless based on inequitable conduct. ***HN11***[] To prove inequitable conduct, Ethypharm must ultimately show, by clear and convincing evidence, that Reginault[17] "knew of the [unreliability of the Lot 2177 curve], knew that it was material, and made a deliberate decision to withhold" **[**35]** this information from the PTO. *See Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 2011 U.S. App. LEXIS 10590, 2011 WL 2028255, *9 (Fed. Cir. May 25, 2011)*. Ethypharm has simply suggested that Reginault's omission was grossly negligent or negligent under a "should have known" standard, which is not sufficient.[18] *Id.* Reginault's testimony that several data sets make up a dissolution curve is too attenuated from the proposition that the Lot 2177 data was "unreliable." If it is true as a scientific principle, as Reginault testified, that one data set can never provide a complete portrait of the relevant information, the PTO would have taken this into account in its consideration of figure 1. Regardless, there is no evidence that Reginault deliberately set out to deceive the PTO in the manner suggested.[19] Abbott's motion for summary judgment of no sham litigation is granted.

V. CONCLUSION

For the foregoing reasons, Abbott's motions for summary judgment of no anticompetitive conduct and no sham litigation are granted. An appropriate order shall issue.

ORDER

At Wilmington this 23rd day of August, 2011, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that:

1. Defendant's motion for summary judgment on counts one through five regarding its alleged "anticompetitive conduct" (D.I. 176) is granted.

2. Defendant's motion for summary judgment on count seven and plaintiff's allegations of "sham litigation" (D.I. 180) is granted.

3. The Clerk of Court shall enter judgment for defendant and against plaintiff.

4. No party may file a motion for reconsideration absent prior leave of court.

/s/ Sue L. Robinson

United States District Judge

End of Document

[17] Reginault is the only named person at Abbott specifically alleged to have committed inequitable conduct. Ethypharm couches many of its arguments in terms of what "Abbott" knew or intended; such allegations are too general to withstand scrutiny.

[18] The *Therasense* decision issued two days prior to defendant's motion for summary judgment; **[**36]** Ethypharm does not address it in its answering papers.

[19] For example, as Abbott points out, there is no indication that Reginault was asked "**when** he came to this alleged understanding about inherent unreliability and [he] was never asked **whether** he had that understanding in mind when he submitted his 2003 declaration in connection with prosecution of the '881 patent." (D.I. 197 at 9, n.9) (emphasis in original)

[Gorospe v. New Century Mortg. Corp.]

United States District Court for the District of Hawaii

August 23, 2011, Decided; August 23, 2011, Filed

CV. NO. 10-00505 DAE-BMK

Reporter

2011 U.S. Dist. LEXIS 93992 *; 2011 WL 3734230

MAURO C. GOROSPE and CAROLINA GOROSPE, as individuals, Plaintiffs, vs. NEW CENTURY MORTGAGE CORPORATION; DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated July 1, 2004, Morgan Stanley ABS Capital I Inc., Trust 2004-HE5 Mortgage Pass-Through Certificates Series 2004-HE5; BARCLAY CAPITAL REAL ESTATE, INC., d/b/a/ HOMEQ SERVICING; and DOES 1 through 20 inclusive, Defendants.

Core Terms

antitrust, amended complaint, allegations, anti trust law, mortgage, leave to amend, cause of action, assertions, emotional distress, motion to dismiss, relevant market, Violations, pleading requirements, conspiracy, misrepresentation, circumstances, conclusory, fraudulent, Practices, disclose, unfair, vague, constitute fraud, deceptive act, anticompetitive, particularity, quotations

Counsel: **[*1]** For Mauro C. Gorospe, Carolina Gorospe, Plaintiffs: James H. Fosbinder, LEAD ATTORNEY, Ivey Fosbinder Fosbinder LLLC, A Limited Liability Law Company, Wailuku, HI.

For Old Republic Title & Escrow of Hawaii, a Business Entity, form unknown, Defendant: Jade L. Ching, LEAD ATTORNEY, Alston Hunt Floyd & Ing, Honolulu, HI; Shellie K. Park-Hoapili, LEAD ATTORNEY, Alston Hunt Floyd & Ing Honolulu, Honolulu, HI.

For Deutsche Bank National Trust Company, as Trustee under Pooling and Servicing Agreement dated July 1, 2004, Morgan Stanley ABS Capital I Inc., Trust 2004-HE5 Mortgage Pass-Through Certificates Series 2004-HE5, Defendant: Robert J. Martin, LEAD ATTORNEY, Paul Alston, Alston Hunt Floyd & Ing, Honolulu, HI.

Judges: David Alan Ezra, United States District Judge.

Opinion by: David Alan Ezra

Opinion

ORDER: (1) GRANTING DEUTSCHE BANK'S MOTION TO DISMISS; (2) DISMISSING COMPLAINT WITHOUT PREJUDICE AS AGAINST ALL DEFENDANTS; AND (3) GRANTING PLAINTIFFS LEAVE TO AMEND

On August 22, 2011, the Court heard Defendant Deutsche Bank National Trust Company, as Trustee under Pooling and Servicing Agreement dated July 1, 2004, Morgan Stanley ABS Capital I Inc., Trust 2004-HE5 Mortgage Pass-Through Certificates Series 2004-HE5 ("Deutsche **[*2]** Bank")'s Motion to Dismiss First Amended Complaint. James H. Fosbinder, Esq., appeared at the hearing telephonically on behalf of Plaintiffs Mauro C. Gorospe and Carolina Gorospe ("Plaintiffs"), Robert J. Martin, Esq., appeared at the hearing on behalf of Deutsche Bank. After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS Deutsche Bank's Motion to

Dismiss (Doc. # 37), DISMISSES Plaintiffs' First Amended Complaint as against all Defendants, and GRANTS Plaintiffs leave to amend.

BACKGROUND

On September 1, 2010, Plaintiffs Mauro C. Gorospe and Carolina Gorospe ("Plaintiffs") filed a Complaint against Defendants New Century Mortgage Corporation ("New Century"), Deutsche Bank, Barclay Capital Real Estate, Inc., d/b/a/ HomEq Servicing ("Barclay"), and Does 1 through 20 inclusive (collectively, "Defendants"), alleging that Plaintiffs had been lured into a predatory mortgage loan. ("Compl.," Doc # 1.) On February 22, 2011, Plaintiffs filed a First Amended Complaint ("FAC") against Defendants. ("FAC," Doc. # 31.) Specifically, Plaintiff's FAC alleges the following Counts:

- Count I: Violations of the Clayton Anti-Trust Act (FAC ¶¶ 66-73.)
- Count II: Violations **[*3]** of the Hawaii Anti-Trust/Anti-Monopoly Acts (Id. ¶¶ 74-77.)
- Count III: Civil Conspiracy (Id. ¶¶ 78-82.)
- Count IV: Fraudulent Misrepresentation (Id. ¶¶ 83-90.)
- Count V: Unfair and Deceptive Acts or Practice. (Id. ¶¶ 91-103.)
- Count VI: Breach of Fiduciary Duty (Id. ¶¶ 104-111.)
- Count VII: Unjust Enrichment (Id. ¶¶ 112-117.)
- Count VIII: Mistake (Id. ¶¶ 118-119.)
- Count IX: Unconscionability (Id. ¶¶ 120-128.)
- Count X: Intentional Infliction of Emotional Distress (Id. ¶¶ 129-133.)
- Count XI: Violations of the Fair Debt Collection Practices Act (Id. ¶¶ 134-139.)
- Count XII: Breach of the Covenant of Good Faith and Fair Dealing (Id. ¶¶ 140-143.)
- Count XIII: Complaint to Quiet Title (Id. ¶¶ 144-149.)
- Count XIV: Negligence (Id. ¶¶ 150-156.)

Plaintiffs are residents of the County of Maui, State of Hawaii. (Id. ¶ 21.) Plaintiffs executed a mortgage with Defendant New Century on March 18, 2004, which was recorded as Document No. 2004-071671 in the State of Hawaii Bureau of Conveyances on April 8, 2004. (Id. ¶ 28.) The real property at issue in this loan transaction is located at 60 Wilikona Place, Wailuku, Hawaii 96793 (the "Subject Property"). (Id. ¶ 29.)

Plaintiffs allege that the Subject **[*4]** Property was intended as a rental property until such time as Plaintiffs would relocate and move into the Subject Property. (Id. ¶ 37.) Plaintiffs claim they put their trust and confidence in Defendant New Century to properly qualify them for a loan (id. ¶ 40), but that at the time of closing on the loan, they were not provided with time to review the loan application or other associated documents and were not afforded the opportunity to have legal counsel review the detailed documents. (id. ¶¶ 44-45). Plaintiffs further state that Defendant New Century failed to provide timely notice of various legally required disclosures including, but not limited to, the HUD settlement statement and notification of Plaintiffs' other consumer rights. (Id. ¶ 46.) Finally, Plaintiffs assert various allegations regarding the assignment of the mortgage to Defendant Deutsche Bank. (Id. ¶¶ 50-54.)

On April 28, 2011, Deutsche Bank filed the instant Motion to Dismiss First Amended Complaint ("Motion"). ("Mot.," Doc. # 37.) On June 15, 2011, Plaintiffs filed their Memorandum in Opposition ("Opposition"). ("Opp'n," Doc. # 44.) On July 12, 2011, Deutsche Bank filed a Reply in support of its Motion. (Reply, **[*5]** Doc. # 45.)

STANDARD OF REVIEW

I. *Federal Rule of Civil Procedure 12(b)(6)*

Pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* ("Rule"), a motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Review is limited to the contents of the complaint. See *Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994)*. A complaint may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)* (citation omitted). Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the plaintiff. See *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A complaint need not include detailed facts to survive a *Rule 12(b)(6)* motion to dismiss. See *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In providing grounds for relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. See *id. at 556-57*; see also *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988)* **[*6]** ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.") (citation omitted). "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotations and citations omitted). Thus, "bare assertions amounting to nothing more than a formulaic recitation of the elements" of a claim "are not entitled to an assumption of truth." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* ("[T]he non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.") (internal quotations and citations omitted).

A court looks at whether the facts in the complaint sufficiently state a "plausible" ground for relief. See *Twombly, 550 U.S. at 570*. A plaintiff must include enough facts to raise a reasonable expectation that discovery will reveal evidence and may not just provide a speculation of a right to relief. *Id. at 586*. When **[*7]** a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Id. at 558* (citation omitted). If a court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (finding that leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect") (internal quotations and citations omitted).

II. *Federal Rule of Civil Procedure 9(b)*

Federal Rule of Civil Procedure 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. Under Ninth Circuit law, "*Rule 9(b)* requires particularized allegations of the circumstances constituting fraud." *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547-48 (9th Cir. 1994)* (en banc), superseded on other grounds by *15 U.S.C. § 78u-4*.

In their pleadings, plaintiffs must include the time, place, and nature of the alleged fraud; "mere conclusory allegations of fraud are insufficient" to satisfy this requirement. *Id. at 1548* (quoting **[*8]** *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989))*. "[T]he circumstances constituting the alleged fraud [must] 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)* (quoting *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001))*; see also *Moore, 885 F.2d at 540* (finding that *Rule 9(b)* requires a plaintiff to attribute particular fraudulent statements or acts to individual defendants). However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*; see also *In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1547* ("We conclude that plaintiffs may aver scienter . . . simply by saying that scienter existed."); *Walling v. Beverly Enter., 476 F.2d 393, 397 (9th Cir. 1973)* (finding that *Rule 9(b)* "only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations" (citations omitted)).

A motion to dismiss for failure to plead with particularity **[*9]** is the functional equivalent of a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003)*. In considering a motion to dismiss, the court is not deciding the issue of "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* overruled on other grounds by *Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)*.

DISCUSSION

Deutsche Bank contends that the First Amended Complaint is vague and conclusory and therefore should be dismissed for failure to comply with *Federal Rules of Civil Procedure 8(a)*, *9(b)* and *12(b)(6)*. The Court agrees.

I. Count I: Violation of the Clayton Antitrust Act

Plaintiffs allege that Defendants "engaged in predatory conduct or anticompetitive conduct" by "monopolizing or attempting to monopolize the mortgage lending and servicing market" in violation of the Clayton Anti-Trust Act, *15 U.S.C. § 12, et seq.* (FAC ¶¶ 67-68, 73.) Plaintiffs seek monetary relief for this violation, presumably pursuant to Section 4 of the Clayton Antitrust Act, *15 U.S.C. § 15*.

Regardless of the provision purportedly violated, **[*10]** an antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." [1] *Brunswick, 429 U.S. at 489*. Indeed, the antitrust laws "were enacted for 'the protection of competition, not competitors.'" *Id. at 488* (quoting *Brown, 370 U.S. at 320*); see also *Cascade Health Solutions, 515 F.3d at 901-02* (recognizing the Supreme Court's "long and consistent adherence to the principle that the antitrust laws protect the process of competition, and not the pursuits of any particular competitor").

A plaintiff seeking damages pursuant to *Section 4* of the Clayton Act must show causal antitrust injury, and to obtain injunctive relief pursuant to *Section 16* of the Clayton Act, a plaintiff must allege threatened antitrust injury. [2] *Cargill, 479 U.S. at 109-13*. The purpose of the antitrust injury requirement is to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." *Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. As

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[1] This is different from antitrust standing. See *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110-11 nn. 5-6, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (noting that antitrust injury is necessary, but not always sufficient, to establish standing under *Section 4* and that the standing analysis under *Section 16* may differ from that for *Section 4*); see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters, 459 U.S. 519, 535-46, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (articulating factors that courts should consider when determining whether a plaintiff has standing under *Section 4*); *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232-37 (9th Cir. 1998)* **[*11]** (examining whether a plaintiff had standing to assert claims for damages and injunctive relief under *Sections 4* and *16* of the Clayton Act); *Amarel v. Connell, 102 F.3d 1494, 1506-07 (9th Cir. 1996)* (summarizing the factors relevant to determine whether a plaintiff has standing to pursue a damages claim under *Section 4*).

[2] *Section 4* of the Clayton Act provides treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. *Section 16* of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*.

such, "[t]o show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior [because] it is inimical to the antitrust laws to award damages **[*12]** for losses stemming from acts that do not hurt competition." *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* (citing *Atlantic Richfield, 495 U.S. at 334*); see also *Cascade Health Solutions, 515 F.3d at 902* ("'Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'") (quoting *Brunswick, 429 U.S. at 489*).

In addition to antitrust injury, antitrust plaintiffs must also properly allege a relevant market. See *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)* **[*13]** (finding that to state a claim under either *Section 1* or *Section 2* of the Sherman Act, the plaintiff must sufficiently allege a relevant market). The Ninth Circuit recently addressed the legal principles that govern definition of a relevant market, and it reaffirmed that a complaint may be dismissed under *Rule 12(b)(6)* if its relevant market definition is "facially unsustainable." *Id. at 1045* (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997))*. The relevant market includes both the product market and the geographic market. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Newcal Indus., 513 F.3d at 1045 n.4*. As to the product market, it must "encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus., 513 F.3d at 1045* (citing *Brown Shoe, 370 U.S. at 325*). It must therefore include "the group of sellers or producers who have the 'actual or potential ability to deprive each other of significant levels of business.'" *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)* (quoting *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989))*; see also *Brown Shoe, 370 U.S. at 325* **[*14]** ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). "In limited settings, however, the relevant product market may be narrowed beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product clusters." *Thurman Indus., 875 F.2d at 1374* (citation omitted). To establish the existence of a legally cognizable submarket, "the plaintiff must be able to show (but need not necessarily establish in the complaint) that the alleged submarket is economically distinct from the general product market." *Newcal Indus., 513 F.3d at 1045*; see also *Brown Shoe, 370 U.S. at 325* (listing several "practical indicia" of an economically distinct submarket).

Here, contrary to the abundant weight of authority, Plaintiffs devoted merely five words of its sixty-one page complaint to defining the relevant market. Plaintiffs assert that the relevant market is the "mortgage lending and servicing market" (FAC ¶ 68), but the complaint is utterly devoid of any explanation or elaboration to support this contention. For **[*15]** instance, the complaint does not contain any allegations concerning economic substitutes for the proposed product market, and it is entirely unclear to the Court why Plaintiffs defined the relevant market in the way that they did. Moreover, the complaint does not even specify a relevant geographic market.

The Court is also concerned by the vagueness of Plaintiffs' allegations in support of the antitrust claim. As noted, Plaintiffs allege that "Defendants and each of them, have engaged in predatory conduct or anticompetitive conduct in an attempt to monopolize the mortgage lending and servicing market." (FAC ¶ 68.) The complaint, however, utterly fails to set forth any specific factual or legal allegations or to link those allegations to particular statutory violations. Instead, Plaintiffs allege that Defendants "worked to create the collapse of the mortgage market, which in turn created an economic collapse unprecedented since the Great Depression." (FAC ¶ 71.) Such sweeping statements fail to apprise Defendants of their alleged wrongdoings.

The Supreme Court acknowledged, in a case involving an alleged Sherman Antitrust Act violation, that "a district court must retain the power to **[*16]** insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors, 459 U.S. at 528 n.17*; see also *Twombly, 550 U.S. at 558* ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . , but quite another to forget that proceeding to antitrust discovery can be expensive."); *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046-47 (9th Cir. 2008)* (concluding that the Supreme Court clarified antitrust pleading requirements in Twombly "because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case") (citing *Twombly, 550*

U.S. at 558-59). Because Plaintiffs have provided nothing more than legal conclusions in support of the antitrust claim, this claim must be dismissed.

Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count I of the First Amended Complaint.

II. Count II: Violations of the Hawaii Antitrust/Anti-Monopoly Acts

In Count II of the First Amended Complaint, Plaintiffs rely on the factual allegations contained in Count I to **[*17]** assert violations of state antitrust laws. Plaintiffs state generally that "[m]ortgage lending and servicing in Hawaii is an activity in or affecting interstate commerce. . . ." (FAC ¶ 75.) Plaintiffs then allege that Defendants have violated "the Hawaii Anti-Trust Act, *Hawaii Revised Statutes § 480-13*, and the Hawaii Monopolization Act, *Hawaii Revised Statutes § 480-9*." (FAC ¶ 76.)

The close relationship between federal ***antitrust law*** and Hawaii ***antitrust law*** has been long established. See, e.g., *Robert's Haw. Sch. Bus v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 982 P.2d 853, 881 n.29 (Haw. 1999)* (noting the similarities between *Section 2* of the Sherman Act and *Hawaii Revised Statute section 480-9*.) Indeed, the "[l]egislative history of Hawaii's ***antitrust law*** clearly indicates that the state laws are to be interpreted and construed in harmony with analogous federal antitrust laws." *Island Tobacco Co., Ltd. v. R. J. Reynolds Indus., Inc., 513 F. Supp. 726, 738 (D. Haw. 1981)*. Similar to federal law, therefore, Hawaii courts require plaintiffs in antitrust proceedings to plead the "nature of the competition" to "ensure that the injury results from a competition-reducing aspect of the defendant's **[*18]** behavior." *Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 228 P.3d 303, 325 (Haw. 2010)* (citing and relying on federal law).

As with Plaintiffs' Clayton Act claim, Plaintiffs' state antitrust claim is vague and conclusory and fails to set forth sufficient factual allegations to withstand a motion to dismiss. Broad assertions of state ***antitrust law*** violations of the type presented here simply do not give Defendants an opportunity to properly defend themselves. See *Iqbal, 129 S. Ct. at 1949* ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do."). Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count II of the First Amended Complaint.

III. Count III: Civil Conspiracy

Count III alleges that the Defendants "agreed, between and among themselves, to engage in actions and a course of conduct designed to further an illegal act or accomplish a legal act by unlawful means, and to commit one or more overt acts in furtherance of the conspiracy to defraud the Plaintiffs." (FAC ¶ 79.) According to Plaintiffs, Defendants had a "common purpose of accruing economic gains for themselves at the expense of and detriment to the **[*19]** Plaintiffs." (Id. ¶ 80.)

This Count is dismissed because Hawaii does not recognize an independent cause of action for "civil conspiracy"—such theories of potential liability are derivative of other wrongs. See, e.g., *Chung v. McCabe Hamilton & Renny Co., 109 Haw. 520, 128 P.3d 833, 843 (Haw. 2006)*; *Weinberg v. Mauch, 78 Haw. 40, 890 P.2d 277, 286 (Haw. 1995)*. Here, in contravention of this principle, Plaintiffs did not link the claim of civil conspiracy with another cause of action. [3] Further, to the extent that this count is premised at least in part on fraud, Plaintiffs must meet the heightened pleading requirements of *Rule 9(b)* in alleging a conspiracy. See *Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007)* ("*Rule 9(b)* imposes heightened pleading requirements where the object of the conspiracy is fraudulent." (citation and internal quotations omitted)). The bald assertions contained in this claim do not satisfy *Rule 9(b)*'s pleading standard.

Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count **[*20]** III of the First Amended Complaint.

[3] Plaintiffs acknowledge as much in the Opposition. (See Opp'n at 8 (recognizing that "Plaintiffs may not have tied their claim of civil conspiracy to any particular cause of action . . .").)

IV. Count IV: Fraudulent Misrepresentation

Plaintiffs next allege that Defendants "knowingly and intentionally concealed material information from Plaintiffs which was required by Federal statutes and regulations to be disclosed to the Plaintiffs both before and at the time of closing." (FAC ¶ 84.) Plaintiffs also assert that Defendants "materially misrepresented or failed to disclose material information to the Plaintiffs with full knowledge by Defendants that their affirmative representations were false, fraudulent and misrepresented the truth at the time said representations were made or were omissions of material fact." (Id. ¶ 85.)

Plaintiffs' vague assertions are insufficient to satisfy *Rule 9(b)*'s rigorous pleading requirements, which apply to allegations of fraud or mistake. See *Fed. R. Civ. P. 9(b)* ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). As noted, a plaintiff "must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1393 (9th Cir. 1988)*. **[*21]** Fraud allegations must also include the "who, what, when, where, and how" of the misconduct, and set forth "more than the neutral facts necessary to identify the transaction." See *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*.

Here, with the exception of Paragraph 86, the allegations of misconduct related to this claim are overly broad and general in nature. These assertions do not distinguish between Defendants and are plainly insufficient to meet Plaintiffs' burden under *Rule 8*, much less the more rigorous requirements of *Rule 9(b)* applicable here.

Paragraph 86, the lone paragraph that provides any clarity to the fraudulent misrepresentation claim, is similarly deficient. In this paragraph, Plaintiffs allege several instances of concealment and misrepresentation, but the complaint does not identify who specifically made these misrepresentations or how material facts were concealed from Plaintiffs. Nor do Plaintiffs specify how these representations were false. [4] Without more, the Court cannot conclude that Plaintiffs' vague assertions satisfy *Rule 9(b)*'s heightened pleading requirement.

Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count IV of the First Amended Complaint.

V. Count V: Unfair and Deceptive Acts or Practices

Plaintiffs also contend that Defendants have engaged in unfair or deceptive acts and practices in violation of *Hawaii Revised Statute sections 480-2(a)* and *481A-3*. (FAC ¶¶ 91-103.)

Section 480-2(a) provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." *Haw. Rev. Stat. § 480-2(a)*. "Two distinct causes of action have emerged under *[section] 480-2(a)*: (1) claims alleging unfair methods of competition; **[*23]** and (2) claims alleging unfair or deceptive acts or practices." [5] *Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Haw. 77, 148 P.3d 1179, 1207 (Haw. 2006)*; see also *Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Haw. 1996)*. *Section 481A-3* similarly prohibits "deceptive trade practice[s]." *Haw. Rev. Stat. § 481A-3*.

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[4] As to Plaintiffs' claim that Defendants "[f]alsely represented that [New Century] **[*22]** transferred its interest in the Mortgage to Defendants [New Century, Deutsche Bank, and Barclay]" (FAC ¶ 92(j)), this contention also fails to meet *Rule 9(b)*'s requirement that fraud be pleaded with particularity. In this allegation, Plaintiffs are presumably referring to the assignment from New Century to Deutsche Bank, but the complaint is completely devoid of any factual allegations to support Plaintiffs' argument that New Century did not have authority to assign the mortgage. Accordingly, this contention cannot withstand a motion to dismiss.

[5] Although "[a]ny person" may bring an action for unfair methods of competition in violation of *section 480-2*, only consumers, the attorney general, or the director of the office of consumer protection may bring an action for unfair or deceptive acts or practices in violation of *section 480-2*. *Haw. Rev. Stat. § 480-2(d)*, *(e)*; see also *Davis v. Four Seasons Hotel, Ltd., 122 Haw. 423, 228 P.3d 303, 307 (Haw. 2010)*. A "consumer" is a "natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." *Haw. Rev. Stat. § 480-1*.

Plaintiffs contend that Defendants violated these statutes by: (1) targeting financially unsophisticated and otherwise vulnerable consumers for inappropriate credit products; (2) failing to adequately disclose **[*24]** the true costs and risks of the subject loan and its inappropriateness for Plaintiffs; (3) failing to disclose that the lender approved the subject loan based on financial documents required by Defendants such as tax returns and pay stubs without regard to Plaintiff' ability to sustain the loan with any reasonable means test; (4) falsely representing or failing to fully and completely disclose the amounts Plaintiffs were required to pay; (5) issuing a defective mortgage loan that resulted in little net benefit to Plaintiffs with the primary objective of generating fees; and (6) entering into the public record a materially false document. (FAC ¶ 96.)

Once again, Plaintiffs provide only labels and conclusions to support this claim. For instance, Plaintiffs have utterly failed to allege any facts to suggest that Defendants were targeting financially unsophisticated or otherwise vulnerable consumers. Nor have Plaintiffs proffered facts with respect to Defendants' failure to adequately disclose "the true costs and risks of the subject loan." There are also no factual allegations to suggest that the lender failed to disclose that it approved loans "without regard to Plaintiffs [sic] ability **[*25]** to sustain the loan with any reasonable means test." (Id.) Moreover, Plaintiffs' assertion that Defendants created a defective mortgage loan that resulted in little net economic benefit to Plaintiffs is so utterly lacking in factual basis that it cannot possibly satisfy federal pleading requirements.

Additionally, Plaintiffs' contentions that Defendants falsely represented the amount Plaintiffs were required to pay, and that Defendants caused to be recorded a materially false document purporting to convey an interest in the Subject Property, sound in fraud. These assertions, couched as legal conclusions, are insufficient to meet Plaintiffs' burden under *Rule 8*, much less the more rigorous requirements of *Rule 9(b)* that apply to allegations of fraud or mistake. See *Fed. R. Civ. P. 9(b)* (requiring a party to state with particularity the circumstances constituting fraud or mistake).

In sum, the instant claim consists entirely of conclusory allegations and vague assertions, which do not satisfy federal pleading requirements and are insufficient to put Defendants on notice of the basis for Plaintiffs' claims. See *Iqbal, 129 S. Ct. at 1949* (finding that a complaint does not "suffice if it **[*26]** tenders naked assertions devoid of further factual enhancement") (citation and quotation signals omitted). Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count V of the First Amended Complaint.

VI. Count X: Intentional Infliction of Emotional Distress

Plaintiffs next assert a cause of action for intentional infliction of emotional distress. Plaintiffs specifically contend that they "suffered emotional distress in the form of lost sleep, constant worry and grief from the loss of their property. . . ." (FAC ¶ 132.)

"Under Hawaii law, the elements of IIED are '(1) that the act allegedly causing the harm was intentional or reckless, (2) that the act was outrageous, and (3) that the act caused (4) extreme emotional distress to another.'" *Enoka v. AIG Haw. Ins. Co., 109 Haw. 537, 128 P.3d 850, 872 (Haw. 2006)* (quoting *Hac v. Univ. of Haw., 102 Haw. 92, 73 P.3d 46, 60-61 (Haw. 2003))*. The Hawaii Supreme Court defines the term "outrageous" as conduct "'without just cause or excuse and beyond all bounds of decency.'" *Enoka, 128 P.3d at 872* (quoting *Lee v. Aiu, 85 Haw. 19, 936 P.2d 655, 670 n.12 (Haw. 1997))*. "Moreover, 'extreme emotional distress' constitutes, inter alia, mental suffering, mental anguish, nervous **[*27]** shock, and other 'highly unpleasant mental reactions.'" Id. (quoting *Hac, 73 P.3d at 60*).

Here, Plaintiffs fail to allege any facts to support an inference that Defendants acted in an intentional or reckless manner or that they engaged in outrageous conduct or caused him to suffer severe mental and emotional distress. Plaintiffs' conclusory allegations are once again insufficient to state a claim for relief. See *Iqbal, 129 S. Ct. at 1949* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count X of the First Amended Complaint.

VII. Count XIV: Negligence

Finally, Plaintiffs assert a cause of action for Negligence, stating first that Defendant New Century was negligent in its execution of the Assignments of Mortgage. (FAC ¶ 151.) Plaintiffs further state that Defendant Deutsche Bank owes Plaintiffs, as the borrower, a duty, and was negligent in its processing of the foreclosure on Plaintiffs' home because Defendant knew or should have known, amongst other things, that proper notices were not served for the sale of the property, that there is a lack of **[*28]** standing on the part of the foreclosing entity, and that proper licensing and registration procedures have not been followed. (Id. ¶¶ 153-54.) Plaintiffs also allege that as a result of the negligent acts, they have suffered emotional distress and attorneys fees and costs. (Id. ¶ 156.)

"It is well-established that, in order for a plaintiff to prevail on a negligence claim, the plaintiff is required to prove all four of the necessary elements of negligence: (1) duty; (2) breach of duty; (3) causation; and (4) damages. *Cho v. State, 115 Haw. 373, 168 P.3d 17, 23 n. 11 (Haw. 2007)* (citing *Takayama v. Kaiser Found. Hosp., 82 Haw. 486, 923 P.2d 903, 915-16 (1996))*. Thus, the elements of duty and breach of duty are essential elements of a negligence claim under Hawaii law.

Defendant Deutsche Bank argues that no duty exists between Plaintiffs and Defendants. (Mot. at 12-13; Reply at 7.) Indeed, "[c]ourts generally hold that lenders do not owe their borrowers a duty of care sounding in negligence." *Caraang v. PNC Mortg., F. Supp. , 795 F. Supp. 2d 1098, 2011 U.S. Dist. LEXIS 65421, 2011 WL 2470637, at *23 (D. Haw. June 20, 2011)* (citing *McCarty v. GCP Mgmt., LLC, 2010 U.S. Dist. LEXIS 122585, 2010 WL 4812763, at *6 (D. Haw. Nov. 17, 2010)* (citing *Champlaie v. BAC Home Loans Servicing, LP, 706 F. Supp. 2d 1029, 1061 (E.D. Cal. 2009)* **[*29]** ("[A]s a matter of law, [a] lender does not owe a duty in negligence not to place borrowers in a loan even where there was a foreseeable risk borrowers would be unable to repay.")(some citations omitted))). In the instant case, Plaintiffs fail to allege facts showing that their relationship with either New Century or Deutsche Bank was anything other than a borrower-lender relationship. For that reason, Plaintiffs have not alleged facts showing that New Century or Deutsche Bank owed them a duty of care sounding in negligence. Further, to the extent Plaintiffs mentions emotional distress in their negligence claim, such a claim also fails.

Accordingly, the Court GRANTS Deutsche Bank's Motion to Dismiss as to Count XIV.

VIII. Remaining Claims and Leave to Amend

Plaintiffs concede that the causes of action for Mistake (Count VIII), Breach of Fiduciary Duty (Count VI), Unconscionability (Count IX), Unjust Enrichment (Count VII), Violation of the Covenant of Good Faith and Fair Dealing (Count XII), Violations of the Fair Debt Collection Practices Act (Count XI), and Complaint to Quiet Title (Count XIII), "are unlikely to prevail as written." (Opp'n at 14.) Plaintiffs therefore request leave **[*30]** to amend these claims and any others that the Court finds to be deficient.

Pursuant to *Rule 15(a)(2)*, courts should "freely give leave [to amend] when justice so requires." Further, "requests for leave should be granted with extreme liberality." *Moss v. U.S. Secret Service, 572 F.3d 962, 972 (9th Cir. 2009)*. "Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by an amendment." Id. "However, 'liberality in granting leave to amend is subject to several limitations.'" *Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1058 (9th Cir. 2011)* (quoting *Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989))*. "Those limitations include undue prejudice to the opposing party, bad faith by the movant, futility, and undue delay." Id. (citing *Ascon Props, 866 F.2d at 1160*). "Further, '[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.'" Id. (quoting *Ascon Props, 866 F.2d at 1160*).

Due to the deferential standard for amended complaints in this Circuit, the Court will provide Plaintiffs the opportunity to amend the complaint consistent **[*31]** with this Order. Accordingly, the First Amended Complaint is DISMISSED WITHOUT PREJUDICE as against all Defendants in this action with leave to amend no later than 30 days from the filing of this Order. [6] Failure to file an amended complaint and to cure the pleading deficiencies will

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[6] The Court notes that Defendant Deutsche Bank requested that Plaintiffs not be allowed to amend their antitrust claims because they are allegedly time barred. (Reply at 8.) The Court fails to reach this issue, however, as it is not entirely clear on what date

result in dismissal of this action with prejudice. Plaintiffs are advised that the amended complaint must clearly state how each of the named defendants have injured them, and it must also clearly identify the statutory provisions, if any, under which Plaintiffs' claims are brought. Moreover, the Court does not here limit Plaintiffs' amended pleading only to the causes of action presently contained in the complaint—Plaintiffs may allege new theories of liability, provided that they are supported by the proper factual and legal basis.

CONCLUSION

For the reasons stated above, the Court GRANTS Deutsche Bank's Motion to Dismiss (Doc. # 37), DISMISSES Plaintiffs' First Amended Complaint as against all Defendants, and GRANTS Plaintiffs leave to amend.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 23, 2011.

/s/ David Alan Ezra

David Alan Ezra

United States District Judge

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Plaintiffs antitrust claims arose. Further, because Deutsche Bank's request is first mentioned in its Reply, both parties **[*32]** have not had the opportunity to fully brief the issue.

LexisNexis

Delong v. TaxMasters, Inc.

United States District Court for the Central District of California

August 24, 2011, Decided; August 24, 2011, Filed

CV 11-01431-ODW (AGRx)

Reporter

2011 U.S. Dist. LEXIS 94883 *; 2011 WL 3715251

Jeffrey Delong, et al. v. TaxMasters, Inc., et al.

Core Terms

consumer, refund, arbitration, allegations, customers, terms, bank account, cancel, notice, credit card, violations, practices, damages, unfair

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

Attorneys Present for Defendants: Not present.

Judges: The Honorable Otis D. Wright II, United States District Judge.

Opinion by: Otis D. Wright II

Opinion

CIVIL MINUTES

Proceedings (In Chambers): ORDER **GRANTING in Part** and **DENYING in Part** Defendants's Motion to Dismiss Plaintiffs's Second Amended Complaint. (Dkt. No. 19.)

I. INTRODUCTION

Currently before the Court is Defendants TaxMasters, Inc. and TMIRS Enterprises, LTD's (collectively "Defendants"), Motion to Dismiss Plaintiffs Jeffery Delong and Dennis Holmes's Second Amended Complaint ("SAC"), pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. In particular, the Motion seeks to dismiss only claims three through seven of the SAC. Plaintiffs have since filed an Opposition. Having carefully considered all the papers filed both in support of and in opposition to the instant Motion, the Court deems the matter appropriate for decision without oral argument. *See* *Fed. R. Civ. P. 78*; *L.R. 7-15*. For the following reasons, Defendants' Motion to Dismiss is **GRANTED in PART** and **DENIED in PART.**

II. FACTUAL AND PROCEDURAL BACKGROUND

Jeffery Delong ("Delong") and Dennis Holmes ("Holmes") (collectively "Plaintiffs") were customers **[*2]** of TaxMasters, Inc. ("TaxMasters"), a company that performs tax relief services for individuals with federal and state tax debt problems and liabilities. (SAC ¶¶ 6, 14.) TaxMasters does not have any "brick and mortar" stores, but relies upon potential customers to call its telephone number after viewing its nationwide advertisement on television, radio, and internet. (SAC ¶¶ 15, 16.)

Individuals who call the telephone number are connected to a "representative who proposes a solution to the consumer's tax problems and then closes the deal by obtaining the consumer's credit card or bank account information. (SAC ¶ 17.) TaxMasters typically charges between $1500 to $10,000 for its services; consumers can either pay the entire fee up front or use an installment plan that usually requires a down payment. (SAC ¶ 22.) Allegedly, if a consumer asks to receive a written description of the service prior to purchasing TaxMasters's services, they are told it is not possible to generate the documents without first inputting a payment method into TaxMasters's system. (SAC ¶ 21.) Rather, Plaintiffs claim that before TaxMasters sends a consumer any written materials or contract, it charges the customer's **[*3]** credit card or bank account. (SAC ¶ 24.) Furthermore, Plaintiffs aver TaxMasters refuses to refund any fees collected during the initial phone call, even when asked within twenty-four hours of said phone call or when no service has been performed. (SAC ¶¶ 27, 28.)

When consumers do receive paperwork, Plaintiffs allege it contains numerous previously undisclosed terms and conditions that substantively limit and change the services described during the initial call. (SAC ¶ 25.) Terms include: a minimum charge of the retainer and/or any work preformed if a consumer wishes to cancel; work will not be preformed until full payment is made to TaxMasters; additional charges may be imposed at TaxMasters's discretion; TaxMasters may unilaterally cancel the contract without a refund should they feel a consumer is uncooperative or abusive; consumers waive any right to sue any undisclosed third party subcontracted by TaxMasters. (SAC ¶¶ 26, 29, 31.) Additionally, the paperwork contains a binding arbitration agreement, stating customers must submit to arbitration in Houston, Texas, and pay any fees associated with the arbitration. (SAC ¶ 31.) TaxMasters, on the other hand remains free to sue customers **[*4]** in a forum of their own choosing. (*Id.*)

With regard to Delong, on October 20, 2008, he contacted TaxMasters and agreed to pay $3000 for help with a tax dispute. (SAC ¶ 52.) Delong was allegedly told he could not receive the written contract until he had first authorized TaxMasters to charge his bank account. (SAC ¶ 53.) On October 21, 2008, he returned the executed engagement agreement to TaxMasters, however, he subsequently discovered the terms of the initial telephone conversation had been altered, including that the $3000 may not have been payment in full. (SAC ¶ 55.) Although he tried to cancel the contract via an October 24 fax and email, Delong received a package from TaxMasters on November 6, 2006, saying that it was moving forward with his case; Delong alleges TaxMasters back dated the letter to October 23 in an attempt to deceive him and retain his payment. (SAC ¶¶ 55, 56.) In addition, Delong claims TaxMasters refused to directly refund his $3000. (SAC ¶ 58.)

Holmes had a similar experience. He contacted TaxMasters on or about May 1, 2009, seeking help for a dispute with the IRS. (SAC ¶ 60.) Holmes was told he would be charged $3150 for TaxMasters services, which he agreed **[*5]** to pay on an instalment plan. (SAC ¶ 62.) A $1600 deposit was deducted from his bank account that same day. (*Id.*) On May 15, 2009, Holmes contacted TaxMasters to cancel his contract; at this time TaxMasters had allegedly performed no substantive work on Holmes's behalf. (SAC ¶¶ 65, 68.) TaxMasters, however, refused to provide any refund and charged Holmes an additional $1550 on July 1, 2009. (SAC ¶¶ 66, 69.)

In light of the foregoing, Plaintiffs filed a Complaint on February 16, 2011. (Dkt. No. 1.) A SAC was filed on May 9, 2011, which proceeds on seven claims: (1) recession of contract; (2) unlawful/void contract for sale of legal services; (3) injunctive relief for violation of the Consumer Legal Remedies Act ("CLRA") under *California Civil Code section 1750*; (4) damages for violation of CLRA; (5) violation of *California Business and Professions Code section 17200* by way of *section 17538*; (6) violation of *California Business and Professions Code section 17200* by way of CLRA; and (7) violation of the *California Business and Professions Code section 17200* by way of the Texas Deceptive Trade Practices Act ("DTPA") *section 17.46(b)(23)*. (Dkt No. 16.) Defendants subsequently filed the **[*6]** instant Motion on June 13, 2011, seeking to dismiss claims three through seven.

III. LEGAL STANDARD

Under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a claim may be dismissed if the plaintiff fails to state a claim upon which relief can be granted. To overcome dismissal, the plaintiff must prove that the complaint complies with *Rule 8(a)(2) of the Federal Rules of Civil Procedure* by including a "short and plain statement of the claim showing that the pleader is entitled to relief." Additionally, "[the] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face' . . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged . . . . [Thus] it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))* (citations omitted) (emphasis added) (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Mere "labels and conclusion" or a "formulaic recitation of the elements of a cause of action will not do." *Iqbal, 129 S. Ct. at 1949*.

"[The **[*7]** Court is] not, however, required to accept as true allegations that contradict exhibits attached to the complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. National Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)* (quoting *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031-32 (9th Cir. 2008))*.

Additionally, when considering a 12(b)(6) motion, a court is generally limited to considering materials within the pleading and must construe "[a]ll factual allegations set forth in the complaint . . . as true and . . . in light most favorable to [the plaintiff]." *Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001)* (citing *Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996))*. However, the court may consider under the "incorporation by reference doctrine" any "documents 'whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.'" *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* (emphasis added) (quoting *In re Silicon Graphics Inc. Sec. Litigation, 183 F.3d 970, 986 (9th Cir. 1999))*. **[*8]** Therefore, the Court will only take notice of those documents referred to in the FAC, which Plaintiffs have not contested authenticity and upon which the Court relies upon in its discussion.

IV. DISCUSSION

Plaintiffs's claims, with regard to those at issue in the instant Motion, can be broken up into two categories: (1) claims arising under CLRA, and (2) claims arising under the *California Business and Professions Code section 17200*, otherwise known as the Unfair Competition Law ("UCL"). The Court will address each in turn.

A. CLAIMS ARISING UNDER CLRA

Claims three, four, and six of the SAC involve allegations stemming from violations of CLRA. CLRA declares unlawful a variety of "unfair methods of competition and unfair or deceptive acts or practices" used in the sale of services to a consumer. *See Cal. Civ. Code § 1770(a)*. A plaintiff bringing a CLRA claim must have been exposed to both an unlawful conduct, practice, or misrepresentation on behalf of the defendant, and suffered some type of damage. *Meyer v. Sprint Spectrum L.P., 45 Cal. 4th 634, 641, 88 Cal. Rptr. 3d 859, 200 P.3d 295 (2009)*; *Wilens v. TD Waterhouse Grp., Inc., 120 Cal. App. 4th 746, 754, 15 Cal. Rptr. 3d 271 (Ct. App. 2003)*.

In order to maintain a claim for damages under CLRA, **[*9]** a plaintiff must provide a defendant with a written notice that identifies the "methods, acts, or practices declared unlawful . . . . thirty days prior to the commencement of an action for damages." *Cal. Civ. Code § 1782(a)*, *(a)(1)*. Defendants argue Plaintiffs failed to comply with this statute because the only written notice they received explaining the alleged CLRA violations was a February 14, 2011 certified letter from Delong, sent only two days before the Complaint was filed.

Plaintiffs aver that Delong complied with *section 1782* in that "[o]nly after Defendant[s] failed to respond and rectify their practices within 30 days" of the February 14 letter "did [Delong] file the First Amended Complaint (FAC) on March 23, 2011[,] adding a claim for damages under the CLRA." (Opp'n at 21.) While it may be true that the third claim in the Complaint arose under CLRA, Plaintiffs specifically limit the claim to "injunctive and other equitable relief." (Compl. ¶¶ 91, 92.) Importantly, a claim for injunctive relief does not need to meet the stringent notice requirement of *section 1782(a)* *See* *Cal. Civ. Code § 1782(d)*. Indeed, because Plaintiffs initially limited themselves to injunctive relief **[*10]** and amended the Complaint to include damages only after thirty days had passed since the February 14 letter was delivered to Defendants, Defendants's argument of insufficient notice under CLRA is unavailing.

With regard to the actual elements of the claim, Plaintiffs contend Defendants intended to trick consumers into purchasing its product through "bait and switch tactics," part of which was misrepresenting the terms and up-front fees through substantively and procedurally unconscionable clauses in its standard-form contracts. [1] (SAC ¶¶ 100-01, 121, 130, 132.) Here, the engagement agreement includes a clause for binding arbitration to be held in Houston, Texas-also where the headquarters of TaxMasters is located-with all costs to be paid by the consumer, no matter the outcome of the arbitration. (Compl. Exh. A at 8.) Not only does the consumer have no opportunity to negotiate the terms of the contract before payment is made, as they allegedly do not receive the contract until after TaxMasters charges their credit card or bank account, but the Court finds that the arbitration agreement lacks at least "a modicum of bilaterality," *id. at 998*, because it does not require Defendants to **[*11]** use arbitration in settling its disputes nor do Defendants bear any burden for the costs of arbitration. Thus the court finds the arbitration agreement both procedurally and substantively unconscionable.

CLRA *section 1780(b)* makes the insertion of unconscionable provisions into a contract unlawful pursuant to *section 1770(a)(19)*. Moreover, Plaintiffs allege Defendants intentionally omitted the fact they do not have a refund policy, and had Plaintiffs known that the retainer was not refundable, they would not have provided Defendants with their credit card and/or electronic funds transfer information. (SAC ¶¶ 103-08.) Viewed in this light, the Court finds that Plaintiffs properly identified an unlawful act, conduct, and/or misrepresentation that caused damages when Defendants refused to refund consumers' money after consumers canceled their contracts. Defendants's Motion is **DENIED** as to these claims.

B. CLAIMS ARISING UNDER THE UCL

Claims five and seven involve allegations stemming from violations of the UCL. *California Business and Professions Code section 17200* indicates that a claim may be brought against a defendant for any "unlawful, unfair, or fraudulent business act or practice . . . ." Additionally, Plaintiffs must sufficiently allege that (1) they have lost money or property sufficient to constitute an injury in fact under Article III of the Constitution, **[*13]** and (2) there is a causal connection between Defendant's alleged UCL violation and Plaintiff's injury in fact. *See* *Rubio v. Capital One Bank, 613 F.3d 1195, 1203-04 (9th Cir. 2010)*.

"An act is 'unlawful' under *section 17200* if it violates an underlying state or federal statute or common law . . . . An act is 'unfair' if the act threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law . . . . A practice is 'fraudulent'

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[1] Although Defendants do not argue their contract terms are conscionable, the Court finds it prudent in its analysis to review whether or not some of the terms in the contract are unconscionable, particularly the arbitration agreement. Under California law, an arbitration agreement is unenforceable if it is both procedurally and substantively unconscionable. *Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir. 2007)*. A clause is procedurally unconscionable when it is oppressive-when there is inequality in bargaining power between the parties to a contract, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. *Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010)*. To determine if a clause is substantively unconscionable, "the focus of the inquiry is whether the term is one-sided and will have an overly harsh effect on the disadvantaged party. . . . Thus, mutuality is the 'paramount' consideration when assessing substantive **[*12]** unconscionability." *Id. at 997* (citation omitted).

if members of the public are likely to be deceived . . . ." *Quintero Family Trust v. OneWest Bank, F.S.B., No. 09-CV-1561-IEG, 2010 U.S. Dist. LEXIS 6618, 2010 WL 392312, at *12 (S.D. Cal. Jan. 27, 2010)*. Allegations of fraudulent conduct under *section 17200* must satisfy the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)* ("*Rule 9(b)*"). *See* *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-05 (9th Cir. 2003)*. *Rule 9(b)* demands that "averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id. at 1106* (citation omitted).

Defendants's argue *ad nauseum* that the SAC fails because it does not properly allege **[*14]** the heightened pleading requirements of fraud. (*See* Mot. at 6-12.) While Plaintiffs's claim for fraud under *section 17200* may be exiguously plead under *Rule 9(b)*, the Court cannot overlook Plaintiffs's concurrent argument that Defendants's conduct was unlawful and unfair because they failed to comply with UCL *section 17538*. (*See* SAC ¶¶ 138, 160.)

Section 17538(a), states,

> It is unlawful in the sale . . . of goods or services, for any person conducting sales [] [] by telephone, the Internet or other electronic means of communication . . . to accept payment from or for a buyer . . . and then permit 30 days, unless otherwise conspicuously stated in the offering or advertisement, or unless a shorter time is clearly communicated by the person conducting the sale or lease, to elapse without doing any one of the following things:
> (1) Shipping, mailing, or providing the goods or services ordered.
>
> (2) Mailing a full refund or, if payment was made by means of a transfer from an account, (A) crediting the account in the full amount of the debit, or (B) if a third party is the creditor, issuing a credit memorandum to the third party, who shall promptly credit the account in the full amount of the **[*15]** debit.

Additionally, under *section17538(d)*, a company doing business through the internet or any other electronic means is required to notify consumers of its refund policy in writing before accepting payment.

In this case, Plaintiffs allege that Defendants have violated multiple aspects of *section 17538* through their practices and contract terms. More pointedly, Plaintiffs allege Defendants charged customers credit cards or bank accounts for future services, yet failed to provide a full refund within thirty days after customers asked for the agreement to be canceled; even when the request was made within twenty-four hours of the initial phone call and charge. Moreover, Plaintiffs claim terms agreed to during the initial phone call with Defendant were substantively different than the terms laid out in the written contract, making the terms obscure, unclear, and unconscionable. Accepting these facts as true, which the Court must do at this stage of the litigation, it becomes apparent that Plaintiffs properly allege Defendants's conduct violated *Section 17538(a)(2)*. In turn, Defendants acted unlawfully and caused damages to Plaintiffs when the money was not refunded and/or interest was **[*16]** lost on said money during the time it was unlawfully held. Plaintiffs, therefore, properly allege a claim for an unlawful breach of *section 17200*. It is unnecessary at this time for the Court to determine whether or not Defendants failed to comply with *sections 17538(a)(1)*, *(d)*, as alleged by Plaintiffs. (*See* SAC ¶¶ 29, 143, 148-52.) Defendants's Motion is **DENIED** as to these claims.

2. The Texas DTPA

Finally, the Court cannot entertain Plaintiffs's claim for a violation of *California Business and Professions Code section 17200* by way of the Texas DTPA *section 17.46(b)(23)*. Under the *Erie Doctrine*, a federal court sitting in diversity must apply the substantive law of the forum state. *Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). There is no choice-of-law clause apparent in the engagement agreement. Thus, in this diverse federal action where the forum state is California, any substantive law the Court is to consider must be that of California. *See, e.g., Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1002 (9th Cir. 2010)* **[*17]** (holding California law should be applied to a diversity action brought in a California federal court rather than Texas law, even when there was a choice-of-law provision in the contract). This fatal error cannot be cured. Defendant's motion is **GRANTED** as to the seventh cause of action **WITH PREJUDICE.**

V. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs properly alleged claims under CLRA and *section 17200*, except as to the Texas DTPA. Consequently, Defendant's Motion to Dismiss is **GRANTED in PART** without leave to amend and **DENIED in Part.**

IT IS SO ORDERED.

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[In re TFT-Lcd Antitrust Litig.](#)

United States District Court for the Northern District of California

August 24, 2011, Decided; August 24, 2011, Filed

No. M 07-1827 SI, MDL No. 1827; No. C 10-4945 SI

Reporter

2011 U.S. Dist. LEXIS 97466 *; 2011-2 Trade Cas. (CCH) P77,590; 2011 WL 3738985

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION; This Order Relates To: TARGET CORPORATION, et al., Plaintiffs, v. AU OPTRONICS CORPORATION, et al., Defendants.

Subsequent History: Motion granted by *Jaco Elecs., Inc. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 96738 (N.D. Cal., Aug. 26, 2011)*

Prior History: *In re TFT-Lcd Antitrust Litig., 2011 U.S. Dist. LEXIS 97465 (N.D. Cal., Aug. 24, 2011)*

Core Terms

purchasers, allegations, defendants', motion to dismiss, indirect, retroactive, conspiracy, damages, anti trust law, antitrust, courts, indirect-purchaser

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For Gina Cerda, 07-1339 (3:07-md-01827-SI), Linda Klare, 07-1339, Plaintiffs: Mario Nunzio Alioto, Trump Alioto Trump & Prescott LLP, San Francisco, CA.

For ATS Claim, LLC, 09-1115 (3:07-md-01827-SI), Plaintiff: David Paul Germaine, LEAD ATTORNEY, David Paul Germaine, LEAD ATTORNEY, PRO HAC VICE, Chicago, IL; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA.

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For Hewlett-Packard Company, Interested Party (5/19/09), 10-5577 (3:07-md-01827-SI), Plaintiff: Beatrice B. Nguyen, Gregory D. Call, Esq., LEAD ATTORNEY, Crowell & Moring LLP, San Francisco, CA; Bryan Leach, Fred H. Bartlit, Jr., Karma Micaela Giulianelli, Lester Houtz, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Denver, CO; Mark E Ferguson, Barlitt Beck Herman Palenchar & Scott, Chicago, Il; Mark S. Ouweleen, Attorney at Law, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL; Suzanne E. Rode, Crowell & Moring LLP, San Francisco, CA.

For BellSouth Telecommunications, Inc., 09-4997, Pacific Bell Telephone Company, 09-4997, Southwestern Bell Telephone Company, 09-4997 (3:07-md-01827-SI), AT & T Corp., 09-4997, AT & T Datacomm, Inc., 09-4997, AT &

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For Nokia Corporation, 09-5609, Nokia Inc., 09-5609 (3:07-md-01827-SI), Plaintiff: Brian Parker Miller, Donald MacKaye Houser, Joann Elizabeth Johnston, Kacy Christine McCaffrey, Lisa Kathleen Bojko, Matthew D. Richardson, Peter Konito, Valarie Cecile Williams, PRO HAC VICE, Donald MacKaye Houser, Alston & Bird LLP, Atlanta, GA; Matthew Scott Orrell, Atlanta, GA; Randall Lee Allen, Alston and Bird, Menlo Park, CA; Richard W. Stimson, Alston & Bird LLP, Dallas, TX.

For Motorola, Inc., 09-5840 (3:07-md-01827-SI), Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC.

For Electrograph Systems, Inc., 10-117, Electrograph Technologies, Corp., 10-117 (3:07-md-01827-SI), Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Philip J. Iovieno, Boies, **[*4]** Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For Dell Inc., 10-1064, Dell Products, L.P., 10-1064 (3:07-md-01827-SI), Plaintiff: Andrew Jacob Tuck, Debra Dawn Bernstein, Elizabeth Helmer Jordan, Matthew David Kent, Michael P. Kenny, Rodney J Ganske, Alston & Bird LLP, Atlanta, GA; Steven Daniel Hemminger, Alston & Bird LLP, Menlo Park, CA.

For Indirect Purchaser Plaintiffs (3:07-md-01827-SI), Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Derek G. Howard, Minami Tamaki LLP, San Francisco, CA; Michael Morteza Kowsari, Attorney at Law, Los Angeles, CA; Stephen Gerard Larson, Girardi & Keese, Los Angeles, CA; Steven J Foley, Hellmuth and Johnson PLLC, Edina, MN Unites Sta; Gregory W. Landry, LaMarca & Landry, P.C.; Marvin A. Miller, Miller Law LLC.

For State of Oregon, 10-4346, ex rel. John Kroger, Attorney General (3:07-md-01827-SI), Plaintiff: Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Michael K. Kelley, **[*5]** Haglund Kelley Horngren Jones & Wilde LLP, Portland, OR; Tim David Nord, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

For Direct Purchaser Plaintiffs (3:07-md-01827-SI), Plaintiff: Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Aaron M. Sheanin, Girard Gibbs LLP, San Francisco, CA; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Brendan Patrick Glackin, Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA.

For Tracfone Wireless, Inc., 10-3205, (3:07-md-01827-SI), Plaintiff: David Bedford Esau, James Blaker Baldinger, Carlton Fields, P.A., West Palm Beach, FL; Robert L. Ciotti, Carlton Fields, Tampa, FL.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General (3:07-md-01827-SI), Plaintiff: Anne E. Schneider, Attorney General of Missouri; Liaison Counsel for the State Actions, LEAD ATTORNEY, Jefferson City, MO.

For State of Arkansas, 10-3619, ex rel. Dustin McDaniel, Attorney General (3:07-md-01827-SI), **[*6]** Plaintiff: David A. Curran, Assistant Attorney General, Little Rock, AR.

For State of Michigan, 10-3619, ex rel. Michael A. Cox, Attorney General (3:07-md-01827-SI), Plaintiff: Mary Elizabeth Lippitt, Michigan Attorney General, Assistant Attorney General, Lansing, MI.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General (3:07-md-01827-SI), Plaintiff: Andrew McNally Hartnett, Office of the Missouri Attorney General, Jefferson City, MO; Anne E. Schneider, Attorney General of Missouri, Consumer Protection, Jefferson City, MO.

For State of West Virginia, 10-3619, ex rel Darrell McGraw, Attorney General (3:07-md-01827-SI), Plaintiff: Douglas Lee Davis, Attorney General, Consumer Protection and Antitrust, Charleston, WV; Jill L. Miles, Assistant Attorney General, Charleston, WV.

For State of Wisconsin, 10-3619, ex rel J.B. Van Hollen, Attorney General (3:07-md-01827-SI), Plaintiff: Gwendolyn J. Cooley, Wisconsin Attorney General, Madison, WI.

For State of Florida, Office of the Attorney General, Department of Legal Affairs 10-3517 (3:07-md-01827-SI), Plaintiff: Eli Friedman, Nicholas J. Weilhammer, Office of the Attorney General, State of Florida, Tallahassee, FL; Lizabeth Ann **[*7]** Leeds Brady, Office of the Attorney General, Antitrust Division, Tallahassee, FL; Liaison Counsel for the State Actions, Tallahassee, FL; Robert Scott Palmer, Office of the Attorney General, Anititrust Division, State of Florida, Tallahassee, FL.

For Best Buy Co., Inc., 10-4572, Best Buy Enterprise Services, Inc., 10-4572, Best Buy Purchasing LLC, 10-4572, Best Buy Stores, L.P., 10-4572, Magnolia Hi-Fi, Inc., 10-4572 (3:07-md-01827-SI), Plaintiff: David Martinez, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Robins Kaplan Miller and Ciresi LLP, Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi, Minneapolis, MN; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA.

For Target Corp., 10-4945, Kmart Corp, 10-4945, Sears, Roebuck and Co., 10-4945, Good Guys, Inc., 10-4945, Newegg Inc., 10-4945, Old Comp Inc., 10-4945, Radioshack Corp., 10-4945 (3:07-md-01827-SI), Plaintiff: Christopher T. Leonardo, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC; Jason C. Murray, Jeffrey H. Howard, Crowell & Moring LLP, **[*8]** Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA.

For Eastman Kodak Company, 10-5452 (3:07-md-01827-SI), Plaintiff: John R. Foote, Karl David Belgum, Nixon Peabody LLP, San Francisco, CA.

For SB Liquidation Trust, 10-5458 (3:07-md-01827-SI), Plaintiff: Allan Diamond, Jason Paul Fulton, Jim McCarthy, Diamond McCarthy LLP, Dallas, TX; Erica W. Harris, Susan Godfrey LLP, Houston, TX; Marc M. Seltzer, Ryan Christopher Kirkpatrick, Steven Gerald Sklaver, Susman Godfrey LLP, Los Angeles, CA.

For Costco Wholesale Corp., 11-0058 (3:07-md-01827-SI), Plaintiff: Cori G. Moore, Noah G. Purcell, Perkins Coil LLP, Seattle, WA; David J. Burman, Perkins Coie LLP, Seattle, WA; Troy Philip Sauro, Perkins Coie LLP, San Francisco, CA.

For Sony Computer Entertainment America, LLC, 10-5616, (10-5620 - voluntery dismissa), Sony Electronics, Inc., 10-5616, (10-5620 - voluntary dismissal) (3:07-md-01827-SI), Plaintiff: David Mark Goldstein, Esq., Shannon Christine Leong, Stephen V. Bomse, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA; Richard James Mooney, Robert L. Stolebarger, Holme Roberts & Owen LLP, San Francisco, CA.

For **[*9]** Alfred H. Siegel, 10-5625, as Trustee of the Circuit City Stores, Inc. Liquidating Trust (3:07-md-01827-SI), Plaintiff: David Humberto Orozco, Marc M. Seltzer, Susman Godfrey LLP, Los Angeles, CA; H. Lee Godfrey, Kenneth S. Marks, Susman Godfrey LLP, Houston, TX; Jordan Connors, Parker C. Folse, III, Susman Godfrey LLP, Seattle, WA.

For State of New York, 11-0711 (3:07-md-01827-SI), Plaintiff: Geralyn Jeanette Trujillo, Richard L. Schwartz, Office of the Attorney General, State of New York, New York, NY; Jeremy R. Kasha, New York State Office of the Attorney General (NYC), New York, NY; John Andrew Ioannou, New York State Attorney General's Office, Antitrust Bureau, New York, NY.

For MetroPCS Wireless Inc., 11-0829 (3:07-md-01827-SI), Plaintiff: Philip J. Iovieno, LEAD ATTORNEY, Philip J. Iovieno Boies, Schiller & Flexner LLP, Albany, NY; Anne M. Nardacci, Boies Schiller & Flexner LLP, Albany, NY; Lewis Titus LeClair, Mike McKool, Jr., Scott R Jacobs, McKool Smith, P.C., Dallas, TX; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

For LG Display Co., Ltd., (D, I, 09-1115) formerly known as LG Philips LCD Co., LTD. (3:07-md-01827-SI), Defendant: Michael Robert Lazerwitz, **[*10]** LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC; Arman Oruc, Jane Lee, Jonathan Lin, Simpson Thacher & Bartlett LLP, Washington, DC; Jeremy James Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I, 09-1115), Samsung Electronics America, Inc. (D, I, 09-1115) (3:07-md-01827-SI), Defendant: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Steven D Sassaman, Timothy C. Hester, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, Derek Ludwin, Neil K. Roman, Robert D. Wick, Theodore Paul Metzler, Covington & Burling LLP, Washington, DC.

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For Toshiba Corporation, (D, I, 09-1115) (3:07-md-01827-SI), Toshiba America Electronics Components, Inc., (D, I, 09-1115), Toshiba America Information Systems, Inc., (D, I, 09-1115), Toshiba Mobile Display Co., Ltd., Defendants: Christopher M. Curran, Kristen Jentsch McAhren, LEAD ATTORNEY, White & Case LLP, Washington, DC; John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY.

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For Hitachi Ltd., (D, I, 09-1115), Hitachi Displays, Ltd., (D, I, 09-1115) (3:07-md-01827-SI), Defendant: Kent Michael Roger, Michelle Minju Kim-Szrom, Morgan Lewis & Bockius LLP, San Francisco, CA; John Clayton Everett, Jr., PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC.

For Hitachi Electronic Devices (USA), Inc., (D, I, 09-1115) (3:07-md-01827-SI), Defendant: Kent Michael Roger, LEAD ATTORNEY, Michelle Minju Kim-Szrom, Morgan Lewis & Bockius LLP, San Francisco, CA; Courtney Lynn Landis, Morgan, Lewis & Bockius, San Francisco, CA; John Clayton Everett, Jr., PRO HAC VICE, **[*12]** Morgan, Lewis & Bockius LLP, Washington, DC.

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For AU Optronics Corporation America, (D, I, 09-1115) (3:07-md-01827-SI), Defendant: John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Sedgwick LLP, San Francisco, CA; Allison Marie Dibley, Esq., Bryan B. Barnhart, Carl Lawrence Blumenstein, Nossaman LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Jessica Rae Madrigal, Nossaman Guthner Knox Elliott, San Francisco, CA; Kirk Christopher Jenkins, Sedgwick Detert Moran Arnold, Chicago, IL; Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

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For Chi Mei Corporation, (D, I, 09-1115) (3:07-md-01827-SI), Defendant: John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Adam Michael Raviv, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Leon B. Greenfield, Stephanie K. Wood, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA.

For Nexgen Mediatech USA Inc, (D, 09-1115) (3:07-md-01827-SI), Defendant: Caren K. Khoo, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr, New York, NY; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Adam Michael Raviv, Brent J. Gurney, Leon B. Greenfield, Stephanie K. Wood, Steven F. Cherry, Therese Lee, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra **[*16]** D West, Davis Polk Wardwell, Menlo Park, CA; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chi Mei Optoelectronics Corporation, (D, I, 09-1115) (3:07-md-01827-SI), Defendant: John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Adam Michael Raviv, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA.

For IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08 (3:07-md-01827-SI), Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Epson Electronics America, Inc., (D), Dismissed as a indirect purchaser defendant on 4/1/08 (3:07-md-01827-SI), Defendant: Jeffrey E. Faucette, LEAD ATTORNEY, Taylor & Company Law Offices, LLP, San Francisco, CA; Kevin C. McCann, LEAD ATTORNEY, Paul Hastings Janofsky & Walker LLP, San Francisco, CA; Derek Francis Foran, Morrison & Foerster LLP, San Francisco, CA; Kimberly Linnell Taylor, Carr, McClellan, Ingersoll, Thompson & Horn, Burlingame, CA; Melvin R. Goldman, **[*17]** Morrison & Foerster, San Francisco, CA; Sean David Unger, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA; Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA; Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA; David Lawrence Meyer, Morrison & Foerster, Washington, DC United Sta.

For Tatung Company of America, Inc. ("Tatung America"), (D, 09-1115) (3:07-md-01827-SI), Defendant: Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Joel Steven Sanders, LEAD ATTORNEY, Joel Calcar Willard, Rebecca Justice Lazarus, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Karen Sewell, PRO HAC VICE, Baker & McKenzie LLP, Chicago, Il; Nancy Chung Allred, Robert Walter Tarun, Baker & McKenzie

LLP, San Francisco, CA; Patrick J. Ahern, PRO HAC VICE, Baker & McKenzie, Chicago, IL; Roxane C. Busey, PRO HAC VICE, BAker & McKenzie LLP, Chicago, IL.

For LG Display America, Inc., (D, I, 09-1115) formerly known as LG Philips LCD America, Inc. (3:07-md-01827-SI), Defendant: Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC; Arman Oruc, Jane Lee, Jonathan Lin, Simpson Thacher & Bartlett LLP, Washington, DC; Jeremy **[*18]** James Calsyn, Katerina S Colitti, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Au Optronics Corporation America, Inc, 09-4997 (3:07-md-01827-SI), Defendant: Allison Marie Dibley, Esq., Nossaman LLP, San Francisco, CA.

For Mitsui & Co. (Taiwan), Limited, (D) (3:07-md-01827-SI), Defendant: Lisa Cox Ghannoum, Michael Edward Mumford, Baker Hostetler LLP, Cleveland, OH; Peter Wethrell James, Baker Hostetler, Los Angeles, CA; Ernest E. Vargo, Baker & Hostetler LLC; Tracy Lynn Cole, Baker & Hostetler LLP.

For Sanyo Consumer Electronics Co., Ltd., (D) (3:07-md-01827-SI), Defendant: Allison Ann Davis, LEAD ATTORNEY, Davis Wright Tremaine LLP, San Francisco, CA; Sam N. Dawood, Davis Wright Tremaine LLP, San Francisco, CA; Nick Steven Verwolf, Davis Wright Tremaine LLP, Bellevue, WA.

For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Defendant: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Chimei Innolux Corp. (3:07-md-01827-SI), Defendant: Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Leon B. Greenfield, Stephanie K. Wood, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Samantha **[*19]** Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA; Adam Michael Raviv, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Philips Electronics North America Corporation (3:07-md-01827-SI), Defendant: Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For Tatung Company (3:07-md-01827-SI), Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Patrick J. Ahern, LEAD ATTORNEY, Baker & McKenzie, Chicago, IL.

For Apple Inc. (3:07-md-01827-SI), Interested Party: Caroline Nason Mitchell, Robert Allan Mittelstaedt, LEAD ATTORNEY, Jones Day, San Francisco, CA.

For State of California (3:07-md-01827-SI), Amicus: Adam Miller, LEAD ATTORNEY, CA Dept of Justice, San Francisco, CA; Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For United States Antitrust Division,Department of Justice (3:07-md-01827-SI), Intervenor: Peter K. Huston, LEAD ATTORNEY, Department of Justice, Antitrust Division, San Francisco, CA; Alexandra Jill Shepard, David J. Ward, Heather S. Tewksbury, Michael L. Scott, U.S. Department of Justice, Antitrust Division, San Francisco, CA.

For State **[*20]** of Illinois (3:07-md-01827-SI), Intervenor: Blake Lee Harrop, LEAD ATTORNEY, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP, Portland, OR.

For State of Washington, 10-5711 (plaintiff) (3:07-md-01827-SI), Intervenor: Brady R. Johnson, LEAD ATTORNEY, Attorney General of Washington, Seattle, WA; Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Jonathan A Mark, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP, Portland, OR; Tina E. Kondo, Senior Assistant Attorney General, Seattle, WA.

For NEC LCD Technologies, Ltd. (3:07-md-01827-SI), Intervenor: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

For Best Buy Co., Inc. (3:10-cv-04572-SI), Best Buy Purchasing LLC, Best Buy Enterprise Services, Inc., Best Buy Stores, L.P., Magnolia Hi-Fi, Inc., Plaintiffs: David Martinez, LEAD ATTORNEY, Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Elliot S. Kaplan, PRO HAC VICE, Lauren E. **[*21]** Wood, PRO HAC VICE, Robins Kaplan Miller & Ciresi L.L.P., Minneapolis, MN; K. Craig Wildfang, Attorney at Law, Minneapolis, MN.

For BestBuy.com, L.L.C. (3:10-cv-04572-SI), Plaintiff: David Martinez, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA.

For Chi Mei Optoelectronics Corp., Chi Mei Optoelectronics, USA, Inc., CMO Japan Co., Ltd., Defendants: Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Micah Galvin Block, Samantha Harper Knox, Davis Polk and Wardwell LLP, Menlo Park, CA; Sandra D West, Davis Polk Wardwell, Menlo Park, CA.

For Chunghwa Picture Tubes, LTD. (3:10-cv-04572-SI), Defendant: Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Hannstar Display Corp. (3:10-cv-04572-SI), Defendant: Christopher M. Wyant, K&L Gates LLP, Seattle, WA; Ramona M. Emerson, K&L GATES, Seattle, WA.

For LG Display Co., Ltd., (3:10-cv-04572-SI), LG Display America, Inc., Defendants: Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS TARGET'S FIRST AMENDED COMPLAINT

Now before the **[*22]** Court is defendants' joint motion to dismiss the first amended complaint ("FAC") of plaintiffs Target Corporation; Sears, Roebuck and Co.; Kmart Corporation; Old Comp Inc.; Good Guys, Inc.; Radioshack Corporation; and Newegg Inc. (collectively, "Target"). Pursuant to *Civil Local Rule 7-1(b)*, the Court finds this matter suitable for decision without oral argument and therefore VACATES the hearing currently scheduled for August 26, 2011. Having considered the arguments presented in the moving papers, the Court hereby GRANTS IN PART defendants' motion.

BACKGROUND

Target filed this antitrust action in 2010, seeking to "recover the damages [it] incurred as a result of a long-running conspiracy by manufacturers of liquid crystal display panels ('LCD Panels')." FAC at ¶1. The FAC alleges that "[d]efendants and their co-conspirators formed an international cartel illegally to restrict competition in the United States in the market for LCD Panels." *Id.* at ¶2. The FAC includes claims under the Sherman Act, *15 U.S.C. § 1*, and under the laws of a number of different states. FAC at ¶¶218-55. It names as defendants entities from nine corporate families: AU Optronics [1] ("AUO"); Chi Mei [2]; Chunghwa **[*23]** Pictures Tubes [3]; Epson [4]; Hannstar [5]; LG [6]; Samsung [7]; Sharp [8]; and Toshiba [9].

[1] AU Optronics Corporation and AU Optronics Corporation America.

[2] Chi Mei Corporation, Chi Mei Optoelectronics Corporation, Chi Mei Optoelectronics USA, Inc., CMO Japan Co. Ltd., Nexgen Mediatech, Inc., and Nexgen Mediatech USA, Inc.

[3] Chunghwa Pictures Tubes Ltd. and Tatung Company of America, Inc.

[4] Epson Imaging Devices Corporation and Epson Electronics America, Inc.

[5] Hannstar Display Corporation.

[6] LG Display Co. Ltd. and LG Display America, Inc.

On July 5, 2011, defendants filed a joint motion to dismiss Target's FAC. Defendants' motion takes issue with three aspects of the FAC. First, defendants claim that the FAC impermissibly relies on group pleading and fails to describe each defendant's role in the conspiracy. Second, defendants argue that the FAC does not adequately identify the purchases of LCD panels **[*24]** that Target made directly from defendants. Third, defendants assert that Target may not recover under the antitrust laws of New York, Nebraska, and Nevada for LCD purchases it made before those states granted standing to indirect purchasers.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint that fails to state a claim upon which relief may be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences **[*25]** in the plaintiff's favor. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the Court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

DISCUSSION

As mentioned above, defendants' motion challenges only three aspects of Target's complaint: (1) Target's use of "group pleading"; (2) Target's allegations of direct-purchaser claims; and (3) Target's attempt to recover under the antitrust laws of New York, Nevada, and Nebraska for the full time period of the alleged conspiracy.

I. Adequacy of Group Pleading

Defendants claim that Target's FAC should be dismissed because it does not allege facts particular to each defendant. They argue that the FAC "lump[s] together two dozen parent and subsidiary companies" in an attempt to "bring the entire corporate family into the case as one amalgamated defendant." Motion at 7; *see also, e.g.*, FAC at ¶46 ("Defendants AU Optronics Corporation and AU Optronics Corporation America, Inc. are referred to collectively herein as 'AU Optronics.'"); FAC at ¶¶ 53 (same for Chi Mei entities), **[*26]** 56 (Chunghwa), 59 (Epson), 63 (LG), 67 (Samsung), 70 (Sharp), 75 (Toshiba).

This Court has previously evaluated similar "group pleading" allegations in this multi-district litigation. In *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal. 2009)*, the Court found that the direct-purchaser plaintiffs and the indirect-purchaser plaintiffs had both stated valid claims against defendants, despite their use of group pleading. *Id. at 1184*.

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[7] Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Samsung Electronics America, Inc.

[8] Sharp Corporation and Sharp Electronics Corporation.

[9] Toshiba Corporation, Toshiba America Electronics Components, Inc., Toshiba Mobile Display Technology Co., Ltd, and Toshiba America Information Systems, Inc..

Target's FAC, filed well after the Court issued the above order, bears a predictable resemblance to the direct- and indirect-purchaser complaints. The FAC alleges that the alleged conspiracy was organized at the highest level of the defendant organizations and carried out by both executives and subordinate employees. FAC at ¶104; *see also* *In re TFT LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1184-85*. It alleges that the conspiracy was implemented by subsidiaries and distributors within a corporate family, and that "individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families." FAC at ¶156; *In re TFT LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1184-85*. **[*27]** Target also alleges that "the individual participants in conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a corporate family." FAC at ¶156; *In re TFT LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1184-85*. In addition, Target's FAC contains a detailed description of actions taken in furtherance of the conspiracy both by defendants and their American subsidiaries. *See* FAC at ¶¶103-124, 125-34.

The Court finds that the allegations in Target's FAC are sufficient to put the defendants on notice of the charges against them. Accordingly, it DENIES defendants' motion to dismiss based on Target's use of group pleading.

II. Federal Claims

Defendants also argue that Target's claims for damages under federal law should be dismissed. They assert that Target lacks standing to pursue its federal claims because federal law does not allow indirect purchasers to recover damages. *See* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Target does not contest this point, but asserts that it brings "federal antitrust claims for [its] purchases of finished products containing price-fixed **[*28]** LCD panels directly from Defendants and their corporate affiliates." Pl. Opp'n at 9; *see also* FAC at ¶200 ("In some cases, Plaintiffs purchased LCD Products directly from defendants at prices that were artificially inflated as a result of the conspiracy . . . .").

Defendants seek dismissal of Target's direct-purchaser claims as well, arguing that Target's FAC does not provide adequate detail about its direct purchases. Reply at 6 ("Plaintiffs fail to identify . . . the 'Defendants and their corporate affiliates' from which they directly purchased finished products . . . ."). Defendants did not raise this argument until their reply brief; it is therefore waived. In any event, Target's complaint alleges that it made direct purchases from one or more of the defendants. That is sufficient to satisfy the notice-pleading requirements of the federal rules. The details defendants seek are best left to the discovery process.

III. Retroactive Effect of *Illinois Brick* Repealer Statutes

Finally, defendants move to dismiss in part Target's antitrust claims under the laws of New York, Nebraska, and Nevada. Defendants claim that these states did not allow indirect-purchasers to bring suit until the **[*29]** states amended their antitrust laws. Defendants argue that the amendments were not made retroactive, and that therefore Target may not recover for any damages sustained prior to their enactment.

A. New York

New York's legislature amended the Donnelly Act to permit claims by indirect purchasers on December 23, 1998. *See* *N.Y. Gen. Bus. Law § 340(6)*. Courts have held that the amendment was not retroactive, and plaintiffs do not assert otherwise. *See, e.g.,* *In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 15109, 2000 WL 1511376, at *5 (D.D.C., Oct. 6, 2000)*; *Lennon v. Philip Morris Cos., 189 Misc. 2d 577, 734 N.Y.S.2d 374, 382 (Sup. Ct. 2001)* ("[C]ourts interpreting provisions of the General Business Law have rejected retroactive application of amendments creating new private rights of action."). Accordingly, Target's Donnelly Act claims are DISMISSED to the extent they arose before December 23, 1998.

B. Nebraska

Prior to July 20, 2002, Nebraska's Junkin Act allowed "[a]ny person who shall be injured in his business or property" by an antitrust violation to bring a suit for damages. Neb. Rev. Stat. § 59-821 (2000). On July 20, 2002, the Nebraska legislature amended the Junkin Act to permit suit "whether such injured person dealt **[*30]** directly or indirectly with the defendant." 2002 Neb. Laws L.B. 1278; *see also* Neb. Rev. Stat. § 59-821 (2011). Defendants argue that the amendment does not apply retroactively and that this Court should therefore dismiss any claims that arise from purchases made before July 20, 2002. Nebraska courts generally do not give retroactive effect to substantive statutes "unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively." Soukop v. ConAgra, Inc., 264 Neb. 1015, 653 N.W.2d 655, 657 (Neb. 2002). [10]

The Court disagrees with defendants' interpretation of the Nebraska statute, and concludes that, even prior to the 2002 amendment, indirect-purchaser suits were permitted under Nebraska law. In Arthur v. Microsoft Corp., 267 Neb. 586, 676 N.W.2d 29 (Neb. 2004), **[*31]** the Nebraska Supreme Court considered whether indirect purchasers could bring suit under Nebraska's Consumer Protection Act, a closely related statute to the Junkin Act. The court concluded that indirect purchasers had standing to sue, rejecting the argument that the Consumer Protection Act should be harmonized with the Supreme Court's *Illinois Brick* decision. Id. at 597-98 ("Giving the language of the Act its plain and ordinary meaning while construing its provisions in pari materia to determine the intent of the Legislature, we conclude that the Act allows any person who is injured by a violation of §§ 59-1602 to 59-1606 which directly or indirectly affects the people of Nebraska to bring a civil action to recover damages."); *see also* id. at 594 (stating that a state-law provision requiring harmonization with federal law "does not require us to hold that indirect purchasers have no standing under the Act if to do so would not support the Act's purpose"). In reaching this conclusion, the Nebraska Supreme Court relied heavily on an Iowa Supreme Court decision that allowed indirect purchasers to bring suit under Iowa's antitrust laws. Id. at 597 ("The [Iowa] court concluded that . . **[*32]** . the harmonization provision of Iowa law was not aimed at defining who can sue under state ***antitrust law***, but was designed to achieve uniform application of the state and federal laws prohibiting monopolistic practices.").

In light of *Arthur*, the Court concludes that the Nebraska Supreme Court would likely hold that the Junkin Act permitted indirect-purchaser suits even before the 2002 amendment. Accordingly, defendants' motion to dismiss is DENIED with respect to the Nebraska claims.

C. Nevada

Finally, defendants argue that Target's claims under Nevada's Unfair Trade Practices Act ("UTPA") must also be dismissed in part. Prior to October 1, 1999, the UTPA permitted suit by "any person injured in his business or property." Nev. Rev. Stat. § 598A.210 (1998). Effective October 1, 1999, the UTPA was amended to permit suit by "any person injured or damaged directly or indirectly in his business or property." Nev. Rev. §598A.210 (2011). Two courts have determined that the 1999 amendment was a "clarification" to Nevada's ***antitrust law*** that did not amount to a substantive change in the law. *See Pooler v. R.J. Reynolds Tobacco Co.*, 2001 WL 403167, at *1 (Nev. Dist. Ct., Apr. 4, 2001); In re Static Random Access Memory (SRAM) Antitrust Litigation, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289 at *5 (N.D. Cal., Dec. 8, 2010). **[*33]** Other courts have reached the opposite conclusion. *See, e.g.,* In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1025 (N.D. Cal. 2010).

The Court agrees with defendants that, prior to the 1999 amendment, Nevada law did not allow indirect purchasers to recover for antitrust violations. The UTPA provides that it "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes." Nev. Rev. Stat. § 598A.050. Given this directive, the Court

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[10] In a different MDL pending in this District, the question whether the Junkin Act amendment was retroactive was raised by defendants. The Court in that case did not discuss the issue, but appears to have concluded that the amendment did not have retroactive effect. *See* In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1025 (N.D. Cal. 2010) (dismissing claims under Nebraska law based on sales made prior to July 20, 2002).

concludes that the Nevada Supreme Court would have interpreted the UTPA "in harmony" with the *Illinois Brick* decision. Absent a more definitive statement from Nevada's appellate courts, the Court will abide by the plain language of this provision. Accordingly, the Court GRANTS defendants' motion to dismiss plaintiffs' Nevada claims that are based on purchases that occurred before October 1, 1999.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART and DENIES IN PART defendants' motion to dismiss plaintiffs' first amended complaint. Docket No. 45 in 10-4945; Docket No. 3027 in 07-1827.

IT IS SO ORDERED.

Dated: August 24, 2011

/s/ Susan Illston

SUSAN ILLSTON

United **[*34]** States District Judge

End of Document

Sineitti v. Conoco Phillips Co.

Court of Appeal of California, First Appellate District, Division Two

August 24, 2011, Filed

A127485

Reporter

2011 Cal. App. Unpub. LEXIS 6455 *; 2011 WL 3759684

GINA O. EL SINEITTI, Plaintiff and Appellant, v. CONOCO PHILLIPS CO., Defendant and Respondent.

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

Prior History: [*1] San Francisco County Super. Ct. No. CGC-06-458663.

Core Terms

station, geographic, customers, zone, prices, relevant market, gasoline, declarations, summary judgment, price discrimination, discovery, markets, expert testimony, trial court, documents, branded, present evidence, purchasers, retail, competitive market, interrogatories, antitrust, fuel, buy, triable issue of fact, cause of action, service station, initial burden, deposition, favored

Judges: Kline, P.J.; Haerle, J., Richman, J. concurred.

Opinion by: Kline

Opinion

INTRODUCTION

Plaintiff Gina El Sineitti appeals from a judgment of the San Francisco Superior Court, dismissing defendant ConocoPhillips Co. (ConocoPhillips) from her action against defendants ConocoPhillips and Tower Energy Group (Tower) for alleged price discrimination under *California Business and Professions Code sections 17045* and *21200*. [1] Dismissal followed the court's grant of summary judgment in favor of defendant ConocoPhillips. El Sineitti contends she raised triable issues of fact as to her *section 21200* price discrimination claim. [2] We shall conclude the trial court did not err in granting summary judgment as to this claim on the ground that El Sineitti cannot prove the competitive market that she asserts as the basis for her claim. We shall therefore affirm the judgment.

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[1] All statutory references are to the Business and Professions Code, unless otherwise indicated.

[2] El Sineitti does not challenge the court's grant of summary judgment as to her claim under *section 17045*. Tower did not move for summary judgment and is not a party to this appeal.

FACTS AND PROCEDURAL BACKGROUND[3]

El Sineitti was the sole proprietor and operator of a gasoline service station located at 1490 Ocean Avenue in San Francisco. From 2001 through 2007, El Sineitti's station sold Union 76-branded gasoline under an agreement with ConocoPhillips, a refiner and distributor of petroleum fuel products. El Sineitti began leasing her station from ConocoPhillips in 2001. She purchased the station in January 2006. While she was leasing the station from 2001 through 2005, ConocoPhillips supplied El Sineitti with Union 76-branded gasoline for resale at her station. When she purchased the station, El Sineitti agreed to remain a Union 76 station and to purchase her Union 76 fuel exclusively from Tower, an independent wholesaler and distributor. On December 31, 2007, El Sineitti terminated the agreements with ConocoPhillips and Tower, debranded as a Union 76 station, and began purchasing gasoline from independent suppliers.

On December 12, 2006, El Sineitti filed a complaint against Tower, asserting **[*3]** price discrimination claims under *sections 17045* and *21200*. On June 4, 2008, she filed her first amended complaint naming ConocoPhillips as a defendant. The first amended complaint asserts the same price discrimination claims against ConocoPhillips as she had asserted against Tower: namely, that El Sineitti was unlawfully charged higher prices for gasoline than other Union 76-branded stations. Her claims were premised on the theory that, from 2005 through 2007, her station competed with—and therefore should have been charged the same as—all Union 76 stations located within five miles of her station. [4]

ConocoPhillips answered on July 21, 2008. Thereafter, ConocoPhillips **[*4]** propounded extensive written discovery in the form of interrogatories and document requests and it took El Sineitti's deposition. On April 10, 2009, ConocoPhillips moved for summary judgment, or alternatively for summary adjudication as to each of the causes of action and claims for damages asserted by El Sineitti in the first amended complaint. ConocoPhillips asserted that El Sineitti had failed to raise a triable issue of material fact because she could not show the following essential elements of her *section 21200* cause of action: (1) that her relevant competitive market included any station that allegedly received more favorable pricing, (2) that ConocoPhillips gave any of her competitors a "major" or "substantial" pricing advantage that was sustained over a significant period of time, or (3) that her business was injured as a result of ConocoPhillips's alleged acts. [5]

In May and June 2009, El Sineitti **[*5]** deposed two ConocoPhillips representatives and a third-party former employee. ConocoPhillips also made extensive document productions to El Sineitti in connection with those depositions. In June 2009, El Sineitti filed her opposition to ConocoPhillips's summary judgment motion and ConocoPhillips submitted its reply papers.

After a hearing on the motion, the trial court granted summary judgment in favor of ConocoPhillips, finding that ConocoPhillips had presented affirmative admissions by El Sineitti during discovery as to the factual basis of her claims and had identified needed evidence that she did not possess and could not reasonably obtain. Specifically, the court concluded that ConocoPhillips had satisfied its initial burden on summary judgment by producing evidence

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[3] The **[*2]** facts and procedural background statement is taken in large part from the court's statement of decision, which contains an accurate summary. Additional facts are contained in the discussion, where relevant.

[4] In her answer to ConocoPhillips's interrogatories, El Sineitti stated that her station "competes for the sale of gasoline with all Union 76-branded stations within a five (5) mile radius." She identified 14 Union 76 stations supplied by Tower as within this five-mile radius. She further stated on information and belief that she "does not contend other non-Union 76 branded retail dealers are within [the first amended complaint's] competitive market definition for purposes of the price discrimination alleged in this action."

[5] The summary judgment motion also alleged El Sineitti could not show that ConocoPhillips gave any of her competitors a "secret payment or allowance"—a required element for a *section 17045* cause of action. El Sineitti does not dispute the court's summary judgment grant as to this claim.

that El Sineitti did not possess and could not reasonably obtain evidence from which a reasonable juror could conclude she had sustained her burden as to each of the three elements—definition of the relevant competitive market, substantial or major price differentials over time, and actual injury to El Sineitti proximately caused by ConocoPhillips's alleged conduct. Consequently, the burden shifted to El Sineitti to **[*6]** set forth specific facts showing a triable issue of material fact as to each of these elements. The court concluded that El Sineitti had failed to make this showing.

On November 19, 2009, the court filed its statement of decision granting ConocoPhillips's summary judgment motion. Judgment was entered that day, dismissing ConocoPhillips from the action. This timely appeal followed.

I. Summary Judgment Standard of Review

"'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue **[*7]** of material fact exists as to that cause of action. . . ." [Citation.]' [Citation.]" (*Lyle v. Warner Brothers Television Productions (2006) 38 Cal.4th 264, 274*; see also *Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 252-253* (*Nazir*).)

""'"[W]e take the facts from the record that was before the trial court when it ruled on that motion,"" and we ""'"review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."'"" (*Hughes v. Pair (2009) 46 Cal.4th 1035, 1039*, quoting *Lonicki v. Sutter Health Central (2008) 43 Cal.4th 201, 206*.)" (*Tverberg v. Fillner Construction, Inc. (2010) 49 Cal.4th 518, 522* (*Tverberg*).) Where the trial court has failed to rule upon evidentiary objections made in writing before a summary judgment hearing or orally at the hearing, the objection is preserved on appeal. (*Reid v. Google, Inc. (2010) 50 Cal.4th 512, 517, 531-532*. [6]) "We also ""liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."" [Citations.]" (*Tverberg, at p. 522*; see *Nazir, supra, 178 Cal.App.4th at p. 254*.)

II. Price Discrimination

In 1975, the California Legislature passed *section 21200* to regulate price discrimination by major distributors of motor fuel. (*Shell Oil Co. v. Younger (9th Cir. 1978) 587 F.2d 34, 35*.) In language paralleling section 2(a) of the Robinson-Patman Act (*15 U.S.C. § 13(a) (1970)*), *section 21200* prohibits price discrimination where the effect of such discrimination is to lessen competition. (*Ibid.*) [7] It provides in relevant part: "It is unlawful for any refiner,

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[6] "[I]f **[*8]** the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (*Reid v. Google, Inc., supra, 50 Cal.4th at p. 534*.)

[7] The parties agree that because California price discrimination law closely parallels the Robinson-Patman Act, and is based upon the same policy considerations, case law under the act is considered persuasive authority by California courts. (Cf. *ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal.4th 1247, 1261* [The prohibition on unearned discounts, codified as *section 17045*, of the Unfair Practice Act (§ 17000 et seq.), was designed to prohibit similar types of business conduct as the federal Robinson-Patman Act]; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 271* [Unfair Practice Act closely parallels, and is based upon same policies as, Robinson-Patman Act]; *Petroleum Sales, Inc. v. Valero Refining Co.* (N.D. Cal. 2006) 2006 WL 3708062, p. *21 [applying Robinson-Patman Act analysis and the requirement that plaintiff show it was in actual competition with a favored purchaser at the time of the price differential to *section 21200* claim of price discrimination].)

distributor, manufacturer, or transporter of motor vehicle fuels or oils engaged in business in this state, either directly or indirectly, to discriminate in price between different purchasers of motor vehicle fuels or oils of like grade and quality, where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either **[*9]** grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

"Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination **[*10]** in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section." (*§ 21200*.)

"Mindful of the purposes of the Act and of the antitrust laws generally, [the United States Supreme Court has] explained that Robinson-Patman does not 'ban all price differences charged to different purchasers of commodities of the grade and quality,' [citation]; rather, the Act proscribes 'price discrimination only to the extent that it threatens to injure competition,' [citation]. Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary line, secondary line, and tertiary line. Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors. [Citations.] Secondary-line cases, of which this is one, involve price discrimination that injures competition among the discriminating seller's customers . . . ; cases in this category typically refer to 'favored' and 'disfavored' purchasers. [Citations.] Tertiary-line cases involve injury to competition at the level **[*11]** of the purchaser's customers. [Citation.]" (*Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. (2006) 546 U.S. 164, 176*.)

Secondary-line discrimination can be direct or indirect. "Direct discrimination occurs when a seller charges different prices to different buyers. [Citation.] Indirect discrimination occurs 'when one buyer receives something of value not offered to other buyers,' such as free goods. [Citation.]" (*Lewis v. Philip Morris Inc. (6th Cir. 2004) 355 F.3d 515, 521*.) Here, El Sineitti claims that the higher gasoline prices to her constituted direct discrimination.

In order to establish secondary-line discrimination, the plaintiff who is the disfavored purchaser must establish the element "that the discrimination had a prohibited effect on competition. . . . The 'prohibited effect on competition' element of the prima facie case requires that the discrimination have *caused* an *actual injury* to the disfavored purchaser. Causation is established by examining whether the favored and disfavored buyers were in *actual competition with each other* and proof of injury. Actual competition requires that the plaintiff prove a relevant product and *geographic market* to be defined." **[*12]** (*Water Craft Management, L.L.C. v. Mercury Marine (M.D. La.2004) 361 F.Supp.2d 518, 538*, third and fourth italics added (*Water Craft*); see also *George Haug Co. Inc. v. Rolls Royce Motor Cars (2nd Cir. 1998) 148 F.3d 136, 142* ["[T]o satisfy this 'competitive nexus' requirement, 'it must . . . be shown that, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.' [Citation.]"].) [8]

"The relevant geographic market . . . is 'the area in which buyers or sellers of the relevant product effectively compete.' [Citation.]" (*Berlyn, Inc. v. Gazette Newspapers, Inc. (D.C. Md. 2002) 223 F.Supp.2d 718, 726* (*Berlyn*); see *TYR Sport, Inc. v. Warnaco Swimwearn, Inc. (C.D. Cal. 2010) 709 F.Supp.2d 802, 816* (*TYR Sport*) [relevant

[8] "Thus, in summary, to establish illegal secondary-line price discrimination between purchasers, a plaintiff must prove the following elements: (1) sales made in interstate commerce; (2) the commodities sold to purchaser were of the same grade and quality as those sold to other purchasers; (3) that the seller discriminated in price between purchasers; and (4) *that the discrimination had a prohibited effect on competition.* A price discrimination within the meaning of *§13(a)* is an actual price difference. *The 'prohibited effect on competition' element of the prima facie case requires that the discrimination have caused an actual injury to the disfavored purchaser.* ***[*13]*** *Causation is established by examining whether the favored and disfavored buyers were in actual competition with each other and proof of injury. Actual competition requires that the plaintiff prove a relevant product and geographic market to be defined.* Proof of injury to competition is established prima facie by proof of a 'substantial' price discrimination between competing purchasers over time." (*Water Craft, supra, 361 F.Supp.2d at p. 538*, italics added.)

geographic market is the area of effective competition where buyers can turn for alternate sources of supply].) [9] "For purposes of [s]ection 21200, two stations 'compete' with each other only if they engage in substantial, rather than minimal, competition with each other. [Citations.]" (Madani v. Equilon Enterprises LLC (C.D. Cal. 2009) 2009 WL 2148664, *13, citing Lewis v. Philip Morris Inc., supra, 355 F.3d at p. 533 **[*14]** [sellers who have ability to deprive each other of significant levels of business]; Universal-Rundle Corporation v. F.T.C. (7th Cir. 1967) 382 F.2d 285, 287 [evidence must show a substantial degree of existing as opposed to minimal or sporadic competition].)

In Hamro v. Shell Oil Co. (9th Cir. 1982) 674 F.2d 784, the Ninth Circuit affirmed an order granting a directed verdict on the plaintiff's claim of unlawful price discrimination in violation of section 21200, **[*15]** where the plaintiff failed to offer substantial evidence that he was in competition with the more favored customers. (Id. at pp. 786, 790.) "Shell admitted that from January 1, 1976 through December 1979 it sold gasoline to up to ten independent retailers at a price below that charged to Hamro. However, section 21200 prohibits price discrimination by a seller only 'where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.' [Citation.] However, a review of the record reveals that Hamro failed to offer any evidence from which a reasonable person could conclude that Hamro was in competition with Shell's more favored customers." (Id. at p. 790; accord, Cain v. Chevron U.S.A., Inc. (D.Ore. 1991) 757 F.Supp.1120, 1123 [granting summary judgment under Oregon statute nearly identical to § 21200 and stating "plaintiff must establish that he was in actual and substantial competition with a favored purchaser"], affd. *972 F.2d 1337 (9th Cir. 1992)*; see also England v. Chrysler Corp. (9th Cir. 1974) 493 F.2d 269, 271-272 **[*16]** (*England*) [advantaged and disadvantaged parties must be shown to be "competing customers" at or near the time of the alleged price discrimination].)

"It is well settled that the relevant . . . geographic markets must be defined with some degree of precision to enable the trier of fact to determine if . . . antitrust laws have been violated." (Water Craft, supra, 361 F.Supp.2d at p. 541.) This is because the geographic market can be the entire nation or an area containing only a small percentage of business activity. (*Ibid.*) "The factors to consider in determining the economic significance of the relevant geographic market include the size, cumbersomeness, and other characteristics of the relevant product; regulatory constraints impeding the free flow of competing goods into the area; perishability of products; and transportation barriers. The economic significance of the relevant geographic market does not depend on singular elements such as population, income, political boundaries, or *geographic extent.* Rather, it depends on the relationship between these elements and the characteristics of competition in the relevant product market within a particular area." (Id. at pp. 541-542, fns. **[*17]** omitted, italics added.) *For this reason "Courts consistently require that expert testimony adequately define the relevant geographic and product markets in antitrust cases.*" (Id. at p. 542, italics added; see, e.g., United Food Mart, Inc. v. Motiva Enterprises, LLC (S.D. Fla. 2005) 404 F.Supp.2d 1344, 1348 [granting motion to exclude the plaintiff's expert testimony that the defendant's two Shell stations were in the same relevant geographic market as the plaintiff's Shell station because the expert performed neither of two analyses generally accepted in the economics community for determining whether products or businesses compete with one another].)

III. ConocoPhillips Satisfied Its Initial Burden of Producing Evidence

El Sineitti first contends that ConocoPhillips did not meet its initial burden of producing evidence that El Sineitti "does not possess, and cannot reasonably obtain, needed evidence" to enable her to create a triable issue of material fact as to the particular element to be proven. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854 (*Aguilar*).) "Summary judgment law in this state . . . continues to require a defendant moving for summary judgment

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[9] "In determining that the favored and disfavored purchasers are 'competitors,' the most obvious set of criteria that come to mind are those for defining relevant geographic and product markets. Under those criteria two sellers are in the same market if they (1) compete for sales to the same customers *and* (2) one seller's competition is sufficient to restrain the other's ability to set price above the competitive level. But the Robinson-Patman inquiry typically differs from the general relevant market inquiry in that the second part of the question is unnecessary. As a general matter, it need be shown only that the two sellers compete for the same customers." (XIV Hovenkamp, ***Antitrust Law*** (2d ed. 2004) ¶ 2333b, p. 97, fns. omitted.)

to present **[*18]** evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. In this particular at least, it still diverges from federal law. For the defendant *must* 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' (*Code Civ. Proc., § 437c, subd. (b)*.) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar, at pp. 854-855*, fns. omitted.)

El Sineitti argues that ConocoPhillips failed to meet this threshold because "it presented no evidence, other than deposition testimony of El Sineitti, one interrogatory response (No. 8), a few documents selected from El Sineitti's document production, and a deed to the [El] Sineitti Station." We disagree. The evidence presented by ConocoPhillips was sufficient **[*19]** to satisfy its initial burden so as to shift the burden of proof to El Sineitti to show the existence of a triable issue of material fact.

In *Andrews v. Foster Wheeler LLC (2006) 138 Cal.App.4th 96*, we addressed the question whether the plaintiff's nonresponsive answers to comprehensive discovery were sufficient to meet the defendant's burden of production when the defendant moves for summary judgment. We concluded that the discovery propounded by the defendant was sufficiently comprehensive and the responses to it so devoid of facts, "as to lead to the inference that plaintiffs could not prove causation upon a stringent review of the direct, circumstantial and inferential evidence contained in their interrogatory answers and deposition testimony." (*Id. at p. 107*.) We therefore concluded that the defendant had met its initial burden of presenting evidence sufficient to make a prima facie showing that a triable issue of fact did not exist regarding the element of causation and the burden of production shifted to plaintiffs to establish a triable issue of fact regarding that element of the cause of action. (*Ibid.*) "When defendants conduct comprehensive discovery, plaintiffs cannot play **[*20]** 'hide the ball.'" (*Id. at p. 106*.) If the plaintiffs respond "to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to [the plaintiffs] once defendants move for summary judgment and properly present plaintiffs' factually devoid discovery responses." (*Id. at p. 107*, fn. omitted.)

In this case, ConocoPhillips took extensive discovery from El Sineitti through written discovery and deposition testimony. It submitted the following evidence from her deposition in support of its assertion that El Sineitti was unable to establish her area of effective competition: Her admission that her only support for her definition of her competitive market as all Union 76 stations within five miles of her station came from her own belief and conversations with 10 to 12 or 10 to 15 customers about their purchasing practices with Union 76 stations and their willingness to buy gasoline at another Union 76 station if it is cheaper. She could name only two such customers. She had no documents supporting her contention that specific customers **[*21]** were price sensitive to the purchase of gas at her station. Neither she nor anyone under her direction had ever analyzed the geographic disbursement of her customers. She admitted she had no documents to support her competitive market definition. She admitted she had no economic studies or empirical evidence to support the price sensitivity of customers. ConocoPhillips also presented evidence of El Sineitti's answers to specially prepared interrogatories wherein she was asked to specifically identify "each instance" that she lost business to other Union 76-branded retail gas stations supplied by ConocoPhillips and Tower. She responded on information and belief with the names of only two customers of her station who had told her during the time of the alleged price discrimination they would drive to another Union 76 station that was offering better retail prices. She also asserted that other customers had expressed the same position. Statements by two (or even 15) customers that they would drive to another Union 76 station that was offering better retail prices is insufficient to provide substantial evidence of the relevant competitive geographic market. (See, e.g., *U.S. v. Oracle (N.D. Cal. 2004) 331 F.Supp.2d 1098, 1167*.)

Nor **[*22]** do we accept El Sineitti's claim that defendant failed to satisfy its initial burden of proof by producing discovery responses that did not exclude the possibility that El Sineitti might reasonably obtain evidence to establish her claim. As the trial court observed in its statement of decision, El Sineitti never contended that needed evidence was still undiscovered or in possession of ConocoPhillips or third parties, nor did she move for a continuance of the motion on such grounds pursuant to *Code of Civil Procedure section 437c, subdivision (h)*. [10] ConocoPhillips moved for summary judgment in April 2009, nearly a year after El Sineitti had first named it as a defendant in the action and more than two years after she filed her initial complaint for price discrimination against Tower. She had ample time to initiate discovery and she in fact did conduct discovery after ConocoPhillips had moved for summary judgment. Although not identical to the "state all facts" interrogatories propounded by defendant in *Andrews v. Foster Wheeler LLC, supra, 138 Cal.App.4th at pages 104-106*, the questions ConocoPhillips propounded to El Sineitti at her deposition and in interrogatories constituted "comprehensive **[*23]** discovery" by ConocoPhillips sufficient to elicit from her all facts that she possessed or expected to obtain to support her claim. Her responses were so devoid of facts as to lead to the inference that she could not prove her competitive geographic market and so could not show ConocoPhillips had engaged in price discrimination in favor of her competitors. (*Id. at p. 106*.)

The evidence presented by ConocoPhillips in support of its summary judgment sufficed to satisfy its *initial burden* on summary judgment by showing through El Sineitti's deposition and response to discovery that she **[*24]** did not possess, and could not reasonably obtain, needed evidence to support her claim. (*Aguilar, supra, 25 Cal.4th at p. 854*; *Andrews v. Foster Wheeler LLC, supra, 138 Cal.App.4th at p. 106*.) Consequently, ConocoPhillips made a prima facie showing that a triable issue of fact did not exist regarding El Sineitti's claimed competitive geographic market and the burden of production shifted to El Sineitti to establish a triable issue of fact regarding that element of her *section 21200* price-discrimination cause of action. (*Ibid.*)

We reject El Sineitti's claim that she presented a prima facie case of price discrimination under *section 21200* by producing evidence of a difference in prices in the sale of like goods having the requisite *effect on competition.* El Sineitti suggests the burden shifting provision of *section 21200* "trumps" *Code of Civil Procedure section 437c*, and asserts that this "is a case of first impression." The assertion that the burden-shifting provision of *section 21200* trumps summary judgment law was never raised in the trial court and was therefore waived. (See generally, Eisenberg et al., Civil Appeals and Writs (The Rutter Group 2010) ¶ 8:229, p. 8-155.) Moreover, **[*25]** under the plain language of *section 21200*, before the burden shifts to defendant to *justify* price discrimination, the plaintiff must *first prove price discrimination* at a hearing. [11] Proof of the prima facie case under *section 21200*, as under the Robinson-Patman Act, requires a showing of actual competition, which in turn requires a showing of the relevant geographic market. (See XIV Hovenkamp, ***Antitrust Law***, *supra*, ¶ 2331, pp. 91, 93 [vast majority of courts and the Federal Trade Commission interpret section 2(b) of the Robinson-Patman Act "as meaning that the burden shifts after *all* of the various elements of a price discrimination offense outlined in [section] 2(a), including the injury requirement, have been made out." Thus, the plaintiff has the burden of showing the requisite competitive injury]; see, e.g., *Water Craft, supra, 361 F.Supp.2d at p. 538* ["actual competition requires that the plaintiff prove a relevant product and geographic market].) In this case, the trial court properly determined El Sineitti did not and could not make the necessary showing.

IV. El Sineitti Failed to Establish a Triable Issue of Fact That She Actually and Substantially Competed With Union 76 Stations Within Five Miles

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[10] "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (*Code Civ. Proc., § 437c, subd. (h)*.)

[11] "Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, **[*26]** the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section." (*§ 21200*.)

In opposition to ConocoPhillips's summary judgment motion, El Sineitti offered the following evidence to support her assertion that the relevant geographic market was all Union 76 stations within a five-mile radius of her station or, at least the single station located at 101 South Mayfair, Daly City:

(1) declarations from four alleged customers who stated they would travel five or more miles to purchase gasoline if El Sineitti's prices were too high;

(2) a declaration from El Sineitti's accountant, Albert J. Martig (whom El Sineitti identifies as an industry expert), that El Sineitti characterizes as opining that there is cross-elasticity of demand for gasoline between stations in near proximity and those that may be five to 10 miles away or further; and

(3) evidence discovered from ConocoPhillips that El Sineitti contends inferentially supported a five-mile radius geographic market. El **[*27]** Sineitti characterizes this evidence as:

(a) evidence that ConocoPhillips has used a varying number of price zones in the San Francisco area, from microzoning single stations to four or five zones in 2002, to a single zone for all of San Francisco and northern San Mateo County in 2008;

(b) evidence that ConocoPhillips has used data and software from Marketing Planning Solutions, Inc. (MPSI), and employed "MPSI tactics," a competition model employing software to show how much volume stations in a price zone will lose to a particular station that raises its price;

(c) evidence demonstrating that El Sineitti's station was run in an MPSI tactic showing that it was in a competitive area with other stations;

(d) evidence that stations in the "price zone" next to El Sineitti's, including the station at 101 South Mayfair in Daly City, were run in an MPSI tactic with stations as far away as 7.8 miles;

(e) evidence that the 101 South Mayfair station was taken out of the northern San Mateo County price zone and moved into a price zone in the Sunset area of San Francisco (Bay Area Zone 9), further away from El Sineitti's price zone (Bay Area Zone 32).

A. ***Customer declarations***

The court properly found **[*28]** the customer declarations deficient. The four individuals, hand-picked by plaintiff, [12] did not constitute a scientific or representative market sample of customers for her proposed economic market. As Judge Vaughn Walker has observed: "Drawing generalized conclusions about an extremely heterogeneous customer market based upon testimony from a small sample is not only unreliable, it is nearly impossible. [Citation.]" (*U.S. v. Oracle Corp., supra, 331 F.Supp.2d 1098, 1167* [finding responses from five customers insufficient to establish market definition in a case involving challenge to a merger under the Clayton Act]; see also *FTC v. Freeman Hospital (W.D.Mo. 1995) 911 F.Supp. 1213, 1220* [in defining relevant geographic markets, "anecdotal evidence concerning the marketplace [is] no substitute for solid economic analysis"], affd. *69 F.3d 260 (8th Cir. 1995)*.) There is no evidence that this sample was sufficiently large or sufficiently representative to constitute a statistically valid sample.

Further, the customer declarations themselves fall far short of providing substantial evidence for El Sineitti's **[*29]** proposed market definition. The customers state that price per gallon is the most important factor in their decision as to where to buy gasoline. [13] All four bought gasoline from El Sineitti when her station was a Union 76

[12] The four customer declarants are: William Mayta, Mark Gin, Joe Koman and Kathryn McGarey.

[13] Various individualized circumstances described in the customers' declarations also impact where they purchase gasoline, including the station's proximity to the declarant's residence, proximity to a family member's residence, proximity to work, whether he or she is traveling to shop at Costco, or whether traveling on business.

station and have continued to buy from her even after it became a non-branded station. All four have had repair work at her service station. Although all four state that if the price of gasoline at the Union 76 station at 999 Ocean Avenue or the station at 101 South Mayfair Street in Daly City is $.01 to $.02 per gallon less than El Sineitti's station they "would buy" or "would probably buy" from the lower priced station, all four customers also state that if they became aware that the price at *another* station—not identified as a Union 76 station—was significantly less per gallon, they would buy gas from the lower priced station, even if it were up to five miles away. [14] El Sineitti's proposed relevant market includes *only* Union 76-branded stations, not all gas stations selling all brands of fuel. El Sineitti admitted in answer to an interrogatory that she "does not contend other non-Union 76 branded retail dealers are within [her] competitive market definition for **[*30]** purposes of the price discrimination alleged in this action." However, the customer declarations do not indicate that they would limit the brands of gasoline that they would purchase, given a price difference they deemed significant. Potential customer purchases from non-Union 76 stations are irrelevant to establishing El Sineitti's proposed market. Those stations do not purchase branded fuel from ConocoPhillips, and therefore could not have received more favorable pricing from ConocoPhillips than El Sineitti. (See, e.g., *England, supra, 493 F.2d at pp. 271-272* ["the advantaged and disadvantaged parties must be shown to be competing customers of the giver in order for there to be discrimination"]; *Richard Short Oil Co., Inc. v. Texaco, Inc. (8th Cir. 1986) 799 F.2d 415, 421* [plaintiff dealer failed to present evidence of "lost sales to any competing Texaco station as the result of the difference in prices"].) Further, the declarations also do not indicate whether a customer would necessarily drive up to five miles to purchase from another Union 76 station, regardless of whether a non-Union 76-branded station within a shorter distance was also charging lower prices than El Sineitti. **[*31]** (See *Madani v. Equilon Enterprises LLC, supra, 2009 WL 2148664, pp. *12, 14* [denial of claim for equitable relief under *section 21200* where plaintiff failed to account for the fact that alleged lost volume "likely 'went to competitors of all sorts'" including other brands such as Chevron, Arco, and Unocal].) Indeed, here all four customers continued to buy gasoline from El Sineitti's station even after she debranded as a Union 76 station.

The trial court correctly found that "by failing to account for the brand of gasoline, [El Sineitti's] customer declarations ignore a fundamental aspect of [p]laintiff's claims and proposed market definition, not to mention the other numerous and complicated factors that affect a relevant market definition."

B. *Martig declaration*

El Sineitti offered the declaration of her personal accountant, Albert **[*33]** J. Martig, whom she identified as an industry expert. Martig provides financial and marketing services, and tax work for individuals and businesses, including a large number of service stations. He has worked in that field for 39 years, including periods working as marketing representative for Mobil Oil Corporation and BP Oil Company. He specializes in service station marketing and finances and has worked with oil company owned stations and private owner-operators for both branded and independent stations. He had prepared El Sineitti's taxes for her service station for six years preceding the litigation.

With respect to identification of the geographically relevant market, Martig opined: "*It is well known in the oil business* that the retail price of gasoline at the pump significantly affects the volumes purchased from a particular

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[14] Mayta would travel over five miles from his home to obtain a price savings of $.05 to .10 per gallon.) He states: "If a station where I am buying gasoline raises its price above another station with which I am familiar and is reasonably near to my house, I will stop and buy gasoline from the lowest priced station when I need gasoline." He would "probably" buy from a Union 76 station such as the 999 Ocean Avenue station or **[*32]** the 101 South Mayfair Street station if its price were $.01 to .02 per gallon less than El Sineitti's station. He also travels on business and would purchase gasoline at a station over five miles from El Sineitti's station if its price were $.05 to .10 per gallon less than El Sineitti's. Finally, he has a second home in Forestville, California, where the price differential is often significant and he tries to buy gasoline there.

Gin states he has bought gasoline from "ARCO stations, including some located at distances over 5 miles from [Gin's business]."

Koman has purchased gasoline from a South San Francisco Costco station, located seven and one-half miles from his residence.

McGarey has purchased gasoline from an Olympian station in San Francisco, located about three miles from her residence.

service station. A service station that has higher gasoline prices than stations that its customers might buy from will lose customers to the lower price station. Stations in near proximity with lower gasoline prices at the pump than one with higher prices are the most likely stations to which customers will switch. However, customers that make trips in their **[*34]** car, whether to go to work, to go to school, to shop, [or] to visit relatives will switch to stations near to their destinations or on their way which may be 5 to 10 miles away or further if the station where they normally purchase gasoline has higher prices at the pump." (Italics added.) He also opined that when El Sineitti is charged a price that is higher than that given to stations to which her customers might switch, if she maintains the same profit margins as she has charged in the past, and raises prices, she will lose customers and sales and her volumes of gasoline pumped will go down.

Martig's declaration does not indicate that he either conducted or considered any market analysis. He does not identify any factual data upon which his conclusions are based, nor does he identify any economic basis for his conclusory statements as to how gasoline consumers behave generally, other than his assertion that "[i]t is well known" that price at the pump affects volume sold. The court found that "Mr. Martig's declaration does not present credible evidence to support [p]laintiff's proposed relevant market definition." We agree.

First, we reject El Sineitti's repeated contention that her **[*35]** competitive market is simple to discern and easily understood by all. Courts have recognized that, in the retail gasoline market, "proximity does not per se show actual competition." (*Shell Co. (Puerto Rico) Ltd. v. Los Frailers Service Station (1st Cir. 2010) 605 F.3d 10, 26* [summary judgment for defendant affirmed on Robinson-Patman Act claims where the plaintiff "presumed" competition with three other Shell stations within two miles].) In *United Food Mart, Inc. v. Motiva Enterprises, LLC, supra, 404 F.Supp.2d 1344*, the court excluded the declaration of plaintiff's expert on defendant petroleum company's summary judgment motion. The court found the expert's declaration opining that the plaintiff operator's station was within the same relevant geographic market as two nearby service stations was inadmissible because it was based upon unreliable methodology. The expert did not perform a cross-price elasticity analysis or determine whether a positive correlation existed between retail prices, but merely visually observed the physical proximity of the stations and performed a comparative sales volume analysis. (*Id. at pp. 1349-1350, 1352*.) As the trial court here stated, "the Court cannot **[*36]** accept Plaintiff's proposed relevant market definition simply because Plaintiff says it is so."

In arguing that ConocoPhillips "waived" any objection to Martig's testimony, El Sineitti suggests the court refused to credit Martig's testimony because it found him unqualified on the issue of geographic markets. The court did not reject Martig's declaration on the ground that he was not *qualified* to testify as an expert as to the definition of the relevant geographic market. [15] Rather, the court recognized in its statement of decision that even when properly qualified, expert opinion that is "'purely conclusory because . . . unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion . . . has no evidentiary value.'" (*Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108, 1117*.)

El Sineitti argues the court erroneously required expert economic testimony to define "the relatively simple market of consumers buying gas from retail stations," requiring her to provide a professional economic analysis to survive

[15] We believe the court *could have* excluded Martig's opinion on the basis that he was not qualified to render an opinion on customer behavior or the relevant geographic market as he had no degree or training in economics, had not studied consumer purchasing behavior or patterns in El Sineitti's proposed market or in any market, and had never testified **[*37]** previously in an antitrust matter. (Cf, *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd. (9th Cir. 1991) 924 F.2d 1484, 1490* [non-economic witness was unqualified "to opine on a highly technical economic question" of defining a relevant geographic market; *Western Parcel Exp. v. United Parcel Service (N.D.Cal. 1998) 65 F.Supp.2d 1052, 1058-1060* (*Western Parcel*), affd. *190 F.3d 974* [summary judgment for defendant where plaintiff's experts had no background in antitrust economics or ***antitrust law*** and had not offered opinions on market definitions in previous litigation].) ConocoPhillips asserted Martig was unqualified in writing in its reply to plaintiff's opposition and again orally at the summary judgment hearing, when counsel argued that Martig was "not qualified to give an opinion" regarding whether El Sineitti was in competition with other Union 76 stations in the antitrust economic sense. ConocoPhillips has not "waived" such objection on appeal. (*Reid v. Google, Inc., supra, 50 Cal.4th 512, 526-527, 531-532* [evidentiary objection in summary judgment proceedings was made in writing before the hearing or raised orally at the hearing, the trial court's failure to rule on the objection **[*38]** does not waive the objection for purposes of appellate review].)

summary judgment. Of the evidence that El Sineitti did submit, none was from an expert or involved studies or other analysis defining a relevant geographic market so as to raise a triable issue as to causation by showing that she was in competition with the alleged favored buyers.

We agree with El Sineitti that whether her Union 76 station was in actual competition with other Union 76 stations within a five-mile radius is an inherently factual question. (F.T.C. v. Tenet Health Care Corp. (8th Cir. 1999) 186 F.3d 1045, 1052 ["Determination of the relevant geographic market is highly fact sensitive"]; see TYR Sport, supra, 709 F.Supp.2d at p. 816, fn. 17.) But we disagree with her argument that expert testimony is unnecessary because a jury can use its "common sense" to decide the issue.

It appears that courts are divided as to whether plaintiff must introduce expert testimony to establish the relevant **[*39]** market. (Coast to Coast Entertainment, LLC v. Coastal Amusements, Inc. (D.C. NJ 2005) 2005 U.S.Dist.LEXIS 26849, *56 and fn. 21 (*Coast to Coast Entertainment*).) Courts finding expert testimony necessary include: Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., supra, 924 F.2d 1484, 1490 [principals in the case were not experts "qualified to opine on a highly technical economic question" of the definition of the relevant market]; Bailey v. Allgas, Inc. (11th Cir. 2002) 284 F.3d 1237, 1239; Water Craft, supra, 361 F.Supp.2d 518, 542; Berlyn, supra, 223 F.Supp.2d 718, 727 and fn. 3; Virginia Vermiculite v. W.R. Grace & Co.-Conn. (W.D.Va. 2000) 108 F.Supp.2d 549, 576, n. 16.) Courts stating that expert testimony is *not always required* to define the relevant product market include the United States Supreme Court in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993) 509 U.S. 209, 242 ["Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them" [16]]; Coast to Coast Entertainment, supra, 2005 U.S.Dist.LEXIS 26849, *56 and fn. 21; Anti-Monopoly, Inc. v. Hasbro, Inc. (S.D.N.Y. 1997) 958 F.Supp. 895, 904 ["experts are not always essential **[*40]** to defining the relevant market"]; see also Victus, Ltd. v. Collezione Europa U.S.A., Inc. (M.D.N.C. 1998) 26 F.Supp.2d 772, 786-787 (*Victus*) ["Testimony from an economist is not necessary; however, some evidence of the effects of price increases on the proposed market, and an analysis of consumer reactions to such a scenario, would make [plaintiff's] argument more plausible"].) [17]

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[16] See also United States v. Pabst Brewing Co.(1966) 384 U.S. 546, 549 [government need not prove "by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market"].

[17] Those cases observing that expert testimony is not *always* required do not support El Sineitti's claim that "common sense" and anecdotal evidence of the type she has submitted suffice to provide evidence from which a jury could determine the relevant market.

El Sineitti asserts that in Eastman Kodak Co. v. Image Technical Services, Inc. (1992) 504 U.S. 451, 467, the Supreme Court found without any expert testimony, that there existed a triable issue as to whether there was a relevant product market for parts and services for Kodak equipment. (Id. at pp. 481-482 ["The relevant market for antitrust purposes is determined **[*41]** by the choices available to Kodak equipment owners"].) The court did not discuss whether expert testimony was necessary and nothing in the case suggests that expert testimony was not necessary to define the relevant market.

In Victus, supra, 26 F.Supp.2d 772, 787, the court stated: "Economic experts may not be required, but [the plaintiff] has not provided affidavits of any witnesses who can address such questions, even if their opinions are based solely on their experience in the industry. No reasonable jury could find that a relevant market, as described by [the plaintiff], exists; therefore, summary judgment must be entered against [the plaintiff]." (Fn. omitted.)

In Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. 209, 242, the court stated: "Expert testimony is useful as a guide to interpreting market facts, but not as a substitute for them." However, expert testimony was presented by the parties and the court made this statement in the context of *rejecting* the testimony of the expert. The court explained, "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, . . . it cannot support a jury's verdict." (*Ibid.*)

In TYR Sport, supra, 709 F.Supp.2d 802, **[*42]** the district court overruled the defendant's objection to lay testimony of the plaintiff's executive vice president who had worked in the performance swimwear industry for 34 years and whose testimony regarding barriers to competition in the international market supported the plaintiff's geographical market as the United States, rather than the international market. The court distinguished Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., supra, 924

Nevertheless, as observed in Lopatka and Page, Economic Authority and the Limits of Expertise in Antitrust Cases, 90 Cornell L.Rev. 617 (2005) (Lopatka and Page), "*In antitrust litigation, the factual complexity and economic nature of the issues involved require the presentation of economic expert testimony in all but a few cases.*" (*Id.* at p. 617.) "Courts now recognize that market definition requires the sophisticated use of data and theory—a process that typically requires expert testimony. [18]" (Lopatka and **[*44]** Page, *supra*, at pp. 659-660 & fn. 265.)

We agree with the district court in *Berlyn, supra, 223 F.Supp.2d at page 727*, that whether or not expert testimony is required as a matter of law as a predicate to finding a market definition, nevertheless, "as a practical matter, . . . it would seem impossible to prove such a complex economic question without the assistance of a qualified expert, *viz.*, an economist." The *Berlyn* court granted summary judgment, concluding that the newspaper publisher plaintiffs had failed to identify the relevant product and geographic markets on their antitrust claims. (*Id. at pp. 726-729, 742*.) Noting that it is "unclear whether expert testimony, as a matter of law, is a necessary predicate to finding a market definition" (*id. at p. 727, fn. 3*), the court, nevertheless, explained: "Because they bear the burden of proving relevant market, to survive summary judgment on their antitrust claims, the plaintiffs must offer admissible evidence sufficient for a jury to find that the proposed relevant markets are accurate. *See* Celotex Corp., 477 U.S. at 322, 106 S.Ct. 2548 [(1986)]. Defining markets for antitrust analysis is an extremely complex task. See, e.g., **[*46]** *Cogan v. Harford Memorial Hosp., 843 F.Supp. 1013, 1020 (D.Md.1994)* (characterizing the issue of relevant geographic market as a 'highly technical economic question'); *Victus, Ltd. v. Collezione Europa U.S.A., Inc.*, [*supra*,] 26 F.Supp.2d 772, 786 . . . (noting that defining relevant product markets is a 'difficult economic question'). Relevant market cannot be proved through generalizations about any given industry, but instead must be based on the economic and commercial realities of the particular market studied. *See Eastman Kodak Co. v. Image Tech. Servs.*, [*supra*,] 504 U.S. 451, 467, 112 S.Ct. 2072, 119 L.Ed.2d 265 . . . ; Brown Shoe Co. v. United States, 370 U.S. 294, 335, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). *Thus, to prove relevant market, expert testimony is of utmost importance, and that testimony, or any other evidence, must be based on specific facts pertaining to the proposed market.*" (*Berlyn, at pp. 726-727*, fn. omitted, italics added.) Because the *Berlyn* court had determined the plaintiffs' proposed economic expert was "not qualified to offer his opinion as to the relevant product or geographic markets," it recognized that "plaintiffs bear the difficult, if not impossible, **[*47]** burden of proving the outer boundaries of a relevant market and market power without the aid of an economic expert." (*Id. at p. 727*.)

F.2d at page 1490, in which the Ninth Circuit concluded lay witness testimony on the technical subject of the relevant geographic market was impermissible. In contrast, the executive vice president in *TYR Sport* "testifie[d] only as to factual characteristics of the geographic market, which [was] within his competency as an industry veteran. He [did] not give a conclusory opinion on market definition, unlike the witnesses in *Morgan.*" (*TYR Sport, at p. 816, fn. 17*.)

In *Coast to Coast Entertainment, Inc., supra, 2005 U.S.Dist.LEXIS 26849*, the court concluded that even were it to consider the information provided in plaintiff's non-expert declarations, the plaintiff had failed to demonstrate the relevant product market. (*Id. at p. *56*.) The **[*43]** court also recognized that "a plaintiff cannot prove the relevant market through generalizations about any particular industry, but instead must demonstrate the economic and commercial realities of the particular market studied. *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 467, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*." (*Coast to Coast Entertainment*, at pp. *51-52.)

In *Anti-Monopoly, Inc. v. Hasbro, Inc., supra, 958 F.Supp. 895, 904*, the plaintiff *did* submit the declaration and cross-elasticity reports of an expert economist "to satisfy its burden relating to market definition." Yet, the court concluded plaintiff had failed to satisfy that burden. (*Id. at p. 903*.)

[18] "See, e.g., *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 (11th Cir. 1985)* (holding that '[c]onstruction of a relevant economic market or a showing of monopoly power in that market cannot . . . be based upon lay opinion testimony'); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, [*supra*,] *108 F. Supp. 2d 549, 576*[, fn.] 16 . . . (holding expert testimony practically necessary for market definition); *Drs. Steuer & Latham, P.A. v. Nat'l Med. Enters., Inc., 672 F. Supp. 1489, 1512*[, fn.] 25 (D.S.C. 1987) ('Failure to adduce expert testimony on competitive issues such as market definition augurs strongly in favor of granting summary judgment against an antitrust plaintiff'), affd., ***846 F.2d 70 (4th Cir. 1988)*** (Table). Although the court in *Anti-Monopoly, Inc. v. Hasbro, Inc.*, [*supra*,] *958 F. Supp. 895* . . . , affd., ***130 F.3d 1101 (2d Cir. 1997)***, stated that 'experts are not always essential to defining the relevant market,' *id. at 904*, it cited for this proposition *United States v. Pabst Brewing Co.*, [*supra*,] *384 U.S. 546, 549* . . . , which dates from an era in which market definition was not conducted on economic grounds." (Lopatka and Page, **[*45]** *supra*, 90 Cornell L.Rev. at p. 660, fn. 265.)

"In practice, economists provide the court with expert testimony to explain the relevant market and to measure the impact of the allegedly illegal conduct. [Citation.]" (*Western Parcel, supra, 65 F.Supp.2d 1052 at p. 1058*.) "On summary judgment, this court is not to weigh the credibility of the evidence presented, but rather decide whether the evidence presents a genuine issue of fact. *But assertions in expert declarations do not automatically create genuine issues of fact. [Citation.] When expert opinions are not supported by sufficient facts*, or when the indisputable record contradicts or otherwise renders the opinions unreasonable, they cannot be relied upon. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S.Ct. 2578, 2598, 125 L.Ed.2d 168*. '[E]xpert opinion evidence . . . has little probative value in comparison with the economic factors' that may dictate a particular conclusion. *Matsushita* [*Electric Industrial Co. Ltd. v. Zenith Radio Corp.* (1986)] 475 U.S. [574,] 594[, fn.] 19, *106 S.Ct. at 1360*[, fn.] 19. Expert declarations **[*48]** may be useful as a guide in interpreting market facts, but they are not a substitute for competent economic evidence. *Brooke Group, 509 U.S. at 242, 113 S.Ct. at 2598*. The opinion of [plaintiffs'] experts do not create genuine fact issues about the definition of the relevant market." (*Western Parcel, at p.1060*, italics added.)

El Sineitti's assertion that Martig's declaration demonstrates "cross-elasticity of demand for gasoline" is unpersuasive. Martig never even used the phrase "cross-elasticity." More importantly, Martig's declaration reveals that he never performed any cross-elasticity calculation or analysis of El Sineitti's proposed geographic market. He fails even to specify how much higher he believes prices must be before consumers will travel "5 to 10 miles away or further." He does not consider brand of fuel, traffic patterns, or any other of the many factors that affect El Sineitti's actual competitive market. Moreover, his belief that consumers will purchase fuel somewhere else along their route appears to describe the "minimal" and "sporadic" type of competition that *section 21200* does not encompass. (*Madani v. Equilon Enterprises LLC, supra, 2009 WL 2148664 at p. *8*.)

As **[*49]** we stated in *Andrews v. Foster Wheeler LLC, supra, 138 Cal.App.4th 96*, "'It is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.' [Citation.] Notably, '[p]laintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation or reasoning.' [Citation.] '[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based.' [Citation.]" (*Id. at p. 108*.)

Neither Martig nor the conclusions stated in his declaration provide the admissible evidence from which a jury reasonably could find the relevant geographic market was that claimed by El Sineitti.

C. *Discovery from ConocoPhillips concerning "price zones"*

As the trial court found, El Sineitti relied also upon documents and deposition testimony concerning ConocoPhillips's price zones. However, she "failed to articulate how the cited documents and **[*50]** testimony support her proposed relevant market of all Union 76-branded stations within five miles of her station." [19] The use of price zones are "commonplace in the petroleum business and constitutes a reasonable trade practice." (*Cain v. Chevron U.S.A., supra, 757 F.Supp. at p. 1125*.)

Initially, we note that, in her answers to ConocoPhillips's interrogatories, El Sineitti stated on information and belief that pricing zones did *not* correspond to relevant competitive geographic markets. She states: "Pricing zones for gasoline established by oil companies have been found not to correspond to geographic relevant markets in which there is competition between dealers. Pricing zones established by CONOCO PHILLIPS, in which the same prices are charged to all dealers within that zone, do not correspond to geographic **[*51]** relevant markets for retail gasoline purchases within which relevant markets there is a reasonable possibility that Union 76 customers would

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[19] On appeal, El Sineitti points to a broad range of pages, rather than to specific page cites, to support her claims. This makes our task more difficult. Nevertheless, we have reviewed all the exhibits cited by plaintiff and find the court correctly determined that she failed to articulate the link between these documents and deposition testimony and her claimed geographic market.

drive to another Union 76 branded station if the first Union 76 branded dealer raised its prices above that of another Union 76 branded dealer." This response seems antithetical to her attempt to use ConocoPhillips price zones to support her market definition.

In any event, that ConocoPhillips has used a varying number of price zones in the San Francisco area over the past 10 years does not further El Sineitti's claim to be in competition with all Union 76 stations within a five-mile radius. ConocoPhillips account representative William Buerster testified there would be "as many as three or four zones in San Francisco from 2002 to the present."

ConocoPhillips employee David Hinds's deposition testimony was that in 2002 there were two and possibly three zones in San Francisco. El Sineitti's station was in the San Francisco South Zone. The South San Francisco market tended to be volatile, so sometimes the zone would be "feathered" to avoid a significant price drop from one zone to the next. In July 2008, in response to changing competitive market **[*52]** conditions that did not previously exist, namely major competitors Chevron and Shell consolidating ownership of their branded stations and transitioning their price structure accordingly, the number of price zones was decreased and San Francisco and most of San Mateo were consolidated into a single wholesale price zone. This evidence does nothing to support El Sineitti's claimed geographic market, as consolidation into a single zone occurred in 2008, *after* her claimed damages period, beginning in 2005 and ending in 2007, when she de-branded as a Union 76 station.

Nor is the fact that ConocoPhillips used MPSI data and software to gauge localized competitive conditions helpful to El Sineitti, as she did not explain how the use of MPSI demonstrates a five-mile competitive market for her station. In her opening brief, appellant argues that her station "was run in an MPSI tactic showing that it was in a competitive area with *other stations.*" (Italics added.) She does not limit this statement to "all other Union 76 stations within five miles of her station." At the summary judgment hearing, counsel for El Sineitti pointed to the price zone map produced by ConocoPhillips, and identified it **[*53]** as "showing various price zones that existed at the end of 2003 and the beginning of 2004." Again, this time period was outside the period during which she claimed price discrimination and damages.

El Sineitti submitted a document appearing to show that her station was analyzed against other stations in price zone No. 32 by estimating volume changes that would result from a five-percent price change. As the court pointed out in its statement of decision, this report showed El Sineitti's station grouped with only one other ConocoPhillips Union 76-branded station located in San Francisco—not all other Union 76 stations within five miles. Moreover, this document run date was listed as November 19, 2004—again outside plaintiff's alleged period of price discrimination.

El Sineitti also relies upon a document purporting to show that ConocoPhillips ran an MPSI competitive analysis for a station located at 101 South Mayfair Avenue in Daly City with another station as far away as 7.8 miles. This document is completely irrelevant to the question of El Sineitti's competitive geographic market. It was conceded that the 101 South Mayfair station was never in the same price zone as El Sineitti's station. **[*54]** Rather, as the court found, the 101 South Mayfair station had been in a zone next to El Sineitti's. So, too, that Conoco Phillips moved the Daly City station into a different price zone, or "feathered" prices across its zones, does not provide evidence that plaintiff actually competed with all Union 76 stations within five miles of her own.

Finally, these documents were not relied upon by Martig and no knowledgeable witness testified that these documents supported El Sineitti's claimed geographic market or explained how they supported an economic analysis of the geographic market.

The court in *Berlyn, supra, 223 F.Supp.2d 718*, rejected the plaintiffs' claim that other evidence supported their market definitions. The court found the documents relied upon by the plaintiffs were "insufficient to support their proposed market definitions, as they are either inadmissible or irrelevant." (*Id. at p. 727*.) These documents included internal documents of the defendant Washington Post and deposition excerpts that did "not directly speak to outer geographical boundaries and lines of competition for antitrust purposes." (*Id. at p. 728*.) The Washington Post documents were probative only in that they **[*55]** listed business statistics by county, the plaintiffs' claimed geographic market. The deposition excepts were statements of non-experts as to what the geographical lines of competition were. (*Ibid.*) In rejecting this evidence as sufficient evidence from which a jury could accept plaintiff's definitions of relevant market on each of the plaintiffs' antitrust claims, including a claim under the Robinson-Patman Act, the court stated: "Plaintiffs' reliance on studies conducted by the defendants is also misplaced, absent a showing that these studies dealt specifically with the markets alleged here or that they were aimed at defining relevant market for antitrust purposes." (*Id. at p. 729*.)

D. *Court did not improperly "weigh" the evidence*

El Sineitti also argues that the court improperly "weighed" the evidence presented by the customer declarations and by Martig's declaration when it determined that these declarations did "not present credible evidence to support [her] proposed relevant market definition." (See *Nazir, supra, 178 Cal.App.4th at p. 286, fn. 22* [noting criticism that some courts granting summary judgment in title VII and age discrimination employment cases "weigh the evidence, **[*56]** frequently draw inferences in favor of the moving party employer, and seemingly make credibility determinations"].) Appellant is mistaken. Although the trial court unfortunately used the term "credible evidence" in finding the declarations of the customers and of Martig to be deficient, it is apparent from the statement of decision as a whole that the court did not "weigh" the evidence in the sense we criticized in *Nazir*, but rather was exercising its traditional function by determining this evidence to be without sufficient weight to allow a reasonable juror to find that the plaintiff satisfied her burden of persuasion on the geographical market issue.

As our Supreme Court recognized in *Aguilar, supra, 25 Cal.4th 826*, "[E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact. . . .* In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself. [Citations.]" (*Id. at p. 856*, fn. omitted.) The court noted its agreement **[*57]** with Areeda and Hovenkamp, ***Antitrust Law***, that "[a]ssessing the sufficiency of the evidence to determine whether a reasonable juror could find that the plaintiff has satisfied his burden of persuasion is a traditional judicial function . . . ." (2 Areeda and Hovenkamp, ***Antitrust Law*** (3d ed. 2007) ¶ 308, p. 136.) (See *Aguilar, at p. 856, fn. 26*.)

"[Plaintiff] argues that the definition of the relevant market is an issue for the jury, and thus it is not appropriate for the court to rule on the relevant market in this motion. *See* *Image Tech. Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir.1997)* ('Ultimately what constitutes a relevant market is a factual determination for the jury'). However, as with any issue of fact, if no genuine issue exists, or if plaintiff has failed to carry its burden of going forward with the evidence, summary judgment is appropriate. *See Morgan*, [*Strand, Wheeler & Biggs, v. Radiology, Ltd., supra,] 924 F.2d at 1489-90*; [citation]. It is therefore proper for this court to examine the record and the law, to decide if there are genuine fact issues concerning the relevant market." (*Western Parcel, supra, 65 F.Supp.2d at p. 1058*.) We have done so **[*58]** here and have determined that ConocoPhillips met its initial burden of presenting evidence sufficient to shift the burden of production on the issue of the relevant geographic market to El Sineitti. El Sineitti failed to establish a triable issue of fact regarding the element of causation, as she failed to produce relevant and admissible evidence of her claimed relevant geographic market such that a reasonable juror could find that the favored and disfavored stations were in actual competition with each other.

Because we affirm the trial court's grant of summary judgment on this basis, we need not address the alternative and additional bases upon which the court granted summary judgment on El Sineitti's price discrimination cause of action. [20]

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[20] The trial court recognized that having found El Sineitti had failed to raise a triable issue of material fact as to the definition of her relevant competitive market, it "need go no further." Nevertheless, it proceeded to address the parties' remaining arguments. As to the *section 21200* price discrimination cause of action, the court concluded that El Sineitti also "failed to present a triable issue of fact as to whether she received substantial **[*59]** price differentials over a significant period of time that resulted in competitive harm," and that she "failed to show a triable issue of fact as to whether she suffered any injury caused by ConocoPhillips."

DISPOSITION

The judgment is affirmed. ConocoPhillips is awarded its costs on this appeal.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.

End of Document

Cahn v. Oversee

United States District Court for the Central District of California

August 25, 2011, Decided; August 25, 2011, Filed

No. CV 11-03800-SVW (AGRx)

Reporter

2011 U.S. Dist. LEXIS 164904 *

Cahn v. Oversee.net, et al.

Subsequent History: Claim dismissed by, Without prejudice, Motion granted by *Cahn v. Oversee.net, 2011 U.S. Dist. LEXIS 164901 (C.D. Cal., Nov. 9, 2011)*

Motion granted by, in part, Motion denied by, in part *Cahn v. Oversee.net, 2011 U.S. Dist. LEXIS 164903 (C.D. Cal., Nov. 29, 2011)*

Motion granted by, in part, Motion denied by, in part *Cahn v. Oversee.net, 2011 U.S. Dist. LEXIS 164900 (C.D. Cal., Dec. 6, 2011)*

Motion granted by, in part, Motion denied by, in part *Cahn v. Oversee.net, 2011 U.S. Dist. LEXIS 164906 (C.D. Cal., Dec. 6, 2011)*

Motion granted by *Cahn v. Oversee.net, 2011 U.S. Dist. LEXIS 164902 (C.D. Cal., Dec. 20, 2011)*

Summary judgment denied by *Cahn v. Oversee.net, 2011 U.S. Dist. LEXIS 164911 (C.D. Cal., Dec. 29, 2011)*

Motion denied by, in part, Motion denied by, in part, Without prejudice *Cahn v. Oversee.net, 2012 U.S. Dist. LEXIS 200028 (C.D. Cal., Jan. 4, 2012)*

Later proceeding at *Cahn v. Oversee, 2012 U.S. Dist. LEXIS 200031 (C.D. Cal., Jan. 5, 2012)*

Claim dismissed by, Motion denied by, in part, Motion denied by *Cahn v. Oversee.net, 2012 U.S. Dist. LEXIS 200029 (C.D. Cal., Jan. 6, 2012)*

Findings of fact/conclusions of law at *Cahn v. Oversee, 2012 U.S. Dist. LEXIS 15224 (C.D. Cal., Feb. 6, 2012)*

Motion denied by *Cahn v. Oversee.net, 2012 U.S. Dist. LEXIS 200033 (C.D. Cal., Apr. 19, 2012)*

Partial summary judgment granted by *Cahn v. Oversee.net, 2012 U.S. Dist. LEXIS 200035 (C.D. Cal., Apr. 19, 2012)*

Core Terms

alleges, argues, Defendants', plaintiff's claim, conversion, fraudulent, unfair, inducement, Reply, fails, motion to dismiss, motion to strike, domain name, fair dealing, good faith, breach of contract claim, misrepresentation claim, punitive damages, particularity, earn, intentional misrepresentation, alleged misrepresentation, breach of contract, Misrepresentation, promises, responds, business practice, representations, contractual, Prayer

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For Oversee.net, a California corporation, Jefff Kupietzky, an individual, Lawrence Ng, an individual, Defendants: William A Delgado, LEAD ATTORNEY, Willenken Wilson Loh & Delgado LLP, Los Angeles, CA; Leemore Kushner, Ervin Cohen & Jessup LLP, Los Angeles, CA; Michael C Lieb, Ervin Cohen and Jessup LLP, Beverly Hills, CA.

Judges: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN V. WILSON

Opinion

CIVIL MINUTES - GENERAL

Proceedings: IN CHAMBERS ORDER re MOTION TO DISMISS PURSUANT TO *RULE 12(b)(6)*, MOTION TO STRIKE PURSUANT TO *RULE 12(e)* [12]

I. INTRODUCTION

On May 3, 2011, Plaintiff Monte Cahn filed a Complaint against Defendants Oversee.net, Jeff Kupietzky, and Lawrence Ng alleging a total of ten claims: (1)-(3) three separate breach of contract claims; (4) breach of the covenant of good faith and fair dealing; (5) breach of fiduciary duty; (6) an accounting; (7) intentional misrepresentation; (8) negligent misrepresentation; (9) conversion; and (10) unfair competition under *California Business and Profession Code § 17200*. (Complaint ¶¶ 28-93). On June 1, 2011, Defendants **[*2]** filed a Motion to Dismiss pursuant to *Rule 12(b)(6)* and a Motion to Strike pursuant to *Rule 12(e)*.[1] On June 22, 2011, Plaintiff filed a First Amended Complaint ("FAC"), eliminating the claim for breach of fiduciary duty. On July 15, 2011, Defendant filed a Motion to Dismiss the First Amended Complaint pursuant to *Rule 12(b)(6)* and Motion to Strike pursuant to *Rule 12(f)* ("MTD"). On July 25, 2011, Plaintiff filed an Opposition to Defendants' Motion to Dismiss and Motion to Strike ("Opposition"). On August 1st, 2011, Defendants filed a Reply in support of their Motion Dismiss and Motion to Strike ("Reply").

For the reasons set forth in this Order, Defendants' Motions are hereby GRANTED.

II. FACTUAL BACKGROUND

According to the FAC, in 1999, Plaintiff Cahn, a pioneer in the field of internet domain name selling and valuing, formed Domain Systems, Inc. d/b/a Moniker.com ("Moniker"). (FAC ¶¶ 8-9). Moniker provided services including sales, brokerage, registration and management of internet domain names. (Id.). Cahn managed Moniker until 2005, at which time he sold Moniker to Seevast Corp. (Id. at ¶ 10). Cahn remained CEO of Moniker and managed the business until 2007, at which point Defendant Oversee allegedly approached Seevast and Cahn **[*3]** with an offer

[1] Specifically, Defendants sought dismissal of Plaintiff's Second Claim for Breach of Contract, Fifth Claim for Breach of Fiduciary Duty, Seventh and Eight Claims for Intentional and Negligent Misrepresentation, Ninth Claim for Conversion, and Tenth Claim for violation of Business & Professions Code *Section 17200*. Defendants further moved to strike Plaintiff's prayer for punitive damages on the grounds that Plaintiff failed to plead a claim that would entitle him to punitive damages.

to purchase Moniker. (Id. at ¶ 12). According to the FAC, Oversee insisted that Cahn join Oversee for a period of at least three years as an explicit condition of the agreement to purchase Moniker. (Id.).

Plaintiff further alleges that Defendants Jeff Kupietzky and Lawrence Ng were "primarily responsible" for negotiating on behalf of Oversee, and that Kupietzky and Ng made a series of statements and promises in or around 2007 designed to induce Plaintiff to join Oversee after its acquisition of Moniker. (Id. at ¶ 13-16). Plaintiff alleges that, as an additional inducement for Plaintiff to join Oversee, Oversee proposed a "Management Incentive Plan" ("MIP") under which Plaintiff could earn up to $13,000,000 if certain performance goals were met. (Id. at ¶ 19). Plaintiff further alleges that Ng and Kupietzky were "primarily responsible" for making false representations designed to assure Plaintiff that he would be able to earn the $13,000,000 in payments under the MIP (Id. at ¶ 20). Plaintiff alleges that, as a result, he was induced to forego other lucrative business opportunities, and that the parties reached a mutual agreement regarding the sale of Moniker to Oversee **[*4]** on or around December 14, 2007. (Id. at ¶ 22). Plaintiff further alleges that he believes that, at some time on or around December 2007, Defendants formed the intent to conceal their intentions to benefit from "Moniker's great public reputation" while interfering with Plaintiff's ability to manage Moniker, thus making it impossible for Plaintiff to obtain the $13,000,000 in payments under the MIP. (Id. at ¶¶ 22-23).

Plaintiff alleges that, subsequent to the acquisition of Moniker by Oversee, Defendants engaged in a series of affirmative actions for the purpose of denying Plaintiff the ability to obtain benefits under the MIP. (Id. at ¶ 24A-M). Specifically, among other allegations, Plaintiff alleges that Defendants: gave Plaintiff additional responsibilities without modifying the performance goals under the MIP; improperly diverted revenues and profits from Moniker; cut Plaintiff's staff at Moniker in spite of promises to provide Moniker with sufficient resources to combat prior staffing issues; improperly reported Moniker's expenses, creating the false impression that Moniker was underperforming; restrained Moniker's marketing budget; denied Moniker the opportunity to cross-market **[*5]** to other Oversee subsidiaries in spite of promises to the contrary; and failed to obtain a California escrow license for Moniker that would have allowed Moniker to legally perform domain name auctions in California, where Over was based. (Id.). Plaintiff alleges that Defendants' conduct caused customers to leave Moniker, thus negatively affecting Plaintiff's ability to achieve the performance goals under the MIP. (Id. at ¶ 24N).

Plaintiff alleges that, on or around June 4, 2010, Oversee offered additional compensation through a Commission Plan under which Plaintiff was to receive a pre-determined percentage payment of certain individual sales transaction. (Id. at ¶ 28). Plaintiff alleges that Defendants denied him full compensation under the Commission Plan through improper diversion of revenue and accounting errors. (Id. at ¶ 29). Plaintiff's employment with Defendant Oversee expired on December 31, 2010. (Id. at ¶ 31).

Plaintiff's FAC alleges the following claims for relief: (1) Breach of Contract - 2007 Management Incentive Plan; (2) Breach of Contract - Commission Plan 2010; (3) Breach of Contract - Restaurants.com; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing; **[*6]** (5) Accounting; (6) Intentional Misrepresentation; (8) Negligent Misrepresentation; (9) Conversion; (10) Unfair Competition under *Cal. Business & Professions Code § 17200*.[2]

Defendant has filed a Motion to Dismiss certain Claims for Relief in the First Amended Complaint under *Rule 12(b)(6)*, arguing that Plaintiff fails to state a claim upon which relief can be granted. Specifically, Defendants argue that the Fourth, Sixth, Eight Ninth and Tenth Claims for Relief all fail to state a claim upon which relief can be granted. Defendants further argue that the Sixth and Eighth Claims for Relief fail to plead fraud with particularity as required by *Rule 9(b)*. Additionally, Defendant has filed a Motion to Strike Plaintiff's prayer for punitive damages pursuant to *Rule 12(f)*, arguing that Plaintiff has failed to plead a claim entitling him to punitive damages.

II. LEGAL STANDARD

[2] Plaintiff's FAC does not include a 7th claim for relief.

A. Motion to Dismiss

On a motion to dismiss, a plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Dismissal **[*7]** is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989)* (quoting Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986))*.

Claims for fraud must meet the heightened pleading requirements of *Rule 9(b)*. *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed.R.Civ.P. 9(b)*. The Ninth Circuit clarified the requirements of *Rule 9(b)* in *In re Glenfed Inc. Securities Litigation, 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc). When pleading fraud, a complaint "must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Id. at 1548 n. 7* (quoting J.W. Moore et al., *Moore's Federal Practice § 9.03*, at 9-19-21 (2d. ed. 1994)). Moreover, "*Rule 9(b)* does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007)* (citation and quotation omitted).

B. Motion to Strike

Rule 12(f) permits a court to strike from a pleading "any redundant, immaterial, impertinent, or **[*8]** scandalous matter" either on its own or upon a party's motion. *Fed. R. Civ. P. 12(f)*. "[T]he function of a *12(f)* motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir.1983)*. Immaterial matter is that which has no important relationship to the claim, and impertinent matter that which does not pertain and is unnecessary to the issues in question. *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1994)* (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1382, at 706-07 (1990)), rev'd on other grounds, *510 U.S. 517, 534-35, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*.

III. DISCUSSION

Defendants have not moved to dismiss any of Plaintiff's three breach of contract claims, nor Plaintiff's claim for an accounting. (MTD at 5-6). Rather, Defendants argue that Plaintiff's remaining claims are all legally improper efforts to restate basic contract claims, and should be dismissed on that basis. (Id. at 6).

Furthermore, it should be noted that while Plaintiff's Oversee Employment Agreement contains a Florida choice of law provision, the MIP states that its terms are governed by California law. (Id. at 4). Therefore, Defendants contend that claims arising out of the MIP are governed by California law, while all other claims are governed **[*9]** by Florida Law. (Id.). Defendants contend that both choice of law provisions are reasonable and enforceable because Plaintiff is a Florida resident, Oversee is a California corporation with its principal place of business in Los Angeles, and Plaintiff alleges that a substantial part of the events giving rise to Plaintiff's claims occurred in the Central District of California. (Id. at 5). Plaintiff does not appear to contest Defendant's argument regarding applicable law.

A. Plaintiff's Fourth Claim: Breach of the Covenant of Good Faith and Fair Dealing

1. The MIP and California Law.

Defendants argue that plaintiff's claim for breach of the covenant of good faith and fair dealing fails under California law because Plaintiff alleges that both the MIP were reduced to written agreements that supersede all prior negotiations. (Id. at 6, citing *Cal. Civ. Code § 1625* ("The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."). Therefore, Defendants argue that Plaintiff's claims that Oversee misled him regarding the amounts he would earn pursuant to the MIP and Commission **[*10]** Plan are inadmissible because Plaintiff alleges that both agreements are integrated writings. (Id., citing *Banco do Brasil v. Latian, 234 Cal. App. 3d 973, 1000, 285 Cal. Rptr. 870 (1991)* ("[W]here the parties to a contract have set forth the terms of their agreement in a writing which they intend as the final and complete expression of their understanding, it is deemed integrated and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.")).

Plaintiff responds that, under California law, the implied covenant of good faith and fair dealing in every contract "not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (Opposition at 4 (citing *Harm v. Frasher, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367 (1960))*. Plaintiff argues that, pursuant to the MIP, Plaintiff's compensation was based on attainment of certain performance goals. (Id. at 5.) Accordingly, Plaintiff argues that Defendants had a duty to refrain from doing anything that would impair Plaintiff's ability to meet those goals as well as an affirmative duty to do everything that the MIP presupposes Oversee would do to accomplish the purpose **[*11]** of the MIP. (Id.). Plaintiff argues that the litany of post-merger conduct referenced above constitutes a breach of the covenant of good faith and fair dealing because such conduct was targeted at impairing Plaintiff's ability to receive benefits under the MIP. (Id. at 6; FAC ¶¶ 24A-M).

Defendants reply that, rather than allege a failure to comply with implied contractual obligations, Plaintiff's Fourth Claim actually alleges fraudulent inducement. (Reply at 1). Accordingly, defendants argue that, to the extent that this claim is a fraudulent inducement claim, it should be dismissed for failure to plead with the requisite particularity. (Id.). Additionally, Defendants reiterate their argument that Plaintiff's Fourth Claim relies on the same allegations as Plaintiff's breach of contract claims. (Id.).

Accordingly, Defendants argue that Plaintiff's Fourth Claim is superfluous, and should therefore be dismissed.

2. The Commission Plan and Florida law

Defendants argue that, under Florida law, a party cannot state a tort claim that relies on alleged breaches of contract. (MTD at 7-8). Defendants argue that Plaintiff merely alleges that he failed to receive payment due under the Commission Plan. (Id. at 8). Therefore, **[*12]** Defendants argue that, because this claim is not extraneous to the contract, Plaintiff is limited to his contract claims. (Id. (citing *HTP, Ltd. V. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238, 1239-40 (Fla., 1996)* ("The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.").

Plaintiff responds that, under Florida law, an action for breach of the implied covenant of good faith and fair dealing "is not an independent cause of action, but attaches to the performance of a specific contractual obligation." (Opposition at 7 (quoting *Centurion Air Cargo v. UPS Co., 420 F.3d 1146, 1151-52 (11th Cir. 2005)*. Plaintiff argues that the litany of post-merger conduct referenced above constituted deliberate interference with Plaintiff's ability to manage the business, thus impairing his rights under the Commission Plan. (Id.). Accordingly, Plaintiff argues that he has pled a viable claim for breach of the covenant of good faith and fair dealing under the Commission Plan.

Defendants reply that Florida **[*13]** law dose not recognize a claim for breach of the implied covenant of good faith and fair dealing "where the allegations underlying the claim for breach of the implied covenant are duplicative of those which support the claim for breach of contract." (Reply at 3 (quoting *Enola Contracting Services, Inc. v. URS Group, Inc., 2008 U.S. Dist. LEXIS 33441, 2008 WL 1844612 *3 (N.D. Fla. April 23, 2008)*. Defendants further argue that Plaintiff's Fourth Claim arises solely under the MIP, and thus arises only under California law. (Id.). Specifically, Defendants note that Plaintiff relies solely on paragraph 24 of the FAC in support of his claim, and that paragraph 24 of the FAC solely concerns allegations regarding the MIP, not the Commission Plan. (Id.). Accordingly, Defendants argue that: (1) Plaintiff's Fourth Claim does not invoke Florida law; and (2) under Florida law, Plaintiff's Fourth Claim is invalid because it is duplicative of Plaintiff's breach of contract claims. (Id. at 4).

3. Conclusion

Defendants are correct that Plaintiff's Fourth Claim relies on the same factual allegations as Plaintiff's breach of contract claims. Furthermore, in *Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal.4th 85, 102, 44 Cal. Rptr. 2d 420, 900 P.2d 669 (1995)* the California Supreme Court established "a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising **[*14]** from principles of tort law' than the bad faith denial of the existence of, or liability under, the breached contract." (Internal citation omitted). Any duties owed by Defendants to Plaintiff arose from the parties' contractual relationship. Furthermore, it is unclear from Plaintiff's FAC the extent to which Plaintiff's Fourth Claim relies on California and/or Florida law. Accordingly, Defendant's Motion to Dismiss is GRANTED regarding Plaintiff's Fourth Claim.

B. Plaintiff's Sixth and Eighth Claims: Intentional and Negligent Misrepresentation

Defendant argues that Plaintiff's claims for Intentional and Negligent Misrepresentation are actually allegations that Oversee breached the MIP by failing to comply with its terms, and/or by impairing Plaintiff's ability to earn bonuses under the MIP. (MTD at 8-9). Defendants further argue that Plaintiff has failed to plead his misrepresentation claims with the particularity required under *Rule 9(b)*. (Id.). Specifically, Defendants argue that Plaintiff makes a conclusory allegation that Defendants "represented to Cahn that he would have the ability to earn up to $13,000,000 in payments under the MIP" but fails to specify where, when and by what means each of the Defendants **[*15]** made any alleged misrepresentation. (Id. at 10; FAC ¶¶ 63, 71). Furthermore, Defendants argue that Plaintiff fails to allege why any such representations were false. (Id.).

Additionally, Defendants argue that Plaintiff's misrepresentation claims are restatements of his breach of contract claims because "the only fraud asserted against Oversee is an alleged false promise to perform the contractual duties at issue." (Id. at 11-12). Finally, Defendants argue that the alleged misrepresentations regarding Plaintiff's ability to earn up to $13,000,000 in bonuses were statements regarding future events, and are thus non-actionable opinions. (Id. at 12; *Tarmann v. State Farm Mut. Auto Ins. Co., 2 Cal. App. 4th 153, 158, 2 Cal. Rptr. 2d 861 (1991)* ("Predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud.")).

Plaintiff responds that he has pled his misrepresentation claims with the requisite particularity, noting that a pleading "is sufficient under *Rule 9(b)* if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." (Opposition at 9 (quoting *Neubronner v. Milken, 6 F.3d 666, 671-72 (9th Cir. 1993))*. Plaintiff argues that he has met this burden because the FAC makes specific allegations regarding the various alleged misrepresentations made by Defendants **[*16]** Kupietzky and Ng as well as why those alleged misrepresentations were false. (Id. at 9-10; citing FAC ¶¶ 13-21, 24A-M, 67, 76).

Plaintiff further notes that, subsequent to filing his complaint, Plaintiff became aware of a contract between Defendant Oversee and Google. (Id. at 10-11). Plaintiff contends that the acquisition of Moniker by Oversee violated Oversee's alleged contract with Google. (Id.). Accordingly, Plaintiff argues that Defendants knew that Plaintiff could never reach the performance goals under the MIP, and therefore Plaintiff could not possibly earn the $13 million in bonus payments under the MIP. (Id.). Plaintiff thus characterizes his misrepresentation claims as "[a]n action for promissory fraud," alleging that Defendants induced Plaintiff to enter into his employment agreement and the MIP via the above-referenced misrepresentations. (Id. at 11).

Additionally, Plaintiff responds that his misrepresentation claims are not restatements of his contract claims. (Id.). Plaintiff argues that California courts have allowed tort damages in contract cases "where the contract was fraudulently induced." (Id. at 11-12 (quoting *Erlich v. Menezes, 21 Cal. 4th 543, 87 Cal. Rptr. 2d 886, 981 P.2d 978 (1999))*. Plaintiff argues that, but for Defendants' alleged false representations, Plaintiff **[*17]** would not have entered into the MIP. (Id. at 12; citing *Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal.4th 979, 990-991, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004))*. Accordingly, Plaintiff argues that Defendants' alleged misrepresentations are independently actionable. (Id.).

Finally, Plaintiff argues that Oversee's argument that predictions of future events are not actionable is only partially correct. (Id. at 13). Plaintiff notes that a "promise of future conduct is actionable as fraud only if made without a present intent to perform." (Id., (quoting *Magpali v. Farmers Group, Inc., 48 Cal. App.4th 471, 481, 55 Cal. Rptr. 2d 225 (1996))*. Plaintiff argues that because Defendants were aware during the 2007 negotiations that Plaintiff would never be able to meet the performance goals necessary to trigger payment under the MIP, Defendants' alleged "promise" to pay Plaintiff up to $13,000,000 in bonuses constitutes actionable fraud. (Opposition at 13-14).

Defendants reply that Plaintiff's Opposition makes it clear that the allegedly fraudulent statements cited by Plaintiff in his misrepresentation claims are also incorporated into Plaintiff's breach of contract claims. (Reply at 4). Accordingly, Defendants argue that Plaintiff's misrepresentation claim is actually a breach of contract claim, improperly restated. (Id.).

Defendants further argue that, if Plaintiff is actually attempting to establish the elements of fraud **[*18]** in the inducement, then the proper remedy is rescission of the MIP. (Id. at 5; *Ford v. Shearson Lehman/American Express, Inc., 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895 (1986)* ("In the usual case of fraud, where the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable. In order to escape from its obligations the aggrieved party must rescind, by prompt notice and offer to restore the consideration received, if any.") (Emphasis in original; internal citations omitted)).

Additionally, Defendants reiterate their arguments that: (1) Plaintiff's misrepresentation claims were not pled with the requisite particularity; and (2) any alleged representations by Kupietzky and Ng concerning the MIP merged into the MIP pursuant to *Cal. Civ. Code § 1625*. (Id. at 8). Finally, Defendants argue that Plaintiffs' reliance on Magpali is misplaced because Magpali "does not allow a plaintiff to support a fraud claim by relying on representations about future *contractual* performance." (Id. at 8-9). Because all of the alleged misrepresentations relate to contractual performance, Defendants argue that Plaintiff should be limited to his contract claims, and his fraud claims should thus be dismissed. (Id.).

Plaintiff's claims for misrepresentation **[*19]** do not meet the particularity requirements of *Rule 9*. Furthermore, Plaintiff's allegations all relate to representations regarding Defendants' future performance of its obligations under the MIP. Therefore, Defendants' motion is GRANTED regarding Plaintiff's Sixth and Eighth Claims..

C. Plaintiff's Ninth Claim: Conversion

The elements of a claim for conversion are: "(1) plaintiffs' ownership or right to possession of property at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages." *Messerall v. Fulwider, 199 Cal. App. 3d 1324, 1329, 245 Cal. Rptr. 548 (1988)*. Defendants argue that Plaintiff's claim for conversion fails because Plaintiff fails to allege that "Oversee knowingly and intentionally asserted wrongful control over Cahn's domain names." (MTD at 14). Because Plaintiff's FAC merely alleges a "mix up," as opposed to an intentional act, Defendants argue that Plaintiff's claim for conversion fails. (Id.).

Plaintiff responds that a conversion claim "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff." (Plaintiff's Opposition to Defendant's Motion to Dismiss at 14 (quoting *Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704 (1998))*. Plaintiff notes that his FAC alleges that Oversee "exercised possession **[*20]** of approximately 4,500 domain names which [Plaintiff] personally owned." (Id. at 15). Accordingly, Plaintiff argues that, so long as Defendants intended to assert control over Moniker's domain names, Defendants' alleged ignorance that a number of domain names that Plaintiff personally owned were "mixed in" with Moniker's is irrelevant. (Id.).

Defendants reply that, while they acknowledge that conversion is a strict liability tort, Plaintiff has failed to allege any intentional act by Defendants in support of his conversion claim. (Reply at 9-10). Specifically, Defendants note that Plaintiff argues that he discovered that 4,500 of his domain names were "mixed up" with Moniker's domain names, and that Defendant Oversee was receiving revenue from those domain names. (Id. at 10). However, Defendants note that at no point does Plaintiff's FAC allege a specific intentional act by Defendants. (Id.). Accordingly, Defendants argue that Plaintiff's claim for conversion should be dismissed.

Defendants are correct that Plaintiff's conversion claim fails to allege any intentional act by Defendants. Therefore, Defendant's motion is GRANTED regarding Plaintiff's Ninth Claim.

D. Plaintiff's Tenth Claim: Unfair Competition [*21] under *Cal. Business & Professions Code § 17200*

Defendants argue that Plaintiff's claim for Unfair Competition fails because it fails to allege a valid claim under *Cal. Business & Professions Code § 17200* ("UCL"), and it fails to allege entitlement to a remedy available under the UCL (MTD at 15). Specifically, defendants argue that a plaintiff must sufficiently allege unlawful, unfair or fraudulent business practices. (Id.). Defendants further note that the complaint "must state with reasonable particularity the facts supporting the statutory elements of the violation." *Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal. 1997)*. Defendants argue that Plaintiff's FAC fails to allege any unfair, unlawful or fraudulent business practice, and that Plaintiff cannot meet the requirements of any of the three prongs of a UCL claim. (Id.). Defendants further argue that Plaintiff improperly seeks general and punitive damages pursuant to his UCL claim. (Id. at 16; *Cal. Bus. & Prof. Code § 17203*). Defendants acknowledge that Plaintiff's Prayer for Relief requests "restitution of all wrongfully withheld amounts and disgorgement of ill-gotten profits." (Id. at 17). However, Defendant argues that this allegation fails because the UCL only allows restitution to recover money or assets taken from Plaintiff by Defendant. (Id.; See *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1146, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003))*. Defendants argue that Plaintiff is not seeking money he paid to Oversee, **[*22]** but is requesting damages. (Id.). Accordingly, Defendants argue that Plaintiff's UCL claim should be dismissed.

Plaintiff responds that his FAC states a cognizable UCL claim because it alleges conduct constituting both unfair and fraudulent business practices. (Opposition at 15). Plaintiff notes that the UCL's scope is broad, encompassing "any unlawful, unfair or fraudulent practice" even where the practice at issue is not proscribed by law. (Id. at 16; see *Schnall v. Hertz Corp., 78 Cal. App.4th 1144, 1153-54, 93 Cal. Rptr. 2d 439 (2000))*.

An unfair business practice occurs when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. 4th 700, 719, 113 Cal. Rptr. 2d 399 (2001)* (internal citation omitted). Plaintiff argues that Defendants engaged in an unfair business practice by making intentional misrepresentations that induced Plaintiff to enter into his employment agreement and the MIP. (Opposition at 16-17). Plaintiff further argues that the public was harmed because Plaintiff communicated Defendants' allegedly false promises to his customers. (Id. at 17). In addition, Plaintiff for the first time alleges that Defendants' conduct was unfair because that conduct also violated ***antitrust law***.[3] (Id. at 17).

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[3] "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly

Plaintiff also argues that he has properly pled fraudulent conduct under the **[*23]** UCL. (Id. at 18). Plaintiff notes that the "fraudulent" prong of the UCL only requires a showing that members of the public "are likely to be deceived." (Id., see *Bank of the West v. Superior Court, 2 Cal.4th 1254, 1267, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992))*. Plaintiff argues that his FAC states that Moniker's employees and customers were misled as a result of Defendants' alleged misrepresentations. (Id.). Accordingly, Plaintiff argues that he has stated a claim under the "fraudulent" prong of the UCL.

Finally, Plaintiff argues that his FAC seeks an appropriate remedy because the Prayer for Relief explicitly requests restitution. (Id. at 19). Plaintiff argues that he is seeking restoration of money acquired through unfair practices. (Id., see *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1147-48, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003))*.

Defendant replies that Plaintiff fails to state a valid claim under the UCL because Plaintiff is actually alleging that he, not the Defendants, misled Moniker customers. (Defendants' Reply Memorandum at 10). Furthermore, Defendants argue that Plaintiff the Court in Korea Supply explained that an order for restitution under the UCL is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the money was taken." (Id. at 11; *Korea Supply Co., 29 Cal. 4th at 1149*). Defendants therefore argue that Plaintiff's claim that Defendants **[*24]** frustrated his expectation to future earnings is not a valid claim for restitution under the UCL. (Id.).

Finally, Defendants note that Plaintiff's antitrust violation theory is not articulated in the FAC, characterizing this assertion as a desperate attempt by Plaintiff to salvage his UCL claim. (Id.).

Plaintiff has failed to identify a remedy available to him under the UCL. Accordingly, Plaintiff's 10th Claim is DISMISSED.

E. Plaintiff's Prayer for Punitive Damages

Defendants argue that, because Plaintiff's claim for Intentional Misrepresentation lacks merit, Plaintiff's prayer for punitive damages should thus be stricken. (Defendants' Motion to Dismiss First Amended Complaint at 18; see *Wilkerson v. Butler, 229 F.R.D. 166, 172 (E.D. Cal. 2005)* ("A motion to strike is appropriate to address requested relief, such as punitive damages, which is not recoverable as a matter of law.").

Plaintiff responds that he has stated a viable claim for Intentional Misrepresentation. (Opposition at 19). Plaintiff further argues that, because he has pled facts demonstrating willful, unlawful and malicious conduct by the Defendants, he is entitled to seek exemplary damages. (Id., see *Cal. Civ. Code § 3294(a)* ("In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence **[*25]** that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.").

Whether Plaintiff can seek punitive damages necessarily depends on whether Plaintiff can state a valid claim for intentional misrepresentation. Therefore, because Defendant's Motion to Dismiss is GRANTED regarding Plaintiff's Sixth and Eighth Claims, Defendant's Motion to Strike is GRANTED regarding Plaintiff's prayer for punitive damages.

IV. CONCLUSION

The essence of Plaintiff's claims at issue is an attempt to plead a breach of contract claim in tort. Accordingly, Defendants' Motion to Dismiss pursuant to *Rule 12(b)(6)* and Motion to Strike pursuant to *Rule 12(f)* are hereby

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threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 186-187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

GRANTED. Plaintiff's Fourth, Sixth, Eighth, Ninth and Tenth Claims are therefore DISMISSED WITHOUT PREJUDICE with leave to amend. Should Plaintiff refile his claim for intentional misrepresentation/fraudulent inducement, that claim must be pled with particularity pursuant to *Rule 9(b)*.

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Samsung Elecs. Co. v. Panasonic Corp.

United States District Court for the Northern District of California

August 25, 2011, Decided; August 25, 2011, Filed

No. C 10-03098 JSW

Reporter

2011 U.S. Dist. LEXIS 155157 *

SAMSUNG ELECTRONICS CO., LTD., Plaintiff, v. PANASONIC CORPORATION, et al., Defendants.

Subsequent History: Complaint dismissed at, Judgment entered by *Samsung Elecs. Co. v. Panasonic Corp., 2012 U.S. Dist. LEXIS 180282 (N.D. Cal., Jan. 3, 2012)*

Motion granted by, Without prejudice *Samsung Elecs. Co. v. Panasonic Corp., 2016 U.S. Dist. LEXIS 205509, 2016 WL 11781870 (N.D. Cal., Sept. 26, 2016)*

Motion granted by, Without prejudice *Samsung Elecs. Co. v. Panasonic Corp., 2016 U.S. Dist. LEXIS 205511 (N.D. Cal., Sept. 26, 2016)*

Motion granted by, Without prejudice, Stay granted by, Without prejudice *Samsung Elecs. Co. v. Panasonic Corp., 2016 U.S. Dist. LEXIS 205510 (N.D. Cal., Sept. 26, 2016)*

Motion granted by, Stay granted by, Motion denied by, Without prejudice *Samsung Elecs. Co. v. Panasonic Corp., 2016 U.S. Dist. LEXIS 205512 (N.D. Cal., Sept. 26, 2016)*

Motion granted by, in part, Without prejudice *Samsung Elecs. Co. v. Panasonic Corp., 2016 U.S. Dist. LEXIS 205513 (N.D. Cal., Sept. 26, 2016)*

Sanctions disallowed by *Samsung Elecs. Co. v. Panasonic Corp., 2019 U.S. Dist. LEXIS 160192 (N.D. Cal., Feb. 20, 2019)*

Motion granted by *Samsung Elecs. Co. v. Panasonic Corp., 2019 U.S. Dist. LEXIS 160183, 2019 WL 4439489 (N.D. Cal., Mar. 6, 2019)*

Core Terms

Card, License, patent, antitrust, alleges, patent misuse, royalties, memory, motion to dismiss, statute of limitations, Specification, Defendants', manufacturers, competitor, cause of action, overt act, technologies, supplier, amend, flash

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For SD-3C LLC, a Delaware limited liability company, Defendant: Aldo A. Badini, Winston & Strawn LLP, New York, NY; **[*2]** Christopher B. Hockett, Neal Alan Potischman, Davis Polk & Wardwell, Menlo Park, CA; Rajesh S. James, PRO HAC VICE, Davis Polk and Wardwell LLP, New York, NY; Samantha Harper Knox, Davis Polk & Wardwell LLP, Menlo Park, CA.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING MOTION TO DISMISS THE FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

Now before the Court is the joint motion of Defendants Panasonic Corporation ("Panasonic"), Panasonic Corporation of North America ("PNA"), and SD-3C, LLC ("SD-3C") (collectively, "Defendants") to dismiss the First Amended Complaint ("FAC") filed by Plaintiff Samsung Electronics Co., Ltd. ("Plaintiff"). Having carefully reviewed the parties' papers and considering their arguments and the relevant authority, and good cause appearing, the Court hereby GRANTS Defendants' motion to dismiss.

BACKGROUND

This antitrust action challenges an alleged patent licensing arrangement to control the availability and pricing of Secure Digital Memory Card ("SD Card") technologies and thereby restrain trade. SD Cards are flash memory cards used in various devices such as digital cameras and cell phones. (FAC ¶¶ 14-21.) SD-3C licenses patents are **[*3]** essential to practicing the SD Card Specification (the "Specification") developed by Panasonic, SanDisk Corporation, and Toshiba Corporation (the "SD Group"). (*Id.* ¶¶ 2, 4, 38, 46.) On August 25, 1999, Panasonic, SanDisk, and Toshiba announced that they would "jointly develop and promote a next generation flash memory card." (*Id.* ¶¶ 37, 38.) The Specification incorporated "additional functionality," including "advanced security and copyright protection features," not found in prior flash memory card formats. (*Id.* ¶¶ 38, 39.) In March 2000, Panasonic, SanDisk, and Toshiba publicly issued the Specification. (*Id.* ¶ 46.) The SD Group promoted the SD Card format by offering device manufacturers "royalty-free licenses to incorporate SD Card functionality into their products ... and by promising to make SD Cards backwardly compatible with the [MultiMediaCard ("MMC")] format." (*Id.* ¶ 41.) Since the SD Card was launched in 2000, no significant alternative to the SD Card format has been introduced. (*Id.* ¶ 112.) By 2009, SD Cards allegedly "accounted for more than 80 percent of all flash memory cards sold worldwide." (*Id.* ¶ 111.)

Following the creation of the Specification, the SD Group formed **[*4]** an open membership body called the SD Association and formed SD-3C to make available patent pool licenses to essential SD Card technology. (FAC ¶¶ 2, 52.) Companies that wish to manufacture SD Cards are required to enter into an SD Card License with SD-3C. (*Id.* ¶ 65.) The SD Card License remains for all practical purposes the exclusive means by which the SD Group members license their SD Card Technology. (*Id.* ¶ 66.)

On September 24, 2003, Samsung entered into an SD Memory Card License Agreement (the "SD Card License") with SD-3C which became effective November 11, 2003. (*Id.* ¶¶ 68-70.)

Samsung filed this action on July 15, 2010. Defendants filed an initial motion to dismiss on September 24, 2010. Samsung filed the FAC on October 14, 2010. Defendants moved again to dismiss the FAC on December 1, 2011. On March 31, 2011, this Court vacated the hearing on the motion and took the matter under submission.

The Court shall address specific additional facts in the remainder of this Order.

LEGAL STANDARD

A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most **[*5]** favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986)*. However, even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*.

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.... **[*6]** When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly, 550 U.S. at 556-57*) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*; *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*.

ANALYSIS

A. Antitrust Causes of Action Are Barred by the Statute of Limitations.

Under the Clayton Act, *15 U.S.C. section 15b*, private antitrust claims are subject to a four-year statute of limitations. *See Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300 (9th Cir. 1986)*. "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." *AMF, Inc. v. General Motors Corp., 591 F.2d 68, 70 (9th Cir. 1979)* (quoting *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975)*.

In this **[*7]** matter, Plaintiff alleges that the SD Group committed various antitrust violations when they "agreed to develop the SD Card in August 1999... to devise a modification of the existing MMC specification to serve as the first version of the SD Card specification." (FAC ¶ 4.) Plaintiff alleges that this original agreement

> did not produce material procompetitive efficiencies in the development of a standard for a high-speed secure flash memory card. Instead, it served instead as the means by which these companies, acting in concert with 3D-3C, could secure for themselves a dominant market position. The anticompetitive agreement and conduct of Defendant, SanDisk and Toshiba that are the subject of this complaint seek to maintain and exploit that unlawfully acquired dominance.

(*Id.*)

Plaintiff continues to allege in the complaint that the agreements between Defendants and SanDisk and Toshiba suppress competition in violation of Sections 1and 2 of the Sherman Act. (*Id.* ¶ 5.) These parties issued the first version of the SD Card Specification in March 2000. (*Id.* ¶ 46.) On September 24, 2003, Plaintiff signed the SD Memory Card License ("2003 License") in the form offered by 3D-3C. (*Id.* ¶ 70.) The **[*8]** 2003 License was then signed by officials of Panasonic, San Disk and Toshiba, on behalf of 3D-3C, effective November 11, 2003.

In September 2006, officials with 3D-3C and Plaintiff met to discuss an amendment ("2006 Amendment") to the 2003 License, but Plaintiff refused to sign the 2006 Amendment.

This case was filed on July 15, 2010, past the expiration of the four year statute of limitations. Although generally a cause of action accrues and the statute of limitations begins to run at the time a defendant commits an action that injures plaintiff's business, in the context of a continuing conspiracy, this has been construed to mean that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *AMF, 591 F.2d at 71*. In this way, the continuing violations doctrine can save an otherwise barred claim. In ***antitrust law***, "[a] continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured." *Pace Industries, Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* **[*9]** (citation omitted). It is clear, however, that "a continuation of harm to plaintiffs alone will not keep the cause of action alive without some overt act or continuing conduct of defendants during the limitations period." *Electroglas, Inc. v. Dynatex Corp., 497 F. Supp. 97, 105 (N.D. Cal. 1980)*. [1] "When a continuing violation exists, the limitations period runs from the 'last overt act' by the defendant, which must be (1) a new and independent act that is not merely a reaffirmation of a previous decision that (2) inflicts a 'new and accumulating' injury on the plaintiff." *Red Lion Medical Safety Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218, 1223 (E.D. Cal. 1999)* (citing *Pace Industries, 813 F.2d at 238*).

In this case, Plaintiff asserts that "Defendants have committed numerous overt acts" that have injured Plaintiff both as a competitor and as a supplier. (Opp. Br. at 23-24.) As a competitor, Plaintiff alleges it has suffered continued injury as a result of Defendants' requirement that it pay a royalty, their refusal to provide logo guidelines unless Plaintiff accepted the 2006 Amendment, their refusal to identify the essential patents, and the renewal of the joint licensing scheme in 2007. (*See* FAC ¶¶ 72, 81, 83, 85-88, 107.) As a supplier, Plaintiff alleges it continues to suffer injury as a result of Defendants' introduction of the 2006 Amendment, which, although unsigned by Plaintiff, was coercive to other manufacturers and/or assemblers of SD Cards, all of whom are actual or potential customers of Plaintiff as a supplier. (*See id.* ¶¶ 73, 74, 92.) Plaintiff argues that the introduction of the 2006 Amendment caused new injury to Plaintiff as it incrementally limits Plaintiff's ability to expand its business because its customers are injured in their ability **[*11]** to compete.

The Court finds that the multiple contentions that Defendants carried out the terms of their original 2003 Agreement do not constitute "new and independent" acts. Indeed, they are merely a reaffirmation of a previous decision. *See* *Red Lion, 63 F. Supp. 2d at 1223*. This alleged conduct is the implementation of the contract terms originally agreed to by the parties in 2003. *See* *Pace, 813 F.2d at 238* (holding that acts after the execution of a contract relating to its continued implementation do not constitute "overt acts" that restart the statute of limitations period because they are not "new and independent" acts that inflict new injury). Plaintiff alleges in the First Amended Complaint that the cross-licensing agreement among the three major competitors in the SD Card industry allowed those competitors "to enjoy a permanent cost advantage over other competing manufacturers and sellers of CD Cards." (FAC ¶ 110). The complaint also alleges that the "combination" gave the SD Group a "permanent advantage." (*See id.* ¶¶ 1, 14, 113, 114, 124.) The continued alleged injuries incurred as a result of Defendants' original standards setting conduct

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[1] Any harm that accrues after the tolling of the statute of limitations periods but that is associated with an overt act that occurred prior to the limitations period is not remediable. However, "each separate cause of action that so accrues [during the statute of limitations period] entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered **[*10]** during and will predictably suffer after trial." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

were, as currently alleged, "permanent **[*12]** at initiation" and therefore "were 'but unabated inertial consequences of some pre-limitations action.'" *AMF, 591 F.2d at 72*. After repeatedly alleging that the original cross-licensing agreement reached by the members of the SD Card Group members gave them a permanent cost advantage, Plaintiff now alleges that subsequent overt acts generated new and independent damage.

In this regard, Plaintiff alleges that it suffered injury based on the new and independent act of Defendants' introduction of the 2006 Amendment. The Court notes, however, that Plaintiff did not sign the Amendment and, according to its own theory of liability, stood to profit from the further restriction of competition to competitors in the same field. *See American Ad Management, Inc. v. General Telephone Co. of California, 190 F.3d 1051, 1056 (9th Cir. 1999)* ("There can be no antitrust injury if the plaintiff stands to gain from the alleged unlawful conduct.") [2] Plaintiff argues that it may state a claim for injury caused by the proposed 2006 Amendment as a supplier of the SD Card products. Plaintiff contends in its opposition to the motion to dismiss that it may have incurred damages by virtue of the restricted ability **[*13]** of those unidentified competing manufacturers who signed the 2006 Amendment to have sold more SD Cards and in turn those companies might have purchased more SD Card components from Plaintiff as inputs for those cards it may have sold. According to this theory, the inability of those competing manufacturers to have sold more cards after signing the 2006 Amendment would ostensibly inure to the benefit of Plaintiff as a competitor of the parts, but would simultaneously disadvantage Plaintiff as a supplier of the same parts. The Court does not find this theory of liability expressed plausibly in the complaint and does not find the injury postulated to be a direct monetary loss as required by governing law. *See American Ad Management, 190 F.3d at 1059, 1060*. The Court finds that, as currently pled, Plaintiff's theory of damages is too attenuated, indirect and remote to constitute a cognizable antitrust injury. *See Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1190 (9th Cir. 1984)* (holding that claim is time barred where plaintiff failed to demonstrate that defendants' acts not only caused injury, but caused a cognizable antitrust injury to the plaintiff during the limitations period).

In addition, Plaintiff's state antitrust claims fall outside the statute of limitations period for all of the same reasons applicable to its federal antitrust claims. *See Cal. Bus. & Prof. Code § 16750.1*; *Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 852-53, 94 Cal. Rptr. 785, 484 P.2d 953 (1971)* (Cartwright Act interpreted consistently with Sherman Act).

Although the Court finds, as currently pled, the antitrust causes of action are barred by the passage of the statute of limitations period, the Court does not find that it would be futile to allow Plaintiff an opportunity to amend the complaint. It is feasible that Plaintiff may be able, without contradicting the allegations already set out in the first and second iterations of the complaint, to state a claim that Defendants were engaged in subsequent overt acts that caused them to suffer new antitrust injury during the four year period preceding the filing of this case. [3] As amendment would not be futile **[*15]** as a matter of law, the Court GRANTS Defendants' motion to dismiss the antitrust claims, with leave to amend.

B. Patent Misuse Claim is Dismissed.

Plaintiff asserts a claim for declaratory judgment for patent misuse on the theory that a patentholder engaged in patent misuse when it charges a royalty on an unlicensed good or the unlicensed component of a good. (FAC ¶ 156.) Plaintiff contends that the calculation of royalties based on a percentage of the net sales price of the entire SD

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[2] Based **[*14]** in part on the briefing of this issue in the reply, Plaintiff moved for leave to file a sur-reply. Defendants objected and filed a sur-response. Although the Court finds neither to be necessary, it has reviewed all of the filings before the Court.

[3] The Court notes the allegation in the First Amended Complaint that "even if the combination among the SD Group members could have been justified 10 years ago when the SD Card was first produced, the continued and ongoing agreements among three major competitors to maintain a dominant position in the SD Card and related markets cannot be justified today, given the absence of current efficiencies that could outweigh the combination's ongoing anticompetitive effects." (FAC ¶ 57.) Should Plaintiff opt to amend it complaint for a third time, the Court exhorts Plaintiff to pinpoint a specific time at which Defendants' conduct allegedly became an unjustified violation of antitrust principles.

Card, including the **[*16]** unlicensed memory capacity, together with the coercive nature of the royalty provision, constitutes patent misuse. Defendants move to dismiss this cause of action on the basis that it challenges the lawful practice of calculating patent royalties based on a percentage of a licensed product's sales price and falls outside of the only two categories of patent misuse recognized by the Federal Circuit. (*See* Motion at ii, 27 (citing *Princo Corp. v. ITC, 616 F.3d 1318, 1329 (Fed. Cir. 2010)*.)

The Federal Circuit has held that a claim for patent misuse may be stated only where "the conduct in question restricts the use of that patent and does so in one of the specific ways that have been held to be outside of the otherwise broad scope of the patent grant." *Princo, 616 F.3d at 1329*. The *Princo* court confined the patent misuse doctrine to licensing agreements that either have "the effect of extending the life of the patent beyond the statutory period," or contain "tying" requirements that require "as [a] condition of license that unpatented materials used in connection with the invention ... be purchased only from the licensor." *Id. at 1327, 1342*. Although it is clear that the allegations by **[*17]** Plaintiff in this matter do not fall within those two narrow exceptions, Plaintiff contends that the conduct violates Supreme Court law, regardless of the standards delineated by the Federal Circuit for stating a claim for patent misuse.

Plaintiff argues that the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, set out the requirements for stating a claim for patent misuse. *395 U.S. 100, 139-140, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. The *Zenith* Court held that it is patent misuse for a patentholder to use its "monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define." *Id. at 140*. Unlike in this matter, the royalties in *Zenith* were based "on the licensee's total radio and television sales, irrespective of whether the licensed patents were actually used in the products manufactured." *Id. at 134*. The holding by the Supreme Court was that the leveraging of the patent to garner a percentage share of receipts from sales of products that did not even employ the patented technology was going beyond the scope of the patent grant, and constituted misuse. *Id. at 136-37*. This case is readily distinguishable, as even Plaintiff **[*18]** concedes that the SD Cards here, regardless of memory capability, employ the technologies presented in the SD Card license. (*See* FAC ¶¶ 50-51, 64-65.)

The practice of charging royalties based on a percentage of the total price of a finished product is a widely accepted method for calculating patent royalties where the final product includes, but is not limited to, parts or components that are covered by other patents or are unpatented. *See, e.g., Hull v, Brunswick Corp., 704 F.2d 1195, 1199 (10th Cir. 1983)*; *Western Electric Co. v. Stewart-Warner Corp., 631 F.2d 333, 339 (4th Cir. 1980)* ("basing royalties on the sales of finished semiconductor devices instead of the fair market value of the chips" is not patent misuse, but rather a "much easier way to ascertain the selling price of the finished product than the fair market value of one of its components."); *see also Bose Corp. v. JBL, Inc., 274 F.3d 1354, 1361 (Fed. Cir. 2001)* (royalty base calculated based on the entire value of the product, incorporating the patented materials, even though they only comprised a small component of the full system). Accordingly, the charged conduct does not amount to patent misuse and claim six is dismissed.

C. [*19] *Section 17200* is Dismissed.

Plaintiff alleges a claim for unfair competition under *California Business and Professions Code § 17200* ("*Section 17200*") which prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice." Plaintiff claims to have suffered injury from a competitor's unlawful business act or practice. (FAC ¶ 161.) An action based on *Section 17200* "borrows" violations of other laws and treats them as unlawful practices. *Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*.

The "unlawful" prong of *Section 17200* prohibits "any practices forbidden by law, be it civil criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)* (internal quotation omitted). Because the Court has concluded that Plaintiff has failed to state a claim under any independent law, the Court similarly finds that Plaintiff has failed to state a claim under *Section 17200* for unlawful business practices and dismisses the claim with leave to amend.

In addition, Defendants move to dismiss the Section 17200 claim on the basis that the California unfair competition law **[*20]** "does not apply to actions occurring outside of California that injure non-residents." *Ice Cream Distributors of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc., 2010 U.S. Dist. LEXIS 52985, 2010 WL 2198200, *9 (N.D. Cal. May 28, 2010)*. Plaintiff is a corporation organized under Korean law with its principal place of business in Korea. (FAC, ¶ 7.) Plaintiff does not specifically allege any conduct by Defendants that occurred in or emanated from California. However, in response to the motion to dismiss, Plaintiff argues that other members of the alleged antitrust combination are California-based and Defendants are equally liable for their conduct. (Opp. Br. at 28.) In order for co-conspirator liability to attach, Plaintiff must allege that Defendants owe a duty to Plaintiff recognized by law and allege that Defendants are potentially subject to liability for breach of that duty. *Standfacts Credit Services, Inc. v. Experian Information Solutions, Inc., 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005)* (citing *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd., 7 Cal. 4th 503, 511, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (1994))*. As currently pled, the complaint does not state such elements for co-conspirator liability against Defendants Panasonic or PNA. Accordingly, **[*21]** this claim is dismissed for this additional reason, with leave.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss. Plaintiff shall file an amended complaint by no later than September 16, 2011. Defendants shall have 20 days thereafter to file their response. If no amended complaint is filed by September 16, 2011 in compliance with this Order, this case shall be dismissed for failure to state a claim.

IT IS SO ORDERED.

Dated: August 25, 2011

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

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United States ex rel. Bunk v. Birkart Globistics GmbH & Co.

United States District Court for the Eastern District of Virginia, Alexandria Division

August 26, 2011, Decided; August 26, 2011, Filed

No. 1:02cv1168 (AJT/TRJ); No. 1:07cv1198 (AJT/TRJ)

Reporter
2011 U.S. Dist. LEXIS 158057 *

UNITED STATES OF AMERICA ex rel. Kurt Bunk and Daniel Heuser, Plaintiffs/Relators, v. BIRKART GLOBISTICS GmbH & CO., et al., Defendants.UNITED STATES OF AMERICA ex rel. Ray Ammons, Plaintiff/Relator, v. THE PASHA GROUP, et al., Defendants.

Subsequent History: Motion for new trial granted by, in part, Motion for new trial denied by, in part, Motion granted by *United States ex rel. Bunk v. Birkart Globistics Gmbh & Co., 2011 U.S. Dist. LEXIS 120721 (E.D. Va., Oct. 19, 2011)*

Prior History: *United States ex rel. Bunk v. Birkart Globistics Gmbh, 2011 U.S. Dist. LEXIS 168839 (E.D. Va., July 5, 2011)*

Core Terms

channels, transportation, immunity, rates, Shipping, freight, forwarders, defendants', cycle, bids, prime rate, carriers, exemption, segment, inland, anti trust law, local agent, ocean, fraudulent, false claim, conspiracy, freight forwarder, household goods, destination, antitrust, me-too, common carrier, price fixing, course of conduct, marine terminal

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For United States of America (1:07-cv-01198-AJT-TRJ), Interested Party: Steven Eric Gordon, LEAD ATTORNEY, US Attorney's Office (Alexandria), Alexandria, VA; Richard W. Sponseller, United States Attorney's Office, Alexandria, VA.

Judges: Anthony J. Trenga, United States District Judge.

Opinion by: Anthony J. Trenga

Opinion

MEMORANDUM OPINION

The trial of this case began on July 18, **[*3]** 2011 with a jury. On July 27, 2001, the government rested its case in chief and the defendants moved for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(a)*, which on July 28, 2011, the Court orally granted in part, denied in part, and reserved on several issues.[1] On August 1, 2011, the government moved for reconsideration with respect to the Court's ruling, which the Court orally denied the same day; and the Court issues this written memorandum opinion in further support of its rulings of July 28, 2011 that certain of defendants' conduct is exempt from antitrust challenges under the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719 (2000), currently codified at *46 U.S.C. §§ 40301-40307 (2006)*,[2] and therefore cannot form the basis of a False Claims Act ("FCA") violation under *31 U.S.C. § 3729*.

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[1] Following the plaintiffs' case in chief, the Court granted defendants' Rule 50 motion as to both liability and damages as to all ITGBL claims pertaining to all channels other than those related to the 14 channels for which the carrier Covan International set the prime rate for IS01 (referred to as the "Covan Channels") and the 12 channels for which the carrier Cartwright International **[*4]** set the prime rate for IS02 (referred to as the "Cartwright Channels"). The Court also granted defendants' motion as to the plaintiffs' common law claims. The Court reserved with respect to whether the plaintiffs presented sufficient evidence for a jury to determine the number of false claims that defendants caused to be filed as to both the Covan Channels and the Cartwright Channels. The Court denied defendants' Rule 50 motion as to the Direct Procurement Method ("DPM") claim. Following the close of all of the evidence, the Court again denied defendants' Rule 50 motion as to the DPM claims but again reserved as to the sufficiency of the evidence for a jury to determine the number of false claims that defendants caused to be filed, expressing substantial doubt as to the sufficiency of the evidence in that regard, including the sufficiency of the evidence with respect to certain summary charts and related exhibits, and the exclusion of those exhibits under *Fed. R. Civ. P. 37* and otherwise. On August 4, 2011, the jury returned a verdict in the defendants' favor as to the Covan Channels and in the plaintiffs' favor as to the Cartwright Channels and the DPM claim. The jury further found **[*5]** that defendants caused to be filed 4,351 false claims as to the Cartwright Channels and the parties stipulated that in the event of liability as to the DPM claim, the defendants filed 9,136 invoices under the DPM contract. Re. Ex. 296. The Court ordered that any post-trial motions, including those pertaining to the issues on which the Court reserved, be filed on or before August 29, 2011.

[2] The Shipping Act of 1984 was amended effective October 6, 2006. The Court applies the version of the statute in effect during defendants' conduct, 46 U.S.C. app. §§ 1701-1719 (2000).

BACKGROUND

This action is brought by the United States, Relator Kurt Bunk, and Relator Ray Ammons (collectively "plaintiffs"). On July 18, 2008, the United States intervened as to all claims relating to the International Through Government Bill of Lading ("ITGBL") program. Those claims allege that the defendants Gosselin Worldwide Moving N.V., Gosselin Group N.V. (together "Gosselin"), and Marc Smet (collectively with Gosselin "defendants"), among others, formed a single, overarching bid-rigging and price-fixing conspiracy on November 14, 2000 that successfully raised the rates charged for packing and unpacking U.S. military **[*6]** household goods within Germany by German moving companies, known as German local agents. Based on these allegations, plaintiffs assert causes of actions for violations of the FCA, *31 U.S.C. § 3729*, common law fraud, common law conspiracy to defraud the United States, and unjust enrichment.

Although the United States intervened as to the ITGBL claims, the United States did not intervene as to the claim referred to as the Direct Procurement Method contract, or DPM claim, brought by Relator Bunk. Relator Bunk alleges that the defendants violated the FCA by filing a false Certificate of Independent Price Determination in connection with their bid for the DPM contract, under which defendants certified that the prices in their offer had been arrived at independently, when in fact, they and other potential bidders had entered into a price fixing agreement and territory allocations.

STATEMENT OF FACTS [3]

A.

The United States selects American freight forwarding companies, also known as carriers, to transport the household goods of military personnel who are posted to a foreign country through the **[*7]** ITGBL program. The ITGBL program is administered through the Surface Deployment and Distribution Command ("SDDC"), formerly known as the Military Traffic Management Command ("MTMN"), of the Department of Defense ("DOD"). The SDDC solicits bids for "through rates" from these American freight forwarding companies. A through rate is composed of all of the costs involved in a door-to-door move of household goods. Carriers submit through rates biannually that cover a six-month period for a particular year, and are referred to as International Summer or International Winter cycle followed by the year; thus IS01 refers to the International Summer 2001 cycle and IW01 refers to the International Winter 2001 cycle. For each seasonal cycle, there are separate transportation routes, called channels, that correspond roughly with a transportation route to and from each state, with some states having more than one channel, so that between Germany and the United States in 2001 and 2002, the years at issue, there was a total of 52 channels in each direction for each of the two seasons in each year.

The bidding takes place according to a two-step process. In the first step, also known as the initial **[*8]** filing, freight forwarders who wish to participate file a bid for a particular channel based on a through rate per hundred pounds of weight transported. For this reason, a freight forwarder could file as many as 104 separate through rates, one for each of the 104 channels in the IS cycle and then again for the IW cycle. During the years relevant in this case, 2001 and 2002, the freight forwarder would file its initial bids in November for the IS cycle and in May for the IW cycle. The low bid that emerges from this process is referred to as the "prime through rate" or simply the "prime rate." Under this bidding system, the freight forwarder who filed the prime rate for a particular channel was guaranteed at least 10% of the volume for that channel.

Once the freight forwarders filed their initial rates, the DOD would publish the lowest five rates and give the other participating carriers who had not filed at the prime rate an opportunity to indicate whether they would agree to ship at one of the five published rates. This second step of the process is called the "me-too" round of bidding. As with the carrier that had filed the prime rate, the DOD guaranteed that any carrier that filed **[*9]** a "me-too" at the prime rate would receive a certain percentage of the volume for that channel; and it was generally believed that most, if

[3] The Statement of Facts is based on the evidence presented during plaintiffs' case in chief at trial.

not all, of the volume for a particular channel would be assigned to the carriers that had agreed to ship at the prime rate, although there were instances where the government would use carriers who had agreed to ship only at one of the higher rates, primarily because the prime rate carriers had insufficient capacity to handle all the volume that needed to be transported in that channel.

With limited exceptions, the freight forwarders' filed rates cover all costs associated with a "door-to-door" delivery. The components of a move include: the local (either U.S. or foreign) origin agent services, which primarily include packing of household goods; the origin line haul, which is the motor transportation of the household goods from a person's home to the origin port of shipment; origin port services; ocean transport services; destination port services; the destination line haul, which is the motor transportation of the household goods from the port to the person's new home; and destination local agent services, which primarily include the unpacking **[*10]** of the household goods. Generally, freight forwarders subcontract components of the move to subcontractors like the defendants who perform the services overseas. Freight forwarders must consider each component when they file rates with the DOD for each channel. The freight forwarder obtains payment for the move based on a government bill of lading ("GBL") which is submitted through a public voucher or invoice. Only the freight forwarder submits invoices for payment and only the freight forwarder is paid directly by the government, specifically, by the Defense Finance and Accounting Service.

B.

On November 14, 2000, in Sonthofen, Germany, the defendants entered into an agreement that came to be known as the Sonthofen Agreement, under which the signatories agreed to adhere to the "landed rate" system for the transportation of military household goods in the ITGBL program.[4] The landed rate system adopted in the Sonthofen Agreement bundled into one price the packing and unpacking destination services of the German local agents and the German line haul services, charges which the German agents controlled and set, along with the port agents' services, together with the trans-Atlantic ocean **[*11]** transportation services, which the German agents did not control or set.[5] Among the signatories to that agreement, in addition to Marc Smet on behalf of Gosselin, was ITO Mobel Transport GmbH ("ITO"), Andreas Christ Spedition & Mobeltransport GmbH, Birkhart Globistics AG, Victoria Gruppe, and E.N. Duerling GmbH.

In addition to acting as local agents, Gosselin and ITO acted as general agents and sold the bundled landed rate to freight forwarders, collected payment from the freight forwarders and paid the German local agents for their services. The local agents' central purpose for this agreement was to get paid higher rates for their packing and unpacking destination services by preventing the freight **[*12]** forwarders from negotiating directly with local German agents and thereby curb the ability of freight forwarders to negotiate directly for a reduced rate.

Following the Sonthofen Agreement, on November 17, 2000, Gosselin through Marc Smet advised the freight forwarders for whom Gosselin served as general agent, including Covan International ("Covan"), Airland, Sentinel, and Jet Forwarding, that the rates had increased, that the German local agents were not going to handle business at the lower rates and that the larger local agents had already agreed to work only under the landed rate system. Subsequent communications took place among the German local agents, including a follow-up meeting on November 29, 2000 in Limburgerhoff, Germany in which they confirmed their agreement to work only under the landed rate system and the actual rates that they would receive for their packing and unpacking services.

In April 2001, another round of similar communications took place among the German agents with respect to the IW01 rate cycle, again led by Marc Smet of Gosselin, followed again by similar communications for the IS02 cycle. By April of 2001, the Pasha Group, an American landed rate provider, **[*13]** joined in the agreement and on April 25, 2001, Smet e-mailed the Pasha Group the rates Smet proposed be paid to German local agents under the

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[4] The Sonthofen Agreement stated in its entirety: "We, the undersigned companies agree that as of 4/1/2001 we will be using 'landed rates' for the U.S. Military business." Gov. Ex. 14.

[5] Prior to the Sonthofen Agreement, Gosselin had used a "landed rate" system with the freight forwarders since the late 1990s, which the government does not challenge. The Sonthofen Agreement for the first time infused into the landed rate system the alleged collusion of the German local agents to act in concert.

landed rate with respect to their request for fixed rates in IW02. Although not all the German agents signed or agreed to the Sonthofen Agreement, the evidence was that approximately 70-80% of the German agents did agree to abide by the Sonthofen Agreement, although some, including some of the actual signatories, did work for and negotiate individual rates lower than the landed rate. The freight forwarders would use the landed rate in calculating what rates to bid for the entire door-to-door move, and it is a fair inference that to the extent the landed rate was higher than what could have been negotiated otherwise with the local German agents, that increase was reflected in higher bids to the DOD for the overall door-to-door move.

Following the Sonthofen Agreement, the defendants were involved in two separate efforts to influence the actual bids that were filed by freight forwarders, one in the IS01 cycle and the other, in the IS02 cycle. In that regard, after the prime rate was set by Covan International ("Covan"), an American freight forwarder, **[*14]** for certain channels for the IS01 rate cycles, the German local agents determined that those identified prime rates were too low to cover all their charges for the local destination and line haul services that they had set for themselves and that, as a result, Covan and any other carriers that filed a me-too rate to those prime rates might fail to pay the German local agents after they performed their services, as other prime rate carriers had done in the past.[6] They therefore decided that they would not handle any business for carriers that filed a me-too rate in the fourteen channels in which Covan set the prime rate (the "Covan Channels"). In addition, the carriers were told that efforts were being made to have Covan cancel its prime rate and to have other carriers me-too only the second low rate. Similar events occurred with respect to the IS02 cycle, but this time, in connection with a prime rate that had been filed by another American freight forwarder, Cartwright International Van Lines, Inc ("Cartwright"). In that regard, by an agreement dated January 8, 2002, Smet and other local German agents agreed that they would not handle business for freight forwarders in the twelve **[*15]** westbound channels for which Cartwright had filed the prime rate (the "Cartwright Channels") unless the freight forwarders submitted a me-too bid at the second low rate or above.

STANDARD OF REVIEW

On a motion for judgment as a matter of law, the Court is to consider whether "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." *Fed. R. Civ. P. 50(a)(1)*. In evaluating a motion for judgment as a matter of law, the Court must view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 259 (4th Cir. 2001)*. In considering the evidence presented at trial, the district court does "not make credibility determination or weigh the evidence," as "[c]redibility determination, the weighing of the evidence, and the drawing of legitimate inferences **[*16]** from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*.

ANALYSIS

The United States alleges three separate claims under the FCA, *31 U.S.C. § 3729*: (1) that the defendants knowingly presented or caused to be presented to the United States government a false or fraudulent claim for payment or approval under *§ 3729(a)(1)*; (2) that the defendants knowingly made, or caused to be made or used a false record or statement to get a false claim paid or approved by the government under *§ 3729(a)(2)*; and (3) that the defendants conspired to defraud the United States by getting a false or fraudulent claim allowed or paid under *§ 3729(a)(3)*.

Each of these separate and distinct claims has different elements, but common to all of them is the government's theory of why the claims presented and paid by the United States were false. On that point, the United States contends that the claims were false because they were filed in connection with contracts whose issuance by the

[6] In the years preceding the Sonthofen Agreement, several freight forwarders that had set the prime rates had filed for bankruptcy, with the result that many of the German local agents, including Gosselin and the other signatories to the Sonthofen Agreement, had not been paid millions of dollars for their services.

United States was fraudulently induced when the defendants and other German local agents, who collectively provide a large portion of origin and destination services **[*17]** in Germany, entered into a price fixing or bid-rigging agreement by agreeing to adhere to the landed rate system. The government further contends that the agreement to use the landed rate system had the effect of increasing the price that the United States paid for the transportation of military household goods in Germany under the ITBGL program in all 104 channels (52 channels eastbound and 52 channels westbound) in each of the four rate cycles that occurred in 2001 and 2002. The government claims that because bid-rigging or price fixing is a fraudulent course of conduct, all claims for payment resulting from that conduct are false as a matter of law. This theory of falsity derives from *United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943)*, in which the Supreme Court assumed, without deciding, that the FCA covered a fraudulent course of conduct in connection with a government contract, specifically, bid-rigging. Other lower court cases, including the Fourth Circuit have explicitly adopted that theory of falsity. *See* *United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003)*. This Court will, therefore, apply that theory of falsity to the facts **[*18]** of this case.

In this case, the defendants' conduct on which the government relies to prove that false claims were filed pursuant to a fraudulent course of conduct falls into two distinct categories:

(1) the defendants' various agreements, formal and informal, that began with the Sonthofen Agreement, to use the landed rate system. Included in this category is the agreement among the defendants and other local German agents that they would work for American freight forwarders only under the landed rate system and also certain activities that defendants used to implement the landed rate system, including an agreement not to work for carriers who do not use the landed rate, and communicating that position to various carriers; and

(2) the defendants' efforts, and the efforts of those with whom they acted in concert, to influence the actual rates that various freight forwarders or carriers bid in connection with the Covan Channels and the Cartwright Channels. Included in this category are the communications between the defendants or their alleged coconspirators with freight forwarders in which they stated that the local German agents would not work for any freight forwarder in any channel **[*19]** that did not me-too at least the second low rate, as opposed to the prime rates set by Covan in the IS01 cycle and Cartwright in the IS02 cycle, coupled with efforts to have Covan and Cartwright, and those carriers that filed a me-too bid to their prime rates, cancel their rates.

The defendants argue that neither course of conduct can result in the filing of false claims because the underlying conduct was not illegal under antitrust laws, either because the conduct was immune under the Shipping Act's exemptions or because the conduct, even if not covered by that immunity, was not unlawful under the ***antitrust law*** or otherwise, particularly given the very specific market place and regulatory environment in which the defendants operated, including predatory pricing and other practices that plagued the local German agents. The United States, on the other hand, argues that the conduct is not immune or otherwise protected under the antitrust laws, but even if it were, it is irrelevant whether or not defendants' conduct violated the antitrust laws because the defendants still engaged in a collusive, fraudulent course of conduct for the purposes of the FCA.

In order to rule on defendants' Rule 50 **[*20]** motion, the Court must decide whether defendants' price fixing and other collusive conduct is exempt from the antitrust laws under the Shipping Act and if so, whether that conduct can still be deemed a fraudulent course of conduct for the purposes of the FCA. This issue appears to be one of first impression; the Court has not found any case that has considered whether price fixing conduct that is not unlawful under the antitrust laws can still subject a person to liability under the FCA.

The Shipping Act of 1984, 46 U.S.C. app. § 1706(a)(4) (2000), provides that the antitrust laws do not apply to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade."[7] The statute defines "through transportation" as "continuous

[7] The amended version of the Shipping Act, *46 U.S.C. § 40307(a)(5)*, states that the antitrust laws do **[*21]** not apply to "an agreement or activity relating to the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade."

transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point and a foreign point or port." *Id.* at § 1702(24).

The government first contends that the immunity does not apply because it does not apply to any "conspiratorial conduct." The government's position, if accepted, would read the immunity out of the Shipping Act because the immunity, by its terms, applies to "any agreement or activity" and every conspiracy is necessarily based on an agreement and concerted activity. Likewise, to say that the immunity does not apply to a conspiracy even where the only conduct that would make the agreement an actionable conspiracy is covered by the immunity provided under the statute, necessarily eliminates the immunity, contrary to the clear language of the statute.

The government next contends that the immunity does not apply where the foreign conduct "affects United States commerce." This position appears to be based on § 1706(a)(3) of the Shipping Act, which provides an immunity from ***antitrust law*** "unless the agreement or activity [pertaining to transportation within or between foreign countries] has a direct, substantial, **[*22]** and reasonably foreseeable effect on the commerce of the United States." The government's position is without merit. While it is true that certain immunities under the Shipping Act are so qualified, such as the immunity provided by § 1706(a)(3), the immunity at issue here is set forth in § 1706(a)(4), which has no such limitation. Moreover, there is no evidence that would support the conclusion that the German agent rates charged in Germany affect United States commerce. While those rates may affect the amount of the bid submitted by American freight forwarders under the ITGBL program, there is no evidence to suggest that those rates affect in any way the cost of providing services within the American portion of the transportation route. The evidence is that the landed rate was only used as a component of an overall rate filed with the United States, not as the basis for the pricing of domestic activities involved in through transportation. There was no evidence that it had any effect, let alone a direct effect, on commerce within the United States.

The government also argues that the defendants cannot claim any benefit from the Shipping Act exemption pertaining to "a foreign inland **[*23]** segment" because the exemption applies only to "ocean common carrier agreements" or "marine terminal operator agreements," and their Sonthofen Agreement was not such an agreement. Thus, the government contends, the defendants' conspiracy to increase rates for local German agent services using landed rates does not fall under the Shipping Act because it was not an agreement "between or among" any ocean common carriers [8] and/or marine terminal operators. The government bases this argument on § 1703(a) of the Shipping Act, which states that "[t]his chapter applies to agreements by or among ocean common carriers to ... discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations and other conditions of service" and on § 1703(b) which provides "[t]his chapter applies to agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to ... discuss, fix, or regulate rates or other conditions of service."

Contrary to the government's argument, and as the Ninth Circuit concluded in *United States v. Tucor International Inc.*, the plain language of the Shipping Act "does not compel the conclusion that agreements among ocean common carriers or marine terminal operators are the only agreements within the scope of the Shipping Act's exemptions." *United States v. Tucor Int'l. Inc., 189 F.3d 834, 837 (9th Cir. 1999)*. The plain language of the exemption, § 1706(a)(4), is not limited to such agreements. Rather, the language of § 1706(a)(4) applies not just to "an agreement" by or among ocean common carriers or marine terminal operators, but to "any agreement or activity" — without limitation—concerning the foreign inland segment of through transportation. The scope of this exemption contrasts with the narrower scope of § 1706(a)(2), which is limited to "any activity or agreement within the scope of this chapter," evidencing that Congress knew how to limit an exemption when it intended to do so. Moreover, certain exemptions under the Shipping Act extend to conduct **[*25]** far broader than the ocean segment transportation activities typically engaged in by ocean common carriers. *See id.* at § 1703(a)(3) (exempting from ***antitrust law*** certain agreements that relate to transportation services "within ... foreign countries").

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[8] Pursuant to the act, "'ocean common carrier' means a vessel-operating common carrier" and "'common carrier' means a person holding itself out to the general public to provide transportation **[*24]** by water of passengers or cargo between the United States and a foreign country for compensation ..." 46 U.S.C. app. § 1702(6), (16).

The government also argues based on legislative history that the antitrust exemptions apply only to activities that are subject to Federal Maritime Commission regulation and filing requirements. However, again, nothing in the language of the exemption itself would support such a narrow reading. *See* Van Alstyne v. Electronic Scriptorium, Ltd., 560 F.3d 199, 207 (4th Cir. 2009) ("When statutory language is plain and unambiguous, there is no need for recourse to legislative history"); *see also* Tucor, 189 F.3d at 837 (considering and rejecting a similar argument about legislative intent under the Shipping Act). In addition, such arguments based on legislative history are difficult to embrace in light of the congressional amendments to the Shipping Act in 2006, after the *Tucor* decision, which did not amend Section 1706(a)(4) to limit its application, as the government urges this Court to do. *Compare* 46 U.S.C.A. § 40307(a)(5)(formerly 46 U.S.C. app. § 1706(a)(4))(exemption **[*26]** not limited)) *with* § 40307(a)(3)(formerly 46 U.S.C. app. § 1706(a)(2) (exemption applies to "an agreement or activity within the scope of this part")).

In deciding whether defendants' conduct is immune, the Court has also considered, as the government urges, the Fourth Circuit's decision in United States v. Gosselin World Wide Moving N.V., 411 F.3d 502 (4th Cir. 2005), the criminal proceeding against Gosselin World Wide Moving N.V. and The Pasha Group based on some of the same conduct at issue in this case, specifically, defendants' attempt to cancel or influence the prime rates for the twelve westbound channels set by Cartwright in the IS02 cycle. There, the defendants claimed that the Shipping Act immunity extended to the entire scheme to influence the Cartwright bids. *Id. at 509*. The Fourth Circuit ruled that the statutory exemption did not extend that far. *Id. at 510*. In reaching its decision, the Fourth Circuit clearly analyzed the conduct at issue, not as a unitary undifferentiated whole, but in terms of the purpose of the particular conduct, focusing on the statute's requirement that the agreement or activity must *concern* the foreign inland segment and the parties' intention **[*27]** that their behavior causes a consequence in the foreign inland segment. *Id.* In that regard, the Court observed that "[i]t is true that defendants' original agreement with the German local agents may had the relationship to a 'foreign inland segment' that the statute requires." *Id.* The Fourth Circuit held, however, that defendants' conduct extended beyond the foreign inland segment and concerned the entire through transportation market because the defendants directed and influenced the actual bids that were submitted to the DOD. *Id. at 510-11*. Specifically, the Fourth Circuit concluded that defendants desire to have Cartwright cancel its prime rates and the agreements defendants secured from other U.S. freight forwarders to file bids at or above the second low rate had little to do with the foreign inland segment, but rather were aimed at the entire through transportation market. *Id. at 511*.

Given the appellate decision in *Gosselin*, the question for the Court is whether defendants' behavior had in mind some consequence for the foreign inland segment such that their conduct sufficiently concerned the foreign inland segment of through transportation. Here, the evidence was clear and undisputed **[*28]** that the Sonthofen Agreement pertained to the origin and destination services, which concern exclusively the German inland segment. The fact that the Sonthofen Agreement, as implemented, included a landed rate that included ocean freight costs does not change this fact. The price of moving ocean freight was not part of the Sonthofen Agreement itself and is nevertheless immune under the Shipping Act.

For the above reasons, the Court must conclude, when viewing the evidence most favorably to the government, that the defendants' Sonthofen Agreement and the landed rate falls squarely within the scope of the Shipping Act immunity under § 1706(a)(4). The Court also concludes that other related conduct within the first category described above, such as communicating the rate, or refusing to work for a carrier that does not agree to pay that rate, is also an agreement or activity that concerns the inland segment and is therefore within the scope of the immunity.

With respect to the second category of conduct that serves as the basis for the government's claim of falsity, the conduct directed to the bidding in the Covan Channels, the Court must conclude under the Fourth Circuits' opinion in *Gosselin*, **[*29]** that such conduct is not within the scope of the immunity because it is directed not to the foreign inland segment but to rates that apply to the entire through transportation route. As with the Cartwright Channels in IS02, the defendants sought to have Covan cancel the fourteen westbound prime rates and have other freight forwarders me-too at the second lowest rate or higher — conduct that the Fourth Circuit found to concern the entire through transportation service, rather than the inland portion of the move. Thus, the Court concludes that this conduct is not immunized by the Shipping Act.

Having concluded that the conduct the government relies on with respect to the Sonthofen Agreement is immune, the Court must now consider whether it can still serve as the basis for liability under the FCA. Overall, the government contends that the theory of recovery under the FCA embraced in *Marcus v. Hess*, and the cases based on it, applies to all bid-rigging agreements, regardless of whether the conduct is independently actionable. Similarly, the government argues, based in part on the Court's prior rulings, that because the United States has not asserted causes of action based on the antitrust **[*30]** laws, it need not prove a *per se* or other antitrust violation, or indeed any other legally enforceable actual claim against the defendants, in order to establish that the filed claims for payment were false or fraudulent by virtue of the defendants' conspiracy, citing as support *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 778 (4th Cir. 1999)* (quoting *United States v. Neifert White Co., 390 U.S. 228, 233, 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968))* ("The False Claims Act 'reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.'"). Neither contention supports the government's position that conduct immune under the antitrust laws can serve as fraudulent conduct for the purposes of the FCA. In *Marcus v. Hess*, and those cases that followed, the courts either expressly or implicitly assumed that the underlying collusive conduct was not legally sanctioned or protected. Likewise, the government's position that it need not prove an antitrust claim or any other cognizable claim begs the question whether bid-rigging conduct that is statutorily lawful and specifically exempt from liability under the antitrust laws can nevertheless be the **[*31]** basis for liability under the FCA.

In a similar vein, the government argues that the claimed antitrust immunities are completely irrelevant to proving the elements of a FCA violation, based in large part on this Court's decision in *United States v. Gosselin World Wide Moving N.V., 333 F. Supp. 2d 497 (E.D. Va. 2004)*, the now completed criminal case against some of the defendants, as well as the Fourth Circuit's decision in the appeal of that case, *411 F.3d 502 (4th Cir. 2005)*. The conduct at issue in the criminal case pertained to the Cartwright Channels in the IS02 cycle; and the Court ruled that this conduct did not support a criminal conviction under the Sherman Act because of the statutory antitrust exemption under the Shipping Act for agreements that concern the foreign inland segment of through transportation. *See* *Gosselin, 333 F. Supp. 2d at 507*. It also ruled, however, that this conduct was sufficient to support criminal liability for conspiracy to defraud the government under *18 U.S.C. § 371*. *Id. at 512*. In making those rulings, the Court did not consider the specific issue in this case but merely held that under a *Blockburger* analysis, the two offenses, one under the Sherman **[*32]** Act and one under the federal conspiracy to defraud statute, had different elements. *Gosselin, 333 F. Supp. 2d at 511-12*. On appeal, the Fourth Circuit reversed in part, concluding that the antitrust immunity under the Shipping Act did not extend to defendants' conduct pertaining to the Cartwright Channels. Significant for the purposes of this case is that the Fourth Circuit specifically reserved on whether the immunity under the Shipping Act extends to anti-competitive behavior that is also actionable under a conspiracy to defraud theory. *Gosselin, 411 F.3d at 515*.

The United States' position that defendants' conduct can be the basis for a false claim, notwithstanding its immunity from antitrust liability, is also difficult to reconcile with its unwillingness to argue that FCA liability also results from the immunized price fixing involved in the predetermined rates for the ocean transport segment. Those fixed rates, which are negotiated between the International Shippers' Association ("ISA") and the Trans-Atlantic American Flag Liner Operators ("TAAFLO"), are also incorporated into the bids submitted by freight forwarders as part of the ITGBL program. *See* *46 U.S.C. §§ 40303*, *40307*, **[*33]** formerly 46 U.S.C.A. app. §§ 1704, 1706. Under the government's theory, a claim for payment submitted under the ITGBL program based on bids that incorporate those TAAFLO-ISA fixed prices would also be a false claim, a position the government itself has not embraced or suggested.

The Court concludes that a false claim under the FCA cannot be predicated on price fixing conduct that enjoys a statutory immunity from the antitrust laws. The Court, therefore, concludes that the defendants' landed rate agreement, and other related conduct immune from antitrust liability under the Shipping Act cannot be the basis for a false claim under the FCA.

Based on the statement of facts and plea agreement from the criminal proceeding, the Court previously entered judgment as to liability with respect to defendants' conduct as it relates to the Cartwright Channels. With respect to the other channels in the 2001 and 2002 rate cycles, other than the Covan Channels and the Cartwright Channels, the only conduct relied on by the government to establish liability relates to the landed rate agreement. There is no evidence that the defendants engaged in or directed any of their activities to the actual amount **[*34]** of the bids that would be submitted for those channels or in any way directed activities to attempt to have a freight forwarder cancel its rates. As discussed above, the activities pertaining to the Sonthofen Agreement itself and the use of a landed rate do not alone establish falsity and therefore cannot establish liability under the FCA. The Court, therefore, concludes that defendants' conduct as to these remaining channels concerns only the inland segment of the through transportation process and is therefore immune under the Shipping Act.

Because the defendants' conduct is immune with respect to all ITGBL channels other than the Covan Channels and the Cartwright Channels, the government's evidence is also insufficient to establish with respect to those channels an agreement to achieve an illegal purpose or an agreement to achieve a lawful objective through illegal means and therefore cannot serve as the basis for the government conspiracy to defraud claim under *31 U.S.C. § 3729(a)(3)*. Likewise, the use of the landed rate did not result in the filing of a false claim and, therefore, there is no evidence to establish that the defendants presented or caused to be presented a false **[*35]** claim with respect to those channels in violation of *§ 3729(a)(1)* as to those channels. Nor did the landed rate agreements result in the making, using or causing to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government in violation of *§ 3729(a)(2)*.

CONCLUSION

For the above reasons and those stated in open court, the Court has granted defendants' motion pursuant to *Fed. R. Civ. P. 50(a)* as to all ITBGL channels other than the Covan Channels in the IS01 rate cycle and the Cartwright Channels in the IS02 rate cycle.

The Clerk is directed to forward copies of this Memorandum Opinion to all counsel of record.

/s/ Anthony J. Trenga

Anthony J. Trenga

United States District Judge

Alexandria, Virginia

August 26, 2011

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Electrograph Sys., Inc. v. Epson Imaging Devices Corp. (In re: TFT-LCD (Flat Panel) Antitrust Litig.)

United States District Court for the Northern District of California

August 29, 2011, Decided; August 29, 2011, Filed

No. M 07-1827 SI; MDL No. 1827; No. C 10-0117 SI

Reporter
2011 U.S. Dist. LEXIS 96739 *; 2011-2 Trade Cas. (CCH) P77,596

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION; This Order Relates To: ELECTROGRAPH SYSTEMS, INC., et al., Plaintiffs, v. EPSON IMAGING DEVICES CORP., et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Claim dismissed by *Costco Wholesale Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 96741 (N.D. Cal., Aug. 29, 2011)*

Prior History: *Jaco Elecs., Inc. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2011 U.S. Dist. LEXIS 96738 (N.D. Cal., Aug. 26, 2011)*

Core Terms

subsidiary, personal jurisdiction, entity, allegations, contacts, products, integrated, argues, pleadings, panels, prices, Compl, conspiracy, meetings

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Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING DEFENDANT MITSUI TAIWAN'S MOTION FOR JUDGMENT ON THE PLEADINGS AND FOR DISMISSAL

On August 26, 2011, the Court heard argument on defendant Mitsui & Co. (Taiwan), Ltd.'s ("Mitsui Taiwan") motion for judgment on the pleadings and for dismissal. Having considered the arguments of the parties and the papers submitted, and for good cause appearing, the **[*6]** Court hereby GRANTS defendant's motion.

BACKGROUND

Plaintiffs Electrograph Systems, Inc. and Electrograph Technologies Corp. (collectively, "Electrograph") filed this action in November 2009, seeking to recover for a "long-running conspiracy . . . to fix, raise, stabilize, and maintain prices for Thin-Film Transistor Liquid Crystal Display ("TFT-LCD") panels." Compl. at ¶1. Electrograph's complaint alleges that "[d]efendants and their co-conspirators formed an international cartel" to fix prices of TFT-LCD panels. *Id.* The complaint names as defendants entities from eleven corporate families: Epson, Hitachi, Sharp, Toshiba, Sanyo, LG, Samsung, AU Optronics, Chi Mei, Chunghwa Picture Tubes, and Hannstar. Complaint at ¶¶29-65. In addition, the complaint names as a defendant Mitsui & Co. (Taiwan), Ltd. ("Mitsui Taiwan"). *Id.* at ¶66. According to the complaint, Mitsui Taiwan is "a wholly-owned subsidiary" of co-conspirator Mitsui & Co., Ltd. ("Mitsui"), a Japanese company headquartered in Japan. *Id.; see also* Declaration of Philip J. Iovieno in Support of Electrograph's Opposition ("Iovieno Decl."), Exh. 1. The complaint alleges that Mitsui Taiwan "manufactured, sold and distributed TFT-LCD **[*7]** Products to customers throughout the United States and elsewhere." *Id.*

On June 9, 2011, Mitsui Taiwan filed a motion for judgment on the pleadings and for dismissal of Electrograph's complaint. Mitsui Taiwan asserts that, contrary to Electrograph's allegations, it has never manufactured LCD panels. Instead, it claims that it is a "trading company that buys and sells various products primarily in Asia." Motion at 2. Mitsui Taiwan argues that it "is headquartered in and organized under the laws of Taiwan, has no physical presence in the United States, and lacks the 'minimum contacts' with the United States necessary to justify haling [it] before this Court." *Id.* Thus, it seeks its dismissal from this lawsuit for lack of personal jurisdiction. Alternatively, Mitsui Taiwan asserts that this Court lacks subject matter jurisdiction over Electrograph's claims against it.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(c)*, "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." *Fed. R. Civ. P. 12(c)*. The legal standard for *Rule 12(c)* is virtually identical to the standard for a motion to dismiss under *Rule 12(b)(6)*. *See* ***[*8]*** *Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989)*.

For a motion under either rule, the question presented is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. *See* *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*. In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*.

While *Rule 12(c) of the Federal Rules of Civil Procedure* does not expressly provide for partial judgment on the pleadings, neither does it bar them; it is common to apply *Rule 12(c)* to individual causes of action. *See Moran v. Peralta Community College Dist., 825 F. Supp. 891, 893 (N.D. Cal. 1993)*. When a court finds the pleadings deficient, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)* (per curiam).

DISCUSSION

As mentioned **[*9]** above, Mitsui Taiwan moves for dismissal on the grounds that this Court lacks both personal jurisdiction and subject matter jurisdiction.

I. Personal Jurisdiction

Mitsui Taiwan argues that the *Due Process Clause of the United States Constitution* forbids it from being subjected to this Court's jurisdiction. In order for a court to exercise jurisdiction over a nonresident defendant, the defendant must have the requisite minimum contacts with the forum such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. In this instance, the relevant forum for this minimum contacts analysis is the United States. *Go-Video, Inc. v. Akai Elec. Co., Ltd., 885 F.2d 1406, 1415-16 (9th Cir. 1989)*.

There are two forms of personal jurisdiction: "specific" and "general." "A court may exercise specific jurisdiction where the cause of action arises out of or has a substantial connection to the defendant's contacts with the forum." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123 (9th Cir. 2002)* (citing *Hanson v. Denckla, 357 U.S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958))*. "Alternatively, a defendant **[*10]** whose contacts are substantial, continuous, and systematic is subject to a court's general jurisdiction even if the suit concerns matters not arising out of his contacts with the forum." *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984))*.

The plaintiff has the burden of establishing the district court's personal jurisdiction over a defendant. *Doe I v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001)* (per curiam). However, a district court should not act on the defendant's motion to dismiss without first holding an evidentiary hearing. *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1128-29 (9th Cir. 2003)*. Therefore, the plaintiff need only make a *prima facie* showing of jurisdiction to avoid the defendant's motion to dismiss. *Id.; cf. Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977)*. Unless directly contravened, a plaintiff's version of the facts is taken as true, and "conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." *Unocal, 248 F.3d at 922* (quoting **[*11]** *AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996))*; *see also* *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)* (holding that "[b]ecause the prima facie jurisdictional analysis requires us to accept the plaintiff's allegations as true, we must adopt [plaintiff's] version of events for purposes of this appeal").

Mitsui Taiwan argues that this Court may not exercise either general or specific jurisdiction over it. It argues that general jurisdiction is lacking because it has virtually no contacts with the United States. According to an affidavit from Makoto Ichikawa, the General Manager of Mitsui Taiwan, Mitsui Taiwan is headquartered in and organized under the laws of Taiwan, has no presence in the United States, and has never sold or distributed TFT-LCD panels anywhere in the United States. *Id.* at ¶2-6; *see also id.* at ¶6 (stating that Mitsui Taiwan's "sales of TFT-LCD panels and products have been limited to Taiwan and few other countries outside North America."); *id.* at ¶9 ("[Mitsui Taiwan's] only sales in the United States have been of products not related to TFT-LCD products[,] occurred in a single year from 2002 to 2006 [and] **[*12]** constituted less than 1 percent of [Mitsui Taiwan's] income for that year . . . ."). Similarly, Mitsui Taiwan argues that its lack of contacts is fatal to any claim of specific jurisdiction. It argues that it has never "purposefully availed" itself of the privilege of conducting TFT-LCD business in the United States, and that Electrograph's claims therefore cannot "arise out of" any U.S.-related activities. *See* Ichikawa Decl., ¶7 (stating that Mitsui Taiwan has never "billed or invoiced," "negotiated," "received revenue," "shipped," or otherwise "entered into any agreements for the sale or distribution of TFT-LCD panels or products in the United States"); *id.* at ¶10 ("[Mitsui Taiwan] has never had any meetings or discussions with any other defendant or alleged coconspirator in the United States regarding any issue related to TFT-LCD panels or products.").

Electrograph does not dispute any of the facts asserted in this declaration, and thus apparently concedes that, standing alone, Mitsui Taiwan is not subject to the personal jurisdiction of this Court. Electrograph nonetheless argues that this Court may exercise jurisdiction over Mitsui Taiwan because it is a member of the Mitsui corporate **[*13]** enterprise, which Electrograph refers to as a "single integrated entity." *See* Opp'n at 5. This enterprise consists of the Japanese parent, Mitsui, and its wholly owned subsidiaries Mitsui Taiwan and Mitsui USA. Compl. at ¶ 66; Iovieno Decl., Exh. 1. [1] Electrograph argues that the Court may impute the collective contacts that Mitsui and Mitsui USA have with the United States to Mitsui Taiwan. *See* Opp'n at 11 ("Mitsui Taiwan does not and cannot in good faith contest that the Court has jurisdiction over Mitsui. Given that Mitsui acts as a single integrated entity . . . the Court may exercise personal jurisdiction over Mitsui Taiwan.").

On occasion, courts have exercised personal jurisdiction over a foreign corporation based upon its close relationship with a United States affiliate. Usually this occurs in the context of a foreign parent and its American subsidiary. The general rule is that "[t]he existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum." *Unocal, 248 F.3d at 925*. **[*14]** The Ninth Circuit, however, recognizes two exceptions to this general rule: the "alter ego" exception and the "agency" exception. *Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920 (9th Cir. 2011)*.

The alter ego exception "is predicated upon a showing of parental control over the subsidiary" and requires:

> (1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice. The first prong of this test has alternately been stated as requiring a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former.

Id. (quoting *Unocal, 248 F.3d at 926*). The agency exception "is predicated upon a showing of the special importance of the services performed by the subsidiary" and is satisfied by:

> a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially **[*15]** similar services.

Id. (quoting *Unocal, 248 F.3d at 928*); *see also* *Unocal, 248 F.3d at 926* ("Nonetheless, if the parent and subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary's contacts with the forum may be imputed to the foreign parent corporation." (internal quotation marks omitted)).

Although these cases generally involve parent-subsidiary relationships, on occasion courts have applied their principles to broader corporate relationships. This Court, for example, previously found specific personal jurisdiction over a foreign parent corporation and its foreign subsidiaries based upon their close relationship to an American company, as well as the foreign corporations' direct involvement in the events leading to the litigation. *Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 812 (N.D. Cal. 2004)* ("Unilever's own literature explains that the companies within the group act as 'a single entity with a single management team,' that they co-operate in all areas, and — of signal importance — that they exchange all relevant business information.").

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[1] The Court GRANTS Electrograph's unopposed request for judicial notice.

Although there is some support for Electrograph's "single integrated entity" theory of jurisdiction, **[*16]** the Court finds that the exercise of jurisdiction would not be appropriate here. The primary problem with Electrograph's theory is that no "single integrated entity" allegations appear in its complaint. Rather, the complaint's allegations about the Mitsui corporate family are limited to the allegations (1) that Mitsui Taiwan is a subsidiary of Mitsui, compl. at ¶66; (2) that Mitsui Taiwan attended a series of bilateral meetings with LCD manufacturers, where it "acted as an agent of Sanyo Consumer and reached agreements with other competitors about prices for TFT-LCD Products sold in the United States and elsewhere," compl. at ¶126; and (3) that Mitsui "had at least one bilateral meeting" in 2001 where it acted as "an agent for defendant Epson Japan," compl. at ¶129. The complaint does not treat the Mitsui corporate family as a "single integrated entity." Indeed, the complaint does not even mention Mitsui USA.

Electrograph argues that its complaint reflects its theory of jurisdiction in a provision that states: "[w]hen Plaintiffs refer to a corporate family or companies by a single name in their allegations of participation in the conspiracy, it is to be understood that the Plaintiffs **[*17]** are alleging that one or more employees or agents of entities within the corporate family engaged in conspiratorial meetings on behalf of every company in that family." Compl. at ¶ 134. Given the extremely limited references to Mitsui and Mitsui Taiwan in the complaint, however, this general provision cannot save Electrograph's allegations.

In light of the dearth of allegations regarding Mitsui's corporate structure, Electrograph has provided the Court with a number of items of extrinsic evidence purporting to establish that Mitsui acts as a "single integrated entity." The evidence it has provided, however, is inadequate to support this theory. To begin with, little of this information concerns Mitsui's relationship with Mitsui Taiwan; the bulk of it relates to Mitsui USA. *See, e.g.*, Iovieno Decl., Exh. 1 at 55 (stating that Mitsui USA carries out business activities "in collaboration with the operating segments of the head office in Japan"); Exh. 2 at 6 (Mitsui USA "has significant transactions with Mitsui Japan and its subsidiaries and affiliates"); Exh. 2 at 24 (noting overlap between management personnel of Mitsui and Mitsui USA).

The evidence Electrograph has provided that relates **[*18]** to Mitsui Taiwan is not convincing evidence of a "single integrated enterprise." For example, Electrograph points to Mitsui's SEC filings, which identify Mitsui Taiwan and Mitsui USA as "overseas offices." They also state that Mitsui's subsidiaries "provide market information to each other and cooperate in developing various business opportunities." Iovieno Decl., Exh. 1 at 22; *see also id.* at 60 ("We are a global general trading company and we conduct our business with our subsidiaries and associated companies."). The Ninth Circuit has made clear, however, that "references [in public filings] to subsidiaries or chains of subsidiaries as divisions of the parent company do not establish the existence of an alter ego relationship." *Unocal, 248 F.3d at 928*. Other items Electrograph has provided are consistent with its single integrated entity theory, but do little to establish that Mitsui actually operated in an integrated fashion. *See* Iovieno Decl, Exh. 12 (contract between High Tech Computer Corporation ("HTC") and Mitsui in which HTC agrees to purchase LCD modules "from the Seller (or any of the Seller or its subsidiary including [Mitsui Taiwan]) . . . ."); Exh. 13 (Sanyo presentation **[*19]** touting its "World Wide Sales & Support Network" and identifying Mitsui, Mitsui USA, and Mitsui Taiwan as parts of that network).

By far the most compelling evidence that Electrograph has provided is evidence that both Mitsui Taiwan and Mitsui USA participated in the conspiracy. For example, Electrograph relies on one document produced in this litigation by Chunghwa memorializing a meeting with Mitsui Taiwan. The document suggests that Mitsui Taiwan shared customer and pricing information with Chunghwa. *Id.*, Exh. 14; *see also id.*, Exh. 10 at ¶2 ("Between 2001 and 2004, [Chunghwa] employees met and exchanged information with employees of . . . Mitsui Busan (the Taiwanese agent for Sanyo Epson)."). Other evidence produced in discovery suggests that Mitsui USA held discussions with a Samsung representative in the United States. *Id.*, Exh. 9 (stating that Samsung representative discussed "pricing, volume, current status, as far as shipments, things of that nature . . . ."). Such evidence may suggest that the Mitsui entities participated in the conspiracy as a single unit, but it is entirely speculative to conclude that Mitsui Taiwan and Mitsui USA acted in a coordinated manner. There is **[*20]** no evidence that the Mitsui entities worked together, as opposed to independently carrying out duties requested by Sanyo. *Cf. Concat* (finding that personal jurisdiction existed over foreign subsidiary in part because patent at issue originated from foreign subsidiary).

The Court finds that Electrograph has failed to plead or otherwise make out a prima facie case of personal jurisdiction over Mitsui Taiwan. Accordingly, it GRANTS Mitsui Taiwan's motion to dismiss for lack of personal jurisdiction. The Court also GRANTS Electrograph leave to amend its complaint to set forth its theory of jurisdiction over Mitsui Taiwan. Its amended complaint must be filed by **September 23, 2011.**

II. Subject Matter Jurisdiction

Mitsui Taiwan next moves to dismiss the complaint for lack of subject matter jurisdiction. [2] It claims that the Foreign Trade Antitrust Improvements Act of 1984 ("FTAIA") bars Electrograph's claims against Mitsui Taiwan. The FTAIA sets forth a "general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, **[*21]** *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'" *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)* (quoting *15 U.S.C. § 6a(1)*, *(2)*) (emphasis in original). Mitsui Taiwan claims that its conduct was entirely foreign in nature and therefore cannot fall under this "domestic injury" exception to the FTAIA. The Court disagrees.

Electrograph asserts claims against Mitsui Taiwan based on its alleged role as agent for Sanyo in the antitrust conspiracy. For example, the complaint alleges that Mitsui Taiwan "participated in multiple bilateral meetings . . . and **[*22]** agreed on prices and supply levels for TFT-LCD Products. . . . At that and other meetings [Mitsui Taiwan] acted as an agent of Sanyo Consumer and reached agreements with other competitors about prices for TFT-LCD Products sold in the United States and elsewhere." Complaint at ¶ 126.

Given that Sanyo's conduct is alleged to have caused domestic injury, Electrograph's claims fall within the domestic-injury exception to the FTAIA. Because jurisdiction exists over those claims, Mitsui may be held liable for its participation on Sanyo's behalf.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant's motion for judgment on the pleadings and for dismissal. Plaintiffs may file an amended complaint by **September 23, 2011** Docket No. 70 in 10-0117; Docket No. 2892 in 07-1827.

IT IS SO ORDERED.

Dated: August 29, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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[2] Although the Court concludes that it lacks personal jurisdiction over Mitsui Taiwan, it reaches the question of subject matter jurisdiction to ensure that Electrograph's request to amend its complaint would not be futile. *See* *Broughton, 622 F.2d at 460* (holding that leave to amend should be granted unless amendment would be futile and "the deficiencies of the complaint could not be cured by amendment.").

[Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.](#)

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

August 31, 2011, Filed

B211597

Reporter

198 Cal. App. 4th 1366 *; 131 Cal. Rptr. 3d 519 **; 2011 Cal. App. LEXIS 1150 ***

FLAGSHIP THEATRES OF PALM DESERT, LLC, Plaintiff and Appellant, v. CENTURY THEATRES, INC., et al., Defendants and Respondents.

Notice: As modified Sept. 29, 2011.

Subsequent History: Modified and rehearing denied by *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 2011 Cal. App. LEXIS 1248 (Cal. App. 2d Dist., Sept. 29, 2011)*

Review denied by *Flagship Theatres of Palm Desert LLC v. Century Theatres, Inc., 2011 Cal. LEXIS 12202 (Cal., Nov. 30, 2011)*

Related proceeding at *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 2015 Cal. LEXIS 2173 (Cal., Apr. 15, 2015)*

Decision reached on appeal by *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 2016 Cal. App. Unpub. LEXIS 3812, Trade Reg. Rep. (CCH) P 79647, 2016 WL 3091192 (Cal. App. 2d Dist., May 24, 2016)*

Decision reached on appeal by, Dismissed by, in part, As moot *Flagship Theatres of Palm Desert v. Century Theatres, 2020 Cal. App. LEXIS 841 (Cal. App. 2d Dist., Sept. 2, 2020)*

Prior History: **[***1]** APPEAL from a judgment of the Superior Court of Los Angeles County, No SC090481, Linda K. Lefkowitz, Judge.

Disposition: Reversed with directions.

Core Terms

film, antitrust, theaters, defendants', clearances, trial court, discovery, licensing, distributors, theatres, sealing, Cartwright Act, rule of reason, parties, monopoly power, competitors, compete, anti trust law, confidential, monopoly, license agreement, Sherman Act, market power, effects, cases, summary judgment motion, anticompetitive, bidding, clerk's transcript, designation

LexisNexis® Headnotes

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

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

HN1[] Standards of Review, De Novo Review

An appellate court reviews the trial court's ruling on a motion for summary judgment de novo.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN2[] Private Actions, State Regulation

See *Bus. & Prof. Code, § 16726*.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN3[] Antitrust & Trade Law, Sherman Act

Bus. & Prof. Code, § 16720, subd. (a), of the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, defines the term "trust" as a combination of capital, skill or acts by two or more persons for certain enumerated anticompetitive purposes, including to create or carry out restrictions in trade or commerce. That prohibition is analogous to the catchall language of *section 1* of the Sherman Act, *15 U.S.C. § 1*, which prohibits every contract, combination, or conspiracy, in restraint of trade or commerce. Thus, although the Cartwright Act was not patterned after the Sherman Act, federal case law interpreting the Sherman Act is often a useful aid in interpreting the Cartwright Act.

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

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

HN4[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Under the case law interpreting both the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, and the Sherman Act, some restraints of trade are treated as per se unlawful, while others are analyzed under the rule of reason standard. In general, only unreasonable restraints of trade are prohibited. However, there are certain agreements or practices, which because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

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

HN5[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

A clearance is an exclusive right that a film distributor grants to a theater in connection with the licensing of a film. It prohibits the distributor from licensing the film for exhibition at certain other theaters, either identified by name or located within a specified geographic region, while the film is being shown at the theater that obtained the clearance. Federal case law applying the Sherman Act has treated clearances as vertical nonprice restraints that are evaluated under the rule of reason.

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

HN6[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The case law contains no general definition of prohibited circuit dealing, but it is generally characterized as the pooling of the purchasing power of an entire circuit in bidding for films, which undermines the competitive process of bidding for film licenses theatre by theatre.

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

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

HN7[] **Regulated Practices, Monopolies & Monopolization**

One type of prohibited circuit dealing is a form of monopoly leveraging, that is, a monopolist's use of power in one market to gain an advantage in a related market.

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

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

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

Formula deals are an independent basis on which a film licensing agreement that covers multiple theaters within a circuit (i.e., a circuit deal) can constitute an antitrust violation regardless of whether it involves monopoly leveraging.

Civil Procedure > Appeals > Appellate Briefs

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN9[] **Appeals, Appellate Briefs**

In general, an appellate court reviews only the trial court's ultimate decision, not the reasoning on which it was based, and it may affirm the decision on any valid theory. In an appeal from a summary judgment, however, the appellate court is statutorily prohibited from affirming the judgment on a ground not relied on by the trial court unless it first affords the parties an opportunity for supplemental briefing on the issue. *Code Civ. Proc., § 437c, subd. (m)(2)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN10[] **Private Actions, Prioritizing Resources & Organization for Intellectual Property Act**

For plaintiffs to recover damages for antitrust violations, they must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN11[] **Private Actions, State Regulation**

California case law holds that the requirement that plaintiff must prove antitrust injury to recover damages for antitrust violations applies to claims under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*

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

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

HN12[] **Private Actions, Remedies**

The antitrust injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases governed by the rule of reason.

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

HN13[] **Private Actions, Remedies**

The antitrust injury requirement does not require an antitrust plaintiff to show actual harm to competition. The antitrust injury requirement does not mean that an antitrust plaintiff must prove an actual lessening of competition in order to recover.

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

HN14[] **Regulated Practices, Monopolies & Monopolization**

Conduct that is otherwise forbidden by the antitrust laws is not to be tolerated merely because the victim is just one merchant whose business is so small that its destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businesses, one at a time, as it can by driving them out in large groups.

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

Governments > Legislation > Interpretation

HN15[] Regulated Practices, Monopolies & Monopolization

The Sherman Act has consistently been read to forbid all contracts and combinations which tend to create monopoly, whether the tendency is a creeping one or one that proceeds at full gallop.

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

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

HN16[] Regulated Practices, Monopolies & Monopolization

Under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, an anticompetitive practice is not to be tolerated merely because the victim is just one merchant whose business is so small that its destruction makes little difference to the economy.

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

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

HN17[] Private Actions, Remedies

The antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct, as opposed to being injured by the conduct's neutral or even procompetitive aspects. But to make that showing, the plaintiff need not show that the market has actually become less competitive than it would have been without the defendant's conduct - if the market contains numerous participants and is consequently competitive, and the plaintiff is a relatively small player whose injury or elimination would not materially affect market conditions, then the plaintiff is not thereby foreclosed from recovery.

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

HN18[] Private Actions, Remedies

The antitrust injury requirement means that in order to prevail on its antitrust claims, the plaintiff must show that its loss stems from a competition-reducing aspect or effect of the defendant's behavior.

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

Civil Procedure > Discovery & Disclosure > General Overview

HN19[] Standards of Review, Abuse of Discretion

Appellate courts must keep liberal policies of discovery statutes in mind when reviewing decisions denying or granting discovery. Absent a showing that substantial interests will be impaired by allowing discovery, liberal policies of discovery rules will generally counsel against overturning a trial court's decision granting discovery and militate in favor of overturning a decision to deny discovery. Discovery rulings are reviewed for abuse of discretion.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN20[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The United States Supreme Court cases describe circuit dealing as, for example, a theater circuit's use of monopoly power in certain locations to acquire exclusive privileges in a city where the circuit has competitors. The Supreme Court has condemned as unlawful circuit dealing certain master agreements that cover exhibition in two or more theatres in a particular circuit or covering the exhibition of features in a number of theatres. The sole California case concerning circuit dealing describes it in similar terms and on the basis of the same authorities. Circuit dealing is prohibited because it enables a powerful circuit to gain advantages for itself and impose restrictions on its competitors which otherwise would not have been possible. It is both an abuse of monopoly power and a means for stifling competition by diverting the cream of the business to the large operators.

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

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

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

HN21[] Regulated Practices, Price Fixing & Restraints of Trade

The Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, contains no provision parallel to the Sherman Act's prohibition against monopolization, *15 U.S.C. § 2*, and the Cartwright Act applies only to a "combination" involving two or more persons, *Bus. & Prof. Code, § 16720*, not to unilateral conduct.

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

HN22[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Licensing agreements covering two or more theaters in a circuit are unlawful under the Sherman Act because they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff, the owner of a 10-screen movie theater, filed an antitrust action against defendants, two larger movie theater companies, alleging, inter alia, circuit dealing claims for restraint of trade in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). The lead defendant owned a 15-screen movie theater in a neighboring community. The trial court granted defendants' motion for summary judgment and entered judgment against plaintiff. (Superior Court of Los Angeles County, No SC090481, Linda K. Lefkowitz, Judge.)

The Court of Appeal reversed the judgment, directed the trial court to enter a new and different order denying defendants' motion for summary judgment, and remanded the case for further proceedings. The court concluded that the trial court abused its discretion in granting defendants' requests to limit discovery to the geographic area that defendants claimed was the geographic market in which the parties' theaters competed. The essence of plaintiff's claim was that the lead defendant had used its power outside the geographic market to influence competition within the geographic market. In order to gather evidence to support its circuit dealing claim, plaintiff had to be permitted to engage in discovery concerning the lead defendant's theater circuit and film licensing practices outside the market in which the parties' theaters competed. Plaintiff could not gather evidence in support of its claim if it was limited to collecting evidence within the geographic market. The trial court's imposition of such a geographical limitation on plaintiff's discovery was consequently erroneous. The court rejected defendants' contention that unlawful circuit dealing is limited to licensing agreements that cover all of the theaters in a circuit. The court declined to decide whether plaintiff's circuit dealing claim should be analyzed under the per se rule or the rule of reason standard. (Opinion by Rothschild, J., with Mallano, P. J., and Johnson, J., concurring.) **[*1367]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Definitions—Trust.

Bus. & Prof. Code, § 16720, subd. (a), part of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), defines the term “trust” as a combination of capital, skill or acts by two or more persons for certain enumerated anticompetitive purposes, including to create or carry out restrictions in trade or commerce. That prohibition is analogous to the catchall language of section 1 of the Sherman Act (*15 U.S.C. § 1*), which prohibits every contract, combination, or conspiracy, in restraint of trade or commerce. Thus, although the Cartwright Act was not patterned after the Sherman Act, federal case law interpreting the Sherman Act is often a useful aid in interpreting the Cartwright Act.

CA(2)[] **(2)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Per Se Violations—Rule of Reason—Group Boycotts.

Under the case law interpreting both the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), and the Sherman Act, some restraints of trade are treated as per se unlawful, while others are analyzed under the rule of reason standard. In general, only unreasonable restraints of trade are prohibited. However, there are certain agreements or practices, which because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects.

CA(3)[] **(3)**

Monopolies and Restraints of Trade § 4—Sherman Act—Film Distribution—Clearance—Vertical Nonprice Restraint—Rule of Reason.

A clearance is an exclusive right that a film distributor grants to a theater in connection with the licensing of a film. It prohibits the distributor from licensing the film for exhibition at certain other theaters, either identified by name or located within a specified geographic region, while the film is being shown at the theater that obtained the clearance. Federal case law applying the Sherman Act has treated clearances as vertical nonprice restraints that are evaluated under the rule of reason.

CA(4)[] **(4)**

Monopolies and Restraints of Trade § 4—Film Distribution—Circuit Dealing.

The case law contains no general definition of prohibited circuit dealing, but it is generally characterized as the pooling of the purchasing power of an entire circuit in bidding for films, which **[*1368]** undermines the competitive process of bidding for film licenses theatre by theatre.

CA(5)[] **(5)**

Monopolies and Restraints of Trade § 4—Film Distribution—Circuit Dealing—Monopoly Leveraging.

One type of prohibited circuit dealing is a form of monopoly leveraging, that is, a monopolist's use of power in one market to gain an advantage in a related market.

CA(6)[] **(6)**

Monopolies and Restraints of Trade § 4—Film Distribution—Circuit Dealing—Formula Deals.

Formula deals are an independent basis on which a film licensing agreement that covers multiple theaters within a circuit (i.e., a circuit deal) can constitute an antitrust violation, regardless of whether it involves monopoly leveraging.

CA(7)[] **(7)**

Monopolies and Restraints of Trade § 5—Damages—Antitrust Injury.

For the plaintiffs to recover damages for antitrust violations, they must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 5—Damages—Antitrust Injury—Cartwright Act.

California case law holds that the requirement that plaintiff must prove antitrust injury to recover damages for antitrust violations applies to claims under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 5—Antitrust Injury—Per Se Violations—Rule of Reason.

The antitrust injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases governed by the rule of reason.

CA(10)[] **(10)**

Monopolies and Restraints of Trade § 5—Antitrust Injury—Harm to Competition.

The antitrust injury requirement does not require an antitrust plaintiff to show actual harm to competition. The antitrust injury requirement does not mean that an antitrust plaintiff must prove an actual lessening of competition in order to recover.

CA(11)[] **(11)**

Monopolies and Restraints of Trade § 3—Prohibited Conduct—Victim—Single Merchant.

Conduct that is otherwise forbidden by the antitrust laws is not to be tolerated merely because the victim is just one merchant whose business is so small that its destruction makes little difference to the economy. Monopoly can as surely thrive by the **[*1369]** elimination of such small businesses, one at a time, as it can by driving them out in large groups.

CA(12)[] **(12)**

Monopolies and Restraints of Trade § 4—Sherman Act—Interpretation.

The Sherman Act has consistently been read to forbid all contracts and combinations which tend to create a monopoly, whether the tendency is a creeping one or one that proceeds at full gallop.

CA(13)[] **(13)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Anticompetitive Practice—Victim—Single Merchant.

Under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), an anticompetitive practice is not to be tolerated merely because the victim is just one merchant whose business is so small that its destruction makes little difference to the economy.

CA(14)[] **(14)**

Monopolies and Restraints of Trade § 5—Damages—Antitrust Injury—Anticompetitive Effect.

The antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct, as opposed to being injured by the conduct's neutral or even procompetitive aspects. But to make that showing, the plaintiff need not show that the market has actually become less competitive than it would have been without the defendant's conduct?if the market contains numerous participants and is consequently competitive, and the plaintiff is a relatively small player whose injury or elimination would not materially affect market conditions, then the plaintiff is not thereby foreclosed from recovery.

CA(15)[] **(15)**

Monopolies and Restraints of Trade § 5—Antitrust Injury—Anticompetitive Effect.

The antitrust injury requirement means that in order to prevail on its antitrust claims, the plaintiff must show that its loss stems from a competition-reducing aspect or effect of the defendant's behavior.

CA(16)[] **(16)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Film Distribution—Circuit Dealing—Geographic Market—Discovery.

In a case in which plaintiff, the owner of a 10-screen movie theater, filed an antitrust action against defendants, two larger movie theater companies, alleging, inter alia, claims for restraint of trade in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the trial **[*1370]** court abused its discretion in granting defendants' requests to limit discovery to the geographic area that defendants claimed was the geographic market in which the parties' theaters competed. The essence of plaintiff's claim was that the lead defendant had used its power outside the geographic market to influence competition within the geographic market. In order to gather evidence to support its circuit dealing claim, plaintiff had to be permitted to engage in discovery concerning the lead defendant's theater circuit and film licensing practices outside the market in which the parties' theaters competed. Plaintiff could not gather evidence in support of its claim if it was limited to collecting evidence within the geographic market. The trial court's imposition of such a geographical limitation on plaintiff's discovery was consequently erroneous.

[Cal. Forms of Pleading and Practice (2011) ch. 565, Unfair Competition, § 565.70; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 555, 598.]

CA(17)[] **(17)**

Monopolies and Restraints of Trade § 4—Film Distribution—Circuit Dealing.

United States Supreme Court cases describe circuit dealing as, for example, a theater circuit's use of monopoly power in certain locations to acquire exclusive privileges in a city where the circuit has competitors. The Supreme Court has condemned as unlawful circuit dealing certain master agreements that cover exhibition in two or more theatres in a particular circuit or covering the exhibition of features in a number of theatres. The sole California case concerning circuit dealing describes it in similar terms and on the basis of the same authorities. Circuit dealing is prohibited because it enables a powerful circuit to gain advantages for itself and impose restrictions on its competitors which otherwise would not have been possible. It is both an abuse of monopoly power and a means for stifling competition by diverting the cream of the business to the large operators.

CA(18)[] **(18)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Combination—Two or More Persons.

The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) contains no provision parallel to the Sherman Act's prohibition against monopolization (*15 U.S.C. § 2*) and the Cartwright Act applies only to a “combination” involving two or more persons (*Bus. & Prof. Code, § 16720*) not to unilateral conduct.

CA(19)[] **(19)**

Monopolies and Restraints of Trade § 4—Sherman Act—Film Distribution—Licensing Agreements.

Licensing agreements covering two or more theaters in a circuit are unlawful under the Sherman Act **[*1371]** because they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators.

Counsel: Perkins Coie, Thomas L. Boeder, Jessica E. Eiting and Melora M. Garrison for Plaintiff and Appellant.

Blecher & Collins, Maxwell M. Blecher, David W. Kesselman and Theo G. Arbucci for Defendants and Respondents.

Judges: Opinion by Rothschild, J., with Mallano, P. J., and Johnson, J., concurring.

Opinion by: Rothschild

Opinion

[522] ROTHSCHILD, J.**—This is an antitrust action concerning the distribution and exhibition of motion pictures. Flagship Theatres of Palm Desert, LLC (Flagship), owns a movie theater called the “Cinemas Palme d'Or” (the Palme) with 10 screens. Flagship owns no other theaters. Century Theatres, Inc. (Century), owns a nearby movie theater called the “Century 15 at the River” (the River) with 15 screens. Century owns a large theater circuit of over 1,000 screens, and in 2006 Century was acquired by Cinemark USA, Inc. (Cinemark), resulting in a combined circuit of several thousand screens. Many of Century's theaters are in noncompetitive markets.

Flagship filed this antitrust action against Century and two film distributors, alleging that Century has used the power deriving **[***2]** from both the size of its theater circuit and its many theaters in noncompetitive **[**523]** markets to undermine the competitive process through which theaters bid for and obtain licenses to exhibit first-run films. According to Flagship, under previous ownership the River and the Palme obtained roughly equal numbers of first-run films, but under Century the River now obtains licenses for far more first-run films than the Palme, the few that are left to the Palme are commercially inferior, and the imbalance is not based on the relative merits of the Palme's and the River's bids. On the contrary, according to Flagship, superior bids by the Palme are often rejected in favor of inferior bids by the River as a result of Century's abuse of the power of its circuit.

After Flagship voluntarily dismissed the distributors and amended its pleadings to add Cinemark as a defendant, Century and Cinemark (collectively defendants) moved for summary judgment. They argued, inter alia, that **[*1372]** Flagship could not show antitrust injury and could not show that Century had market power in the market in which the Palme and the River compete. The trial court agreed and entered judgment against Flagship. We reverse.

BACKGROUND

Flagship **[***3]** operates the Palme, a 10-screen movie theater in Palm Desert, California. Century operates the River, a 15-screen movie theater in the neighboring community of Rancho Mirage, California. The Palme and the River are located less than two miles apart on Highway 111, a major thoroughfare running through the Coachella Valley. Previously, when the Palme and the River were being operated by Flagship's and Century's predecessors, film distributors granted “clearances” to the River and the Palme with respect to each other, meaning that a distributor licensing a film to the River would agree not to license the same film to play at the Palme at the same time, and vice versa.

Century began operating the River in approximately July 2002 and continued its predecessor's practice of requesting clearances for the River with respect to the Palme. Before being acquired by Cinemark in 2006, Century operated movie theaters at 80 locations across 12 states, featuring a total of more than 1,000 screens.[1] Flagship introduced evidence that as of 2006, only approximately 12 to 14 of Century's 80 theaters were in competitive markets.

Flagship's only theater is the Palme, which Flagship acquired in 2003. Two of Flagship's founders previously formed another business entity, Flagship Theatre Corporation, which operates only one theater, located in a noncompetitive market.

In July 2006, Flagship filed the instant lawsuit against Century and two film distributors. The complaint alleged claims for restraint of trade in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*),[2] unfair competition in violation of the unfair competition law (*§ 17200 et seq.*; hereafter UCL), and intentional interference with prospective economic advantage. Flagship later filed a first amended complaint and a second amended complaint, alleging similar claims and adding Cinemark as a defendant. Flagship also eventually dismissed the distributor defendants.

[524]** Flagship alleged that before Century began to operate the River, film distributors licensed roughly equal numbers of first-run films to the River **[***5]** and **[*1373]** the Palme, with the Palme “generally receiving the larger share.” After Century began operating the River, however, distributors licensed roughly three times as many first-run films to the River as to the Palme, and the films licensed to the Palme were generally “inferior films” that were expected to “generate far lower box office revenue than those licensed to Century.” Flagship alleged that Century obtained such favorable treatment for the River, to the detriment of the Palme, by using the bargaining power deriving from both the size of Century's circuit and its operation of numerous theaters in noncompetitive markets. Flagship alleged that Century's conduct constituted unlawful “circuit dealing,” which violates the long-standing ***antitrust law*** requirement that “films be licensed on a theater by theater, film by film basis.”

In 2008, defendants moved for summary judgment. Defendants argued that Flagship's antitrust claim under the Cartwright Act failed because (1) the clearances Century obtained for the River against the Palme were lawful, (2) Century did not have sufficient market power in the geographic market in which the Palme and the River compete—which defendants contended **[***6]** was the entire Coachella Valley?to cause competitive harm in that market, and (3) Flagship could not demonstrate antitrust injury. Defendants further argued that because the Cartwright Act claim failed, Flagship's UCL and intentional interference with prospective economic advantage claims failed as well.

Flagship filed opposition and, in the alternative, requested a continuance in order to complete outstanding discovery. Flagship argued that defendants' motion was based on “the false assumption that this is just a case about clearances” and contended to the contrary that the case is based on Century's methods of negotiating with and licensing films from distributors, which deprived the Palme “of the opportunity to fairly compete to license any but a handful of first-run films.”

The trial court granted defendants' motion and entered judgment against Flagship. The court agreed with defendants that Flagship failed to create a disputed issue of material fact regarding (1) antitrust injury, (2) the contention that the geographic market in which the Palme and the River compete is the entire Coachella Valley, and (3) the contention that Century lacks market power in that market. Flagship timely **[***7]** appealed.

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[1] Flagship introduced evidence that as of June 2008, the resulting Cinemark theater **[***4]** circuit operated theaters with 3,483 screens at 270 locations and was the third largest theater circuit in the United States.

[2] All subsequent statutory references are to the Business and Professions Code unless otherwise indicated.

STANDARD OF REVIEW

HN1[] We review the trial court's ruling on a motion for summary judgment de novo. (*Buss v. Superior Court (1997) 16 Cal.4th 35, 60 [65 Cal. Rptr. 2d 366, 939 P.2d 766]*.)
[*1374]

DISCUSSION

I. Summary of Principles of ***Antitrust Law*** and Overview of Claims

CA(1)[] **(1)** The Cartwright Act states that *HN2*[] "[e]xcept as provided in this chapter, every trust is unlawful, against public policy and void." (*§ 16726*.) *HN3*[] *Section 16720* defines the term "trust" as "a combination of capital, skill or acts by two or more persons" for certain enumerated anticompetitive purposes, including "[t]o create or carry out restrictions in trade or commerce." (*§ 16720, subd. (a)*.) That prohibition is analogous to the catchall language of section 1 of the Sherman Act (*15 U.S.C. § 1*), which prohibits "[e]very contract, combination … , or conspiracy, in restraint of trade or commerce." (See *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 838 [107 Cal. Rptr. 2d 841, 24 P.3d 493]* (hereafter **[**525]** *Aguilar*).) Thus, although the Cartwright Act was not patterned after the Sherman Act (*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147, 1164 [252 Cal. Rptr. 221, 762 P.2d 385]*, superseded by statute on other grounds as stated in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 570 [71 Cal. Rptr. 2d 731, 950 P.2d 1086]*), **[***8]** federal case law interpreting the Sherman Act is often a useful aid in interpreting the Cartwright Act (*SC Manufactured Homes, Inc. v. Liebert (2008) 162 Cal.App.4th 68, 84 [76 Cal. Rptr. 3d 73]*).

HN4[] *CA(2)*[] **(2)** Under both Cartwright Act and Sherman Act case law, some restraints of trade are treated as per se unlawful, while others are analyzed under the "rule of reason." "In general, only unreasonable restraints of trade are prohibited. [Citation.] However, 'there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' [Citation.] Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. [Citations.]" (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 930–931 [130 Cal. Rptr. 1, 549 P.2d 833]* (hereafter *Marin County*).) Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects. (See, e.g., *Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672, 1680–1681 [60 Cal. Rptr. 2d 195]*.)[3]
[*1375]

CA(3)[] **(3)** Because the parties' characterizations of Flagship's claims differ considerably, we briefly summarize them here before turning to analysis of the parties' arguments on the merits. According to defendants, Flagship's claims are essentially challenges to Century's practice of obtaining clearances from film distributors. ("[Flagship] is really complaining about Century's clearance requests.") *HN5*[] A clearance is an exclusive right that a film distributor grants to a theater in connection with the licensing of a film. It prohibits the distributor from licensing the film for exhibition at certain other theaters, either identified by name or located within a specified geographic region, while the film is being shown at the theater that obtained the clearance. (See, e.g., *Soffer v. National Amusements Inc. (D.Conn., Jan. 10, 1996, Civ. No. 3:91CV472 (AVC)) 1996 U.S.Dist. Lexis 19751, p. *6*; *Orson, Inc. v. Miramax Film Corp. (E.D.Pa. 1994) 862 F.Supp. 1378, 1386, fn. 10*.) **[***10]** Federal case law applying the Sherman Act has treated clearances as vertical nonprice restraints that are evaluated under the rule of reason.[4] (See *Theee Movies*

[3] Flagship has also alleged **[***9]** a claim under the UCL. The UCL does not proscribe specific practices. Rather, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." (*§ 17200*.)

[4] Vertical restraints are restraints embodied in agreements between parties at different levels of the distribution chain (for example, between a wholesaler and a retailer).

of Tarzana v. Pacific Theatres, Inc. (9th Cir. 1987) 828 F.2d 1395, 1398 (hereafter *Theee Movies*).) There are no published California cases evaluating the legality of clearances under the Cartwright Act.

CA(4)[] **(4)** According to Flagship, this is a "circuit dealing" case, not a case challenging clearances in the absence of circuit dealing. ***HN6***[] The case law contains no general definition of prohibited circuit dealing, but it is generally characterized as "the pooling of the **[**526]** purchasing power of an entire circuit in bidding for films," which undermines the competitive process of bidding for film licenses "theatre by theatre." (*United States v. Paramount Pictures (1948) 334 U.S. 131, 154 [92 L. Ed. 1260, 68 S. Ct. 915]* (hereafter *Paramount Pictures*).)

HN7[] ***CA(5)***[] **(5)** One type of prohibited circuit dealing is a form of monopoly leveraging, that is, "a monopolist's use of power in one market to gain an advantage in a related **[***11]** market." (Sullivan & Grimes, The Law of Antitrust: An Integrated Handbook (2000) § 3.4b1, p. 106.) For example, one of the United States Supreme Court cases concerning circuit dealing addressed certain "master agreements" between distributors and movie theater circuits that "lumped together towns in which the [circuits] had no competition and towns in which there were competing theaters." (*United States v. Griffith (1948) 334 U.S. 100, 102–103 [92 L. Ed. 1236, 68 S. Ct. 941]* (hereafter *Griffith*).) The court explained the anticompetitive character of this kind of circuit dealing as follows: "A [circuit] with a monopoly of theatres in any one town commands the entrance for all films into that area. If [the circuit] uses that strategic position to acquire exclusive privileges in a city where [it] has competitors, [it] is employing [its] monopoly power as a trade weapon against [the **[*1376]** circuit's] competitors. It may be a feeble, ineffective weapon where [the circuit] has only one closed or monopoly town. But as those towns increase in number throughout a region, [the circuit's] monopoly power in them may be used with crushing effect on competitors in other places. [The circuit] need not be as crass as the exhibitors in *United States v. Crescent Amusement Co. [(1944) 323 U.S. 173 [89 L. Ed. 160, 65 S. Ct. 254]*] **[***12]** in order to make [its] monopoly power effective in [its] competitive situations. Though [the circuit] makes no threat to withhold the business of [its] closed or monopoly towns unless the distributors give [it] the exclusive film rights in the towns where [it] has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for … competitive as well as … closed towns, [the circuit] is using monopoly power to expand [its] empire. … [¶] The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations." (*Griffith, supra, 334 U.S. at pp. 107–108*.)

CA(6)[] **(6)** Another United States Supreme Court case, however, discerned ***HN8***[] a second and independent basis on which a film licensing agreement that covers multiple theaters within a circuit (i.e., a "circuit deal") can constitute an antitrust violation regardless of whether it involves monopoly leveraging. (*Paramount Pictures, supra, 334 U.S. at pp. 153–155*.) The case discussed certain "formula deals"—namely, "licensing agreement[s] with a circuit of theatres in which the license **[***13]** fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross"—and "master agreements"—namely, film licensing agreements "that cover exhibition in two or more theatres in a particular circuit." (*Id. at pp. 153–154*.) The court explained that "[t]he formula deals and master agreements are unlawful restraints of trade in two respects." (*Id. at p. 154*.) First, the combination of "closed towns" with "competitive situations" constituted "a misuse of monopoly power" (i.e., unlawful monopoly leveraging). (*Id. at pp. 155, 154*.) Second, licensing agreements covering multiple theaters within a particular circuit are unlawful because "they eliminate the possibility of bidding for films theatre by theatre. In that way **[**527]** they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators." (*Id. at p. 154*.)

Circuit dealing in either of these forms has been held per se unlawful under the Sherman Act (*Paramount Pictures, supra, 334 U.S. at pp. 153–155*; **[***14]** *Griffith, supra, 334 U.S. at pp. 106–109*), but the most recent United States **[*1377]** Supreme Court cases to so hold were decided in 1948.[5] No California Supreme Court case addresses the

[5] *Griffith* acknowledged that "[l]arge-scale buying is not, of course, unlawful *per se*" and "may yield price or other lawful advantages to the buyer." (*Griffith, supra, 334 U.S. at p. 108*.) But the opinion went on to state that large-scale buying "may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor … may it be used to stifle

legality of circuit dealing under the Cartwright Act. The sole California Court of Appeal case on the issue is Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal.App.3d 687 [248 Cal. Rptr. 189] (hereafter *Redwood Theatres*).[6] It acknowledged that the United States Supreme Court held circuit dealing per se unlawful under the Sherman Act but also recognized that both federal ***antitrust law*** and the structure of the film industry have undergone considerable development since the late 1940's. (Redwood Theatres, at pp. 697–698.) *Redwood Theatres* also recognized that the federal case law distinguishes two grounds for finding circuit dealing illegal, one that involves "misuse of monopoly power" and another that would apply "even where all of the markets within a circuit were competitive." (*Id. at p. 696*.) The court then observed that "[i]n the present case, the issue of abuse of monopoly power is no longer raised." (*Ibid.*) The court proceeded to survey ***antitrust law*** in several related areas, including boycotts and vertical restraints, **[***15]** and ultimately concluded that the plaintiff's circuit dealing claim (which was not a monopoly leveraging claim) was subject to rule of reason analysis under the Cartwright Act. (Redwood Theatres, at p. 713.)

II. Antitrust Injury

Our analysis necessarily begins with the grounds on which the trial court granted defendants' motion for summary judgment.[7] The trial court agreed with defendants' argument that Flagship could not show antitrust injury. On appeal, **[**528]** Flagship argues that the trial court erred, and we agree. Defendants' **[*1378]** argument is based on a legally erroneous conception of the antitrust injury requirement, so defendants failed to carry their initial burden on the issue.

The antitrust injury requirement **[***17]** originates in a case decided by the United States Supreme Court under federal ***antitrust law***, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977) 429 U.S. 477 [50 L. Ed. 2d 701, 97 S. Ct. 690] (hereafter *Brunswick*). In that case, the plaintiff bowling alleys challenged the defendant corporation's acquisition of several competitor bowling alleys that otherwise would have gone out of business. The plaintiffs' alleged damages were the profits they had lost by being forced to compete with the acquired bowling alleys. (*Id. at pp. 480–483*.) Thus, the issue presented for review was "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying [the plaintiffs] an anticipated increase in market shares." (*Id. at p. 484*.)

CA(7)[] **(7)** The Supreme Court concluded that antitrust damages are not available under those circumstances. The court described the plaintiffs' case as complaining that by acquiring the failing bowling alleys, the defendant "preserved competition, thereby depriving [the plaintiffs] of the benefits of increased concentration." (*Brunswick, supra, 429 U.S. at p. 488*.) Thus, the damages the plaintiffs sought were "designed to provide them with the profits **[***18]** they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*,' [citation]. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." (*Ibid.*) Accordingly, the court held that ***HN10***[] for the plaintiffs to recover damages for antitrust violations, they "must prove *antitrust* injury, which is to say injury of the type the antitrust laws

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competition by denying competitors less favorably situated access to the market." (*Ibid.*) Given the court's per se condemnation of circuit dealing on both the monopoly leveraging theory and the elimination of theater-by-theater bidding theory, we conclude that the court's recognition that not *all* large-scale buying is unlawful per se was not meant to imply that circuit dealing in particular is subject to rule of reason analysis.

[6] Our search of all federal and state court case law found only a handful of cases even potentially touching on the issue. *Redwood Theatres* was the only state court case, and the remaining post-1940's **[***16]** cases contained no useful discussion of the issue.

[7] ***HN9***[] In general, an appellate court reviews only the trial court's ultimate decision, not the reasoning on which it was based, and we may affirm the decision on any valid theory. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co. (1997) 59 Cal.App.4th 6, 15–16 [68 Cal. Rptr. 2d 837]*.) In an appeal from a summary judgment, however, we are statutorily prohibited from affirming the judgment on a ground not relied on by the trial court unless we first afford the parties an opportunity for supplemental briefing on the issue. (*Code Civ. Proc., § 437c, subd. (m)(2)*.) Our analysis accordingly focuses at the outset on the trial court's grounds for its decision.

were intended to prevent and that flows from that which makes defendants' acts unlawful." (*Id. at p. 489*; see generally 2A Areeda et al., ***Antitrust Law*** (3d ed. 2007) ¶ 337, pp. 82–96.)

CA(8)[] **(8)** *Brunswick* was an antimerger case decided under the Clayton Act (*15 U.S.C. § 12 et seq.*), but subsequent federal case law makes clear that the antitrust injury requirement also applies to other federal antitrust violations. (See, e.g., *MetroNet Services Corp. v. Qwest Corp. (9th Cir. 2004) 383 F.3d 1124, 1130*.) ***HN11***[] California case law holds that the requirement applies to Cartwright Act claims as well. (See, e.g., *Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 548 [78 Cal. Rptr. 2d 133]*.)

CA(9)[] **(9)** In addition, ***HN12***[] the antitrust injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases governed by the rule of reason. In *Atlantic Richfield Co. v. USA Petroleum Co. (1990) 495 U.S. 328 [109 L. Ed. 2d 333, 110 S. Ct. 1884]* **[***19]** (hereafter *Atlantic Richfield*), the United States Supreme Court explained the point as follows: "Actions *per se* **[*1379]** unlawful under the antitrust laws may nonetheless have *some* procompetitive effects, and private parties might suffer losses therefrom. [Citations.] Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of **[**529]** reason."[8] (*495 U.S. at pp. 342–344*, fn. omitted.)

HN13[] ***CA(10)***[] **(10)** The antitrust injury requirement does *not*, however, require an antitrust plaintiff to show actual harm to competition. The United States Supreme Court made the point explicit in *Brunswick*, the very case in which the antitrust injury requirement originated. As the court stated, the antitrust injury requirement does not mean that an antitrust plaintiff "must prove an actual lessening of competition **[***20]** in order to recover." (*Brunswick, supra, 429 U.S. at p. 489, fn. 14*.)

CA(11)[] **(11)** That point was also a central holding of *Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207 [3 L. Ed. 2d 741, 79 S. Ct. 705]* (hereafter *Klor's*). In that case, the plaintiff household appliance retailer alleged that a major department store chain had induced 10 appliance manufacturers and their distributors not to sell to the plaintiff, or to sell to it "only at discriminatory prices and highly unfavorable terms." (*Id. at p. 209*.) The defendants submitted evidence that "there were hundreds of other household appliance retailers, some within a few blocks of [the plaintiff] who sold many competing brands of appliances, including those the defendants refused to sell to [the plaintiff]." (*Id. at pp. 209–210*.) On that basis, the defendants argued that the plaintiff could not recover, because nothing they were alleged to have done could have injured competition—the market was competitive and would remain so even if the plaintiff were entirely eliminated from it. The Supreme Court noted that the defense position would mean "that unless opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert **[***21]** to deprive a single merchant, like [the owner of the plaintiff corporation], of the goods he needs to compete effectively." (*Id. at p. 210*.) The court rejected the defense position, holding that ***HN14***[] conduct that is otherwise forbidden by the antitrust laws "is not to be tolerated merely because the victim is just one merchant whose business is so small that his **[*1380]** destruction makes little difference to the economy." (*Id. at p. 213*.) The court further observed that "[m]onopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. ***CA(12)***[] **(12)** In recognition of this fact ***HN15***[] the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly," ' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' [Citation.]" (*Id. at pp. 213–214*.)

[8] We note that some lower courts have not used the term "antitrust injury" consistently, sometimes employing it "comprehensively to include injury-in-fact caused by the defendant" or the "impact on competition" of the defendant's alleged conduct. (2A Areeda et al., ***Antitrust Law***, *supra*, ¶ 337a, p. 83; see generally *id.*, pp. 83–84 & fns. 3, 4 [collecting cases].) We, however, "use that term in the precisely focused sense of *Brunswick*." (*Id.*, pp. 83–84.)

CA(13)[] **(13)** *Klor's* has never been overruled on that point (or any other), and the California Supreme Court has applied the *Klor's* rule to claims under the Cartwright Act. *HN16*[] "An anticompetitive practice 'is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the **[***22]** economy.'" (*Marin County, supra, 16 Cal.3d at p. 935*, quoting *Klor's, supra, 359 U.S. at p. 213*.)

CA(14)[] **(14)** In sum, *HN17*[] the antitrust injury requirement means that an antitrust plaintiff **[**530]** must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct, as opposed to being injured by the conduct's neutral or even procompetitive aspects (as in *Brunswick*). But to make that showing, the plaintiff need not show that the market has actually become less competitive than it would have been without the defendant's conduct—if the market contains numerous participants and is consequently competitive, and the plaintiff is a relatively small player whose injury or elimination would not materially affect market conditions, then the plaintiff is not thereby foreclosed from recovery.[9]

Both in the trial court and on appeal, defendants' antitrust injury argument has relied on the reasoning that was rejected by the United States Supreme Court in *Klor's* and by the California Supreme Court in *Marin County*. According to defendants, Flagship must show that Century's conduct actually rendered the relevant market uncompetitive (or less competitive), which might be evidenced by higher prices or lower supply. Thus, according to defendants, if Century's conduct has not yet "had an anticompetitive effect on consumers," then the market in which the Palme and the River compete must still be at least as competitive as it would have been without Century's conduct, so Flagship cannot show antitrust injury.
[*1381]

The argument fails because, as a matter of law, Flagship may be able to prevail without showing that the market has become less competitive. No other conclusion is possible under *Klor's* and *Marin County*.

CA(15)[] **(15)** Rather, *HN18*[] the antitrust injury requirement means that in order to prevail on its antitrust claims, Flagship must show that its "loss stems from a competition-*reducing* **[***24]** aspect or effect of the defendant's behavior." (*Atlantic Richfield, supra, 495 U.S. at p. 344*.) Defendants have not introduced any evidence (or even argued) that Flagship does not have, or cannot reasonably obtain, sufficient evidence to make that showing, so defendants did not carry their initial burden in moving for summary judgment on this issue. (*Aguilar, supra, 25 Cal.4th at pp. 854–855*.)

For all of the foregoing reasons, we conclude that the trial court erred by granting summary judgment in favor of defendants on the basis of the antitrust injury requirement.

III. Clearances and Market Power

As noted earlier, a clearance is an exclusive right that a film distributor grants to a theater in connection with the licensing of a film, prohibiting the distributor from licensing the film for exhibition at certain other theaters while the film is being shown at the theater that obtained the clearance. (See pt. I., *ante.*) In their motion for summary judgment, defendants stated that the Palme and the River "have had a long history of clearances under prior ownership" and that Century "has requested, and continues to request, clearances for [the River]." Defendants asserted that Flagship's **[***25]** lawsuit "is really complaining about Century's clearance requests," and defendants argued that Century's clearances are lawful under the standards articulated in anti **[**531]** trust case law. The trial court noted the argument but did not rule on its merits, instead granting summary judgment on the basis of defendants' arguments concerning antitrust injury and market definition. Defendants renew the argument

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[9] To prove an antitrust claim subject to the rule of reason, however, a plaintiff must prove that the anticompetitive effects of the defendant's conduct outweigh its procompetitive effects, which might require the plaintiff to prove that the market has actually become less competitive. That is irrelevant to our point here, which is that the antitrust injury requirement, which applies to cases under the **[***23]** rule of reason and the per se rule alike, does not require the plaintiff to show that the market has become less competitive.

concerning clearances in various forms on appeal, contending, for example, that the River's clearances are vertical nonprice restraints with procompetitive effects that render the clearances lawful under the rule of reason.

We have reviewed Flagship's original, first amended, and second amended complaints, as well as its opposition to defendants' summary judgment motion and its briefs on appeal, and we conclude that Flagship has never contended that defendants' clearances are unlawful independent of defendants' alleged circuit dealing. We therefore do not discuss defendants' argument except to note that clearances are vertical nonprice restraints governed by the rule of reason. (*Continental T. V., Inc. v. GTE Sylvania Inc. (1977* ***[*1382]*** *) 433 U.S. 36, 57–59 [53 L. Ed. 2d 568, 97 S. Ct. 2549]* [vertical nonprice restraints are governed **[***26]** by the rule of reason]; *Theee Movies, supra, 828 F.2d at p. 1398* [clearances are vertical nonprice restraints governed by the rule of reason].)

For the same reasons, we do not discuss defendants' arguments concerning market power and market definition. According to defendants, in order to show that the River's clearances with respect to the Palme are unlawful under the rule of reason, Flagship must show that defendants have market power in the market in which the Palme and the River compete. Defendants' contention that Flagship must show that defendants have market power in the market in which the Palme and the River compete—and that Flagship accordingly must define the boundaries of that market—is thus based on defendants' contention that Flagship's lawsuit is merely a challenge to defendants' clearances. Defendants have not argued that such a showing of market power is required in the context of a circuit dealing case (as opposed to a clearance case), so we do not discuss the issue either.

IV. Circuit Dealing and Related Discovery

Flagship's original, first amended, and second amended complaints all alleged that Century has engaged in circuit dealing in **[***27]** violation of the Cartwright Act. Defendants' memorandum of points and authorities in support of their motion for summary judgment devoted a single paragraph to the issue, asserting that Flagship "has proffered no evidence of any kind to support" the circuit dealing claim and citing evidence purporting to show that the two dismissed defendant distributors have licensed their films to the River rather than the Palme because they were convinced the River "was the higher grossing theater."

The trial court recognized that defendants' motion "only briefly discuss[ed]" circuit dealing, even though Flagship had "from the initiation of the instant action, both in its papers and before the court, described this as a 'circuit dealing case.' " The court went on to conclude that defendants' antitrust injury argument was fatal to Flagship's circuit dealing claim. That conclusion was erroneous because defendants' antitrust injury argument was legally unsound, as we have already explained. (See pt. II., *ante.*) But the trial court also ruled that Flagship failed to introduce sufficient evidence to create any disputed issues of material fact concerning the circuit dealing claim.
[*1383]

On appeal, Flagship argues **[***28]** that the court's ruling on this issue must be overturned **[**532]** as well because the court abused its discretion by making discovery rulings that impermissibly curtailed Flagship's efforts to gather evidence of circuit dealing. We agree.

HN19[] "Appellate courts must keep liberal policies of discovery statutes in mind when reviewing decisions denying or granting discovery. [Citation.] Absent a showing that substantial interests will be impaired by allowing discovery, liberal policies of discovery rules will generally counsel against overturning a trial court's decision *granting* discovery [citation] and militate in favor of overturning a decision to *deny* discovery. [Citation.]" (*Forthmann v. Boyer (2002) 97 Cal.App.4th 977, 987 [118 Cal. Rptr. 2d 715]*.) Discovery rulings are reviewed for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 733 [101 Cal. Rptr. 3d 758, 219 P.3d 736]*.)

The trial court granted defendants' requests to limit discovery to the geographic area of the Coachella Valley, which defendants claim is the geographic market in which the Palme and the River compete. Because of the nature of Flagship's circuit dealing claim, those rulings constituted error.

CA(16)[] **(16)** Flagship's circuit dealing claim alleges that (1) Century's **[***29]** theater circuit outside of the market in which the Palme and the River compete is of such a size and nature as to give Century considerable power, and (2) Century has used that power to Flagship's detriment in the market in which the Palme and the River compete. Thus, in order to gather evidence to support its circuit dealing claim, Flagship must be permitted to engage in discovery concerning Century's theater circuit and film licensing practices outside the market in which the Palme and the River compete. The essence of Flagship's claim is that Century has used its power outside the Palme/River market to influence competition within the Palme/River market. Flagship cannot gather evidence in support of that claim if it is limited to collecting evidence within the Palme/River market. The trial court's imposition of such a geographical limitation on Flagship's discovery was consequently erroneous.

In so holding, we do not tie the trial court's hands with respect to the management of discovery in this action. On remand, if the parties seek to limit or structure discovery in a particular manner—such as by conducting it in phases or stages—the court may grant any such requests as are reasonable. **[***30]** We hold only that the court's limitation of discovery to the Coachella Valley was too narrow.

On appeal, defendants' arguments in support of the trial court's discovery rulings are based on defendants' claim that Flagship could not prevail on any **[*1384]** of its claims without first showing that "Century possessed sufficient market power in a properly defined geographic market [(namely, the market in which the Palme and the River compete)] to have caused actual anticompetitive effect—injury to consumers—in that market." Thus, according to defendants, the limitations on discovery were proper because the trial court was merely streamlining discovery "to allow for potentially case dispositive issues to be litigated at an early stage." Defendants' arguments fail for the reasons explained in parts II. and III., *ante*.

Because we conclude that the trial court's ruling on the circuit dealing claim must be reversed on the basis of the court's erroneous discovery rulings, we need not decide whether defendants carried their initial burden of either conclusively negating an element of the claim or showing that Flagship lacked and could not obtain evidence of prohibited circuit **[**533]** dealing.[10] But because it will be **[***31]** relevant to the proceedings on remand, we wish to clarify one point of law raised by defendants' arguments. On appeal, defendants contend that circuit deals are agreements " 'whereby exhibitors use their monopoly power (or near monopoly power) in one or more areas to negotiate blanket exclusive agreements with distributors covering *all of their* theaters, including areas where they may have competition.' " (Quoting *Reading Internat. v. Oaktree Capital Management LLC (S.D.N.Y. 2003) 317 F.Supp.2d 301, 318, fn. 9*, italics added by defendants.) On that basis, defendants argue that without evidence of at least one blanket licensing agreement that includes *all* of Century's theaters, Flagship cannot prove prohibited circuit dealing.

CA(17)[] **(17)** We disagree. ***HN20***[] The United States Supreme Court cases describe circuit dealing as, for example, a theater circuit's use of monopoly power in certain locations "to acquire exclusive privileges in a city where [the circuit] has competitors." (*Griffith, supra, 334 U.S. at p. 107*.) The court also condemned as unlawful circuit dealing certain "master agreements that cover exhibition in two or more theatres in a particular circuit" or "covering the exhibition of features in a number of theatres." (*Paramount Pictures, supra, 334 U.S. at p. 154*.) The sole California case concerning circuit dealing describes it in similar terms and on the basis of the same authorities. (*Redwood Theatres, supra, 200 Cal.App.3d at p. 695* [a prohibited master agreement "covered exhibition in several theatres in a particular circuit"].) Nothing in the discussion in any of those cases suggests that prohibited circuit dealing is **[*1385]** limited to agreements that cover *all* of the theaters in a circuit. Rather, they suggest that it is not so limited.

The case law explains that circuit dealing is prohibited because it enables a powerful circuit to gain "advantages for itself and impose[] **[***33]** restrictions on its competitors which otherwise would not have been possible." (*Schine Theatres v. United States (1948) 334 U.S. 110, 114 [92 L.Ed. 1245, 68 S.Ct. 947]*.) It is both an abuse of monopoly power and a means for "'stifling competition'" by "'diverting the cream of the business to the large operators.'"

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[10] The trial court's ruling on defendants' summary judgment motion does not state that defendants carried their initial burden on those points. Rather, after rejecting the circuit dealing claim on the ground that Flagship failed to show antitrust injury, the court stated that Flagship had presented "no evidence whatsoever to raise a triable issue of fact supportive of a true circuit dealing issue in this case." But the court did not first assess whether defendants had **[***32]** carried their initial burden on that issue.

(*Redwood Theatres, supra, 200 Cal.App.3d at pp. 695–696*, quoting *Paramount Pictures, supra, 334 U.S. at p. 154*.) Given those reasons for the prohibition against circuit dealing, defendants' proposed rule—which would make a blanket licensing agreement lawful as long as it omitted at least one of the circuit's theaters—makes no sense. When a dominant theater circuit uses its overall size or its monopoly power in certain locations (or both) to obtain more favorable film licensing treatment in competitive locations than it otherwise could have obtained, the circuit's conduct may have the same effects regardless of whether the resulting licensing agreements cover all of the theaters in the circuit or only some of them. For example, a licensing agreement for a "commercial" film might exclude all of the "art house" theaters in the circuit, but the agreement might still be anticompetitive and a prohibited circuit **[***34]** deal.

For the foregoing reasons, we conclude that the summary judgment as to Flagship's **[**534]** circuit dealing claim must be reversed because the trial court abused its discretion by limiting discovery to the Coachella Valley. We also reject defendants' contention that unlawful circuit dealing is limited to licensing agreements that cover all of the theaters in a circuit.

V. The Rule of Reason, the Per Se Rule, and Circuit Dealing

Flagship contends that circuit dealing is per se unlawful under the Sherman Act, cites cases such as *Paramount Pictures, supra, 334 U.S. 131*, and *Griffith, supra, 334 U.S. 100*, and urges us to hold that circuit dealing is per se unlawful under the Cartwright Act as well. Defendants contend that "[u]nder California law, circuit dealing agreements are vertical, non-price restraints evaluated under the rule of reason," citing *Redwood Theatres, supra, 200 Cal.App.3d 687*.

[*1386]

As our **[***35]** analysis in the foregoing parts of this opinion demonstrates, in order to decide this appeal we need not determine whether circuit dealing is subject to the per se rule or the rule of reason under the Cartwright Act. Regardless of which rule applies, the trial court erred when it granted defendants' motion for summary judgment.

It might nonetheless seem advisable for us to decide the issue so as to provide guidance to the trial court for the proceedings on remand. We conclude, however, that we cannot decide it, because it implicates too many unbriefed legal issues and too many factual and legal indeterminacies.

CA(18)[] **(18)** For example, as defendants themselves acknowledged in the trial court, Flagship appears to allege that Century has engaged in prohibited circuit dealing in the form of monopoly leveraging. (See generally pt. I., *ante* [describing this form of prohibited circuit dealing].) But, as defendants also mentioned, ***HN21***[] the Cartwright Act contains no provision parallel to the Sherman Act's prohibition against monopolization (*15 U.S.C. § 2*), and the Cartwright Act applies only to a "combination" involving "two or more persons" (*§ 16720*), not to *unilateral* conduct. (See *Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal.App.2d 672, 677–678 [73 Cal. Rptr. 494]*.) **[***36]** One question, then, is whether Century's agreements with distributors are sufficient to show a "combination" within the meaning of the Cartwright Act for purposes of a circuit-dealing-as-monopoly-leveraging claim. If so, then a separate question is whether such a claim is cognizable under the Cartwright Act. The parties have briefed none of these issues.

CA(19)[] **(19)** Putting aside the monopoly leveraging theory, other questions about Flagship's circuit dealing **[***37]** claim remain. *Paramount Pictures* held that ***HN22***[] licensing agreements covering two or more theaters in a circuit were unlawful under the Sherman Act because "they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators." (*Paramount Pictures, supra, 334 U.S. at p. 154*.) What are the elements of such a claim? Apart from defendants' erroneous contention that prohibited circuit deals are limited to licensing agreements that cover *all* of the theaters in a circuit, the parties have not briefed this issue either.

The type of circuit dealing claim at issue might influence the analysis of whether the per se rule or the rule of reason should apply, because it might make certain authorities or analogies more relevant than others. *Redwood Theatres*, for example, **[**535]** says nothing about whether circuit dealing as monopoly leveraging is subject to the per se rule rather than the rule of reason, **[*1387]** because "the issue of abuse of monopoly power" **[***38]** was not presented in that case. (*Redwood Theatres, supra, 200 Cal.App.3d at p. 696*.) And depending on the precise contours of Flagship's circuit dealing claim, group boycotts might (or might not) present a close analogy. (See *id. at pp. 699–703* [discussing the analogy between circuit dealing and boycotts]; see also *Nynex Corp. v. Discon, Inc. (1998) 525 U.S. 128, 135 [142 L. Ed. 2d 510, 119 S. Ct. 493]* [holding that the *Klor's* rule of per se illegality for boycotts applies only "to cases involving horizontal agreements among direct competitors"].)

In the absence of greater factual and legal development of Flagship's claims and the parties' arguments, we cannot say definitively whether Flagship's circuit dealing claim should be analyzed under the per se rule or the rule of reason. We accordingly do not decide the issue.

VI. The Sealed Briefs and the Sealed Portions of the Record

Early in this litigation, the trial court entered a stipulated protective order that authorized the parties to designate as "confidential" or "confidential: attorney's eyes only" any "document, thing, material, testimony or other information derived therefrom." (The distinction between "confidential" and "confidential: attorney's eyes only" is of **[***39]** no significance for our discussion, so we will henceforth use "confidential" to cover both.) The "confidential" designation meant that the information so designated "has not been made public and … concerns or relates to the confidential business, commercial, financial, or other similarly sensitive information concerning the parties' business operations and the subject matter of the present litigation." Any party making such a designation was thereby "certifying to the Court that there is a good faith basis in law and in fact for the designation, and that there exists an overriding interest in confidentiality that overcomes any right of public access to the record." The stipulated protective order further provided that if any confidential material was included in any papers to be filed with the court "for purposes of adjudication," the parties would follow the procedures of the *California Rules of Court, rules 2.550* and *2.551*, concerning sealed records.

The parties went on to designate various materials as confidential. The parties then used some of the confidential materials in connection with certain discovery motions and defendants' motion for summary judgment. In some instances **[***40]** the parties filed applications to file the relevant papers under seal, while in others the parties lodged the papers conditionally under seal and **[*1388]** moved for an order sealing them. The trial court ultimately entered an order sealing all of the records at issue.

On appeal, the parties moved in this court for an order sealing the portions of the clerk's transcript that contained documents sealed by the trial court, and also for orders sealing the unredacted versions of the parties' appellate briefs. We granted the motions.

As **[***41]** a result, the parties filed both redacted and unredacted versions of their appellate briefs, with the unredacted versions filed under seal. The superior court clerk likewise prepared both a 12-volume redacted clerk's transcript, a five-volume redacted supplemental clerk's transcript containing documents inadvertently omitted from the original 12-volume redacted clerk's transcript, and a four-volume unredacted supplemental clerk's transcript, filed under seal, containing the documents that had been both designated for inclusion **[**536]** in the record on appeal and sealed by the trial court. The redactions in the parties' briefs and the clerk's transcripts are substantial.

Upon reviewing the merits of the appeal, we concluded that there appeared to be no basis for sealing most, if not all, of the redacted text in the parties' briefs. Pursuant to *rule 2.551(h)(3) of the California Rules of Court*, we notified the parties that we proposed to unseal the unredacted versions of their briefs, as well as a passage in the unredacted supplemental clerk's transcript that we had identified as potentially necessary to our analysis. In our notice, we stated that any party wishing to oppose the unsealing **[***42]** of the records at issue should file opposition by a date we specified.

No party filed any opposition. That is, no party undertook to defend the sealing of even a single line of the pages of text that were redacted in the publicly accessible versions of their briefs.

By separate order, we are unsealing the unredacted versions of the parties' briefs. Because of the possibility that some portion of the records sealed by the trial court actually ought to remain sealed, we are not vacating the trial court's sealing orders. We do, however, direct the trial court to revisit the issue on remand. Pursuant to *rule 2.551(h)(3) of the California Rules of Court*, the trial court shall inform the parties that it proposes to unseal all of the records it previously sealed and that any party wishing to oppose the unsealing must file written opposition by a deadline to be specified by the trial court (subject, of course, to any requests for extensions of time, which the trial court may grant or deny in its discretion), and that parties may also file replies to the oppositions, also by deadlines specified by the trial court.

[*1389]

DISPOSITION

The judgment is reversed, the superior court is directed to enter a new **[***43]** and different order denying Century and Cinemark's motion for summary judgment, and the case is remanded for further proceedings consistent with this opinion. Appellant shall recover its costs of appeal.

Mallano, P. J., and Johnson, J., concurred.

A petition for a rehearing was denied September 29, 2011, and the opinion was modified to read as printed above. Respondents' petition for review by the Supreme Court was denied November 30, 2011, S197136.

End of Document

Agnew v. NCAA

United States District Court for the Southern District of Indiana, Indianapolis Division

September 1, 2011, Decided; September 1, 2011, Filed

1:11-cv-0293-JMS-MJD

Reporter
2011 U.S. Dist. LEXIS 98744 *; 2011 WL 3878200

JOSEPH AGNEW, et al., Plaintiffs, vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Subsequent History: Affirmed by *Agnew v. NCAA, 2012 U.S. App. LEXIS 12256 (7th Cir., June 18, 2012)*

Core Terms

amended complaint, bachelor's degree, motion to dismiss, allegations, athletic, relevant market, sports, institutions, geographic, antitrust, labor market, anti-competitive, student-athletes, athletics-based, discounts, football, tuition, procompetitive, bylaws, deliberately, discernible, enrolled, amateur, parties, argues, amend

Counsel: **[*1]** For JOSEPH AGNEW, on behalf of himself and all others similarly situated, PATRICK COURTNEY, Plaintiffs: Shana E. Scarlett, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Brad A. Catlin, Joseph N. Williams, William N. Riley, PRICE WAICUKAUSKI & RILEY, Indianapolis, IN; Jennifer L. Murray, Stuart McKinley Paynter, PRO HAC VICE, THE PAYNTER LAW FIRM PLLC, Washington, DC; Leonard W. Aragon, PRO HAC VICE, HAGEN BERMAN SOBOL SHAPIRO LLP, Phoenix, AZ; Robert B. Carey, HAGENS BERMAN SOBOL SHAPIRO LLP, Phoenix, AZ; Steve W. Berman, PRO HAC VICE, HAGENS BERMAN SOBOL SHAPIRO LLP, Seattle, WA.

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Judges: Hon. Jane Magnus-Stinson, United States District Judge.

Opinion by: Jane Magnus-Stinson

Opinion

ORDER ON NCAA'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Presently pending before the Court is Defendant National Collegiate **[*2]** Athletic Association's (the "NCAA") Motion to Dismiss. [Dkt. 91.] The NCAA argues that Plaintiffs Joseph Agnew and Patrick Courtney's Amended Complaint, [dkt. 84], must be dismissed because it fails to state a claim on which relief can be granted. *See Fed. R. Civ. Pro. 12(b)(6)*. For the following reasons, the Court agrees and dismisses Plaintiffs' Amended Complaint with prejudice.

I.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure impose a notice-pleading requirement for complaints. Thus, "[s]pecific facts are not necessary; the [plaintiff] need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quoting *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Nonetheless, "a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled." *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007)* (synthesizing *Erickson* and *Twombly*). In that circumstance, a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* is proper. A motion filed under that rule asks whether the complaint "contain[s] sufficient **[*3]** factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*). For the purposes of that rule, the Court will ignore legally conclusory allegations. *Id. at 1949-50* ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation."). The Court will, however, give the complaint the benefit of reasonable inferences from all non-conclusory allegations. *See id*.

II.

BACKGROUND

This case was initially filed in the United States District Court for the Northern District of California, [dkt. 1], but the NCAA filed a Motion to Transfer to this Court, [dkt. 22]. Contemporaneously with the transfer motion, the NCAA also filed a motion to dismiss. [Dkt. 24.] The parties fully briefed the motion to dismiss, but the Northern District of California declined to rule on that motion after it granted the NCAA's motion to transfer Plaintiffs' case to this Court. [Dkt. 64.]

After transfer, Plaintiffs and the NCAA agreed to a schedule for re-briefing **[*4]** the NCAA's motion to dismiss in light of Seventh Circuit law. [Dkts. 77; 81.] Plaintiffs filed an Amended Complaint in March 2011 with the NCAA's consent, [dkt. 81], and alleged a violation of *Section 1 of the Sherman Act*, [dkt. 84 at 20].[1]

Plaintiffs allege that this action "arises out of a blatant price-fixing agreement and restraint between member institutions of the NCAA." [Dkt. 84 at 1 ¶ 1.] Plaintiffs challenge two of the NCAA's bylaws: 1) the one-year scholarship limit, which prohibits NCAA member institutions from offering multi-year athletics-based discounts to student-athletes (NCAA Bylaw 15.3.3.1), and 2) the cap on the number of athletic-based discounts a school can offer per sport each year (*see, e.g*., NCAA Bylaw 15.5.4). [Dkt. 84 at 10 ¶¶ 28-29.]

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[1] Plaintiffs' Amended Complaint is styled as a class action and asserts certain "class allegations" in addition to the allegations specific to the named Plaintiffs. [*See, e.g*., dkt. 84 at 18-20.] To date, however, Plaintiffs have not filed a motion to certify a class. Because the Court ultimately finds that Plaintiffs' claims must be dismissed and no motion to certify a class is pending, "the suit must be dismissed because no one besides the plaintiff has a legally protected interest in the litigation." *Wiesmueller v. Kosobucki, 513 F.3d 784, 786 (7th Cir. 2008)*; *see also* *Sheridan v. Marathon Petroleum Co., LLC, 530 F.3d 590, 592, 596 (7th Cir. 2008)* (affirming trial court's dismissal of "entire suit" for failure to state a claim before motion to certify class was filed); *Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1085-86, 1094 (7th Cir. 1992)* (dismissing entire suit because named plaintiff failed to allege antitrust claim and no class **[*5]** certification ruling to appeal). Because no motion to certify is pending, the Court will focus on the allegations specific to the named Plaintiffs.

Mr. Agnew enrolled at Rice University in 2006 after receiving an athletic scholarship to play football "equal to the yearly cost of his bachelor's degree." [Dkt. 84 at 2 ¶ 5.] Mr. Agnew received formal offers from at least three other schools. [*Id*.] Mr. Agnew was injured during his sophomore season and was told prior to his junior year that his scholarship would not be renewed. [Dkt. 84 at 14 ¶ 47.] He successfully appealed the non-renewal of his scholarship and ultimately "receiv[ed] a full year's tuition despite no longer **[*6]** being a member of the Rice football team." [*Id*. at 14-15 ¶ 47.] Mr. Agnew did not receive tuition for his senior year of college and had to pay tuition and boarding expenses out-of-pocket in order to receive his degree. [Dkt. 84 at 14-15 ¶ 47.]

Mr. Courtney enrolled at North Carolina A&T in 2009 after receiving an athletic scholarship to play football "equal to the yearly cost of his bachelor's degree." [Dkt. 84 at 3 ¶ 6.] He injured himself during training camp prior to his freshman season and ultimately was told that his athletic scholarship would not be renewed for his sophomore year. [Dkt. 84 at 15 ¶¶ 48-50.] Mr. Courtney left North Carolina A&T and is currently enrolled in another educational institution where he is paying tuition out-of-pocket. [Dkt. 84 at 15 ¶ 50.]

Plaintiffs allege that without the NCAA Division I bylaws at issue they would have received multi-year athletic scholarships sufficient to cover the entire cost of their bachelor's degrees.[2] [Dkt. 84 at 15 ¶ 51.] Instead, however, Plaintiffs allege that the "NCAA's wholly artificial caps on the number and distribution of athletics-based discounts reduces the overall supply of athletics-based discounts available to student-athletes **[*7]** thereby forcing them to overpay for bachelor's degrees . . . ." [Dkt. 84 at 15-16 ¶ 53.] Likewise, Plaintiffs allege that the NCAA's prohibition on multi-year athletics-based scholarships injures student-athletes by causing them to pay more in tuition when their athletics-based scholarships are reduced or not renewed. [*Id*. at ¶ 54.]

The NCAA filed a Motion to Dismiss Plaintiffs' Amended Complaint, which the parties subsequently briefed. [Dkts. 91; 93; 96; 97.] The Court held oral argument on the NCAA's motion. [Dkt. 116.]

III.

Discussion

The NCAA's primary contention **[*8]** is that Plaintiffs have failed to allege a relevant product market, geographic market, or anti-competitive effect on a relevant market to survive a motion to dismiss. The parties dispute whether Plaintiffs were required to allege a relevant market and, if they were required to do so, whether their allegations are sufficient to survive the NCAA's motion to dismiss. Additionally, the NCAA alleges that Plaintiffs lack antitrust standing to challenge the bylaws at issue.

A. *Antitrust Law* and Amateur College Sports

The purpose of the Sherman Act is to rectify injury to consumers caused by diminished competition. *Banks v. National Collegiate Athletic Association, 977 F.2d 1081, 1087-88 (7th Cir. 1992)*. Therefore, a plaintiff must allege not only an injury to himself but an injury to the market as well. *Id*. A successful claim under *Section 1 of the Sherman Act* requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. *Denny's Marina v. Renfro Prods., 8 F.3d 1217, 1220 (7th Cir. 1993)*.

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[2] Different NCAA bylaws govern Division I, II, and III sports. [Dkt. 93 at 25.] There is no dispute that Plaintiffs received scholarships to play sports at Division I schools. Despite this undisputed fact, as the NCAA points out, the Amended Complaint references Division II and Division III financial aid rules that Plaintiffs were not bound by and could not have been injured by. [Dkt. 93 at 25.] Plaintiffs do not respond to this argument; therefore, the Court construes Plaintiffs' silence as an acceptance of its merit and will not construe the Amended Complaint as stating any claim regarding Division II and III financial rules.

The parties agree that *National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, **[*9]** is the seminal case governing ***antitrust law*** in the context of amateur college sports. [Dkt. 96 at 13.] At issue in *Board of Regents* was whether the NCAA's control over the number of football games a university could televise violated *Section 1 of the Sherman Act*. The Supreme Court recognized that the horizontal restraint at issue typically would be presumed unreasonable and illegal *per se* without inquiry into the particular market context; however, "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id at 101*. Therefore, the Supreme Court applied the Rule of Reason analysis "to form a judgment about the competitive significance of the restraint."[3] *Id. at 103*. A conclusion that a restraint is unreasonable may be based on either the nature or character of the contracts or the surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. *Id*.

In *Board of Regents*, the Supreme Court ultimately concluded that, despite the NCAA's proffered justifications, the NCAA had engaged in unjustified anticompetitive conduct by restraining the number of football games universities could televise. The Supreme Court emphasized, however, that its holding was not a prohibition on the majority of the NCAA's regulations because the NCAA must implement rules to preserve the character and quality of its product:

> What the NCAA and its member institutions market in this case is competition itself -- contests between **[*11]** competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters such as the size of the field, the number of players on a team, and the extent to which physical violence is encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. . . . In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also those available to athletes -- and hence can be viewed as procompetitive.
> * * *
>
> It is reasonable to assume **[*12]** that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate sports. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.
> ***
> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

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[3] The Supreme Court recently reaffirmed the application of the Rule of Reason to restraints on competition that are essential if the product is to be available at all. *American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 2216, 176 L. Ed. 2d 947 (2010)* **[*10]** (citing *Board of Regents, 468 U.S. at 101*). Although the Court need not conduct the applicable analysis at this stage in the proceedings, for purposes of context, the Rule of Reason tests whether a restraint merely regulates and perhaps thereby promotes competition or whether it may instead suppress or even destroy competition. *American Needle, 130 S. Ct. at 2217 n. 10* (citation omitted). To analyze that question the Court must typically consider "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable." *Id*.

Id. at 101-102, 117, 120.

The Court also finds the Seventh Circuit's opinion in *Banks* to be binding.[4] In *Banks*, the Seventh Circuit Court of Appeals affirmed a district court's decision to grant the NCAA's motion to dismiss a plaintiff's complaint regarding the no-agent and no-draft **[*13]** rules. *977 F.2d at 1081*. At issue in *Banks* were rules prohibiting college athletes from participating in intercollegiate sports if they agreed to be represented by an agent or asked to be placed on the draft list of a professional league. *Id. at 1083-84*.

Relying on *Board of Regents, Banks* concludes that "allegations that the NCAA rules restrain trade or commerce may not be viewed as *per se* violations of the Sherman Act, but must be addressed under the 'Rule of Reason.'" *977 F.2d at 1088* (quoting *Board of Regents, 468 U.S. at 85*). Thus, the Seventh Circuit held that in order for a plaintiff's complaint **[*14]** to state a claim upon which relief can be granted, "it must allege anti-competitive effects on a discernible market." *Banks, 977 F.2d at 1088*.

Banks also emphasizes that the Court "is not able to review what [plaintiff] could have alleged, but is called upon to review only what he actually alleged." *Id. at 1087*. The complaint must contain "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some *viable* legal theory." *Id. at 1093* (original emphasis) (citation omitted). A plaintiff may not evade the pleading requirements merely by asserting bare legal conclusions; instead, the facts must outline a violation of the Sherman Act—the plaintiff "will get nowhere merely by dressing them up in the language of antitrust." *Id. at 1093* (quoting *Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. Additionally, a plaintiff must tie his alleged antitrust injury to the rule's allegedly anti-competitive impact. *Banks, 977 F.2d at 1094 n.20*.

B. What Plaintiffs Are Required to Plead

Applying the pleading standards detailed above, the Court turns to the parties' arguments regarding the sufficiency of Plaintiffs' allegations.

The **[*15]** NCAA points to three alleged deficiencies with Plaintiffs' Amended Complaint: 1) failure to plead a relevant market; 2) failure to allege facts sufficient to show that the NCAA's alleged wrongdoing has injured competition as a whole in the relevant market; and 3) failure to allege facts connecting the NCAA rules at issue to their alleged injuries. [Dkt. 93 at 8.]

Plaintiffs contend that the Court should apply the "quick look" version of the Rule of Reason, which Plaintiffs do not believe requires them to plead a relevant market. [Dkt. 96 at 20, 22.] Specifically, Plaintiffs argue that because they have alleged that the NCAA's rules regarding athletics-based discounts constitute "a naked restraint of trade and commerce," [dkt. 84 at 11 ¶ 33], they are not required to plead market power and the burden shifts to the NCAA to provide a competitive justification for its restraint, which the Plaintiffs claim the NCAA has not done, [dkt. 96 at 19].

Plaintiffs' argument ignores the Seventh Circuit's clear holding in *Banks* that because the Rule of Reason applies to challenges to NCAA regulations, a plaintiff's complaint "must allege anti-competitive effects on a discernible market" to survive **[*16]** a motion to dismiss. *Banks, 977 F.2d at 1088*. Although Plaintiffs describe *Banks* as a "rambling" opinion and ask the Court to disregard it, [dkt. 116 at 28], this Court is in no position to overrule, disregard, or limit *Banks, see Gacy v. Welborn, 994 F.2d 305, 310 (7th Cir. 1993)* (emphasizing that district courts are not permitted to disregard Seventh Circuit authority because "[o]urs is a hierarchical judiciary, and judges of inferior courts must carry out decisions [of higher courts]"). Accordingly, it will adhere to *Banks* as applicable Seventh Circuit precedent

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[4] Plaintiffs urge the Court to reject *Banks* and apply *Chicago Professional Sports Limited Partnership v. National Basketball Association, 961 F.2d 667 (7th Cir. 1992)*. [Dkt. 116 at 29.] The Court disagrees with Plaintiffs that *CPSLP* is binding authority in this context. *Banks*, which is more recent, directly addressed an NCAA bylaw in the amateur sports context, while *CPSLP* addressed television broadcast rights in the professional sports context. Therefore, the Court finds the Seventh Circuit's interpretation of *Board of Regents* and its general discussion of NCAA bylaws to be controlling.

and analyze the Plaintiffs' Amended Complaint to determine whether it alleges anti-competitive effects on a discernible market.[5]

The Court also rejects Plaintiffs' argument that the NCAA was required to set forth procompetitive justifications for its regulations at this stage in the proceedings.[6] [Dkt. 96 at 15.] While the Court agrees with Plaintiffs that the NCAA may be required to set forth procompetitive **[*17]** justifications on summary judgment or at trial if Plaintiffs were to meet their initial burden, *see* *Board of Regents, 468 U.S. at 95* (decision issued "[a]fter a full trial"), at this stage in the proceedings the Court focuses on the allegations in Plaintiffs' Amended Complaint, *Banks, 977 F.2d at 1088*; *see also* *Iqbal, 129 S. Ct. at 1949* (holding that a motion to dismiss asks whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'") (quoting *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*). Therefore, Plaintiffs' argument that the NCAA has failed to meet its "heavy burden of establishing that its conduct is procompetitive" fails, [dkt. 96 at 15], and the Court will not consider the NCAA's proffered procompetitive justifications.[7]

In sum, through the lens of binding Seventh Circuit precedent, the Court will analyze the Plaintiffs' Amended Complaint to determine whether it alleges anti-competitive effects on a discernible market. If it fails to do **[*19]** so, the Court must grant the NCAA's motion to dismiss.

C. Plaintiffs' Allegations Regarding a Relevant Geographic Market

The NCAA contends that Plaintiffs have failed to allege a relevant geographic market. [Dkt. 93 at 11.] Plaintiffs allege that they have adequately pled the United States as the relevant geographic market. [Dkt. 96 at 26-27.]

When the Rule of Reason applies, as the Seventh Circuit has held it does here, the plaintiff must show that the challenged restraint has an adverse impact on competition in the relevant market, which includes defining a geographic market. *Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n, 908 F.2d 200, 203 (7th Cir. 1990)*. Identifying a geographic market requires both careful selection of the market area in which the seller operates and to which the purchaser can practicably turn to for supplies. *Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 738 (7th Cir. 2004)*.

The Court rejects the NCAA's argument that the Amended Complaint does not plead a relevant geographic market. Plaintiffs' Amended Complaint references the United States three times. [*See, e.g.*, dkt. 84 at 4 ("There is no major college sports program in the United States that **[*20]** is not an NCAA member, abiding by the NCAA rules.").] Even more importantly, however, the NCAA does not dispute that its member institutions, which abide by its rules, are located throughout the United States and recruit student-athletes from throughout the United States. It is, after

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[5] The parties, particularly Plaintiffs, cite numerous out-of-Circuit cases that they believe support their arguments. Because the Court finds applicable Seventh Circuit precedent to be controlling, it will not address those cases.

[6] At oral argument, the NCAA argued that the one-year scholarship rule makes athletic-based scholarships equivalent to academic scholarships, which typically operate on a year-to-year basis. [Dkt. 116 at 5.] Additionally, the NCAA contended that the one-year scholarship rule takes "some of the potential abuse" out of the recruiting process, which promotes amateurism. [*Id*.] The NCAA's proffered procompetitive **[*18]** justification for the cap on the number of available scholarships is "competitive balance and competitive equity." [*Id*. at 7.] Without such a cap, the NCAA believes that some schools would offer extra scholarships to stockpile players so that those players would be unable to play for a competitor. [*Id*. (referencing Gary Shaw, Meat on the Hoof: The Hidden World of Texas Football (1972)).] The NCAA also made a cogent argument that the bylaws at issue are not anti-competitive because output remains constant. For example, if a student-athlete's scholarship is not renewed, the school will offer that spot to another individual, thereby maintaining output in the market. As detailed below, however, the Court will not address the NCAA's proffered justifications because they are beyond the scope of evaluating Plaintiffs' Amended Complaint.

[7] Likewise, the Court will not address the NCAA's argument that its rules are entitled to a presumption of reasonableness. [Dkt. 93 at 19-22.]

all, the *National* Collegiate Athletic Association. Therefore, the Court concludes that Plaintiffs adequately pled a relevant geographic market.

D. Plaintiffs' Allegations Regarding a Relevant Product Market

The NCAA also argues that Plaintiffs failed to plead a relevant product market. Specifically, the NCAA emphasizes that although Plaintiffs' initial complaint alleged that the relevant market at issue was for "bachelor's degrees from accredited colleges and/or universities," [dkt. 93 at 10-11 (citing dkt. 1 at 5 ¶ 15)], Plaintiffs removed that allegation from their Amended Complaint. Even if Plaintiffs' Amended Complaint implicitly alleges a product market for bachelor's degrees, the NCAA argues that such a market doesn't exist because colleges do not simply sell degrees to anyone willing to pay. [Dkt. 93 at 10.]

In response to the NCAA's motion, Plaintiffs argue that their Amended Complaint sufficiently **[*21]** alleges two product markets: "the market for the *sale* of bachelor's degrees and the labor market for the *purchase* of student athlete services." [Dkt. 96 at 22 (original emphases).]

The Court will analyze each of the proposed markets to determine if the Plaintiffs have alleged a relevant product market.[8] In doing so, the Court will disregard Plaintiffs' antitrust terms of art, such as "naked restraint of trade and commerce," that do not contain an adequate factual basis. *See* *Car Carriers, 745 F.2d at 1106* (emphasizing that plaintiff "will get nowhere merely by dressing them up in the language of antitrust").

i. Labor Market

Plaintiffs cite two paragraphs from their Amended Complaint that they claim allege a labor market:

> From Paragraph 16: "NCAA member institutions compete with each other to attract and enroll highly skilled athletes to their institutions for obtaining bachelor's degrees." [Dkt. 84 at 6 ¶ 16.]
>
> From Paragraph 22: "Students with athletic ability often are given athletics-based discounts, i.e., 'grants-in-aid' or 'athletic scholarships,' that may sometimes equal the yearly cost of a bachelor's degree. In effect, these students who receive full or partial athleticbased discounts are paying-in-kind, either in whole or in part, for their bachelor's degrees." [Dkt. 84 at 8 ¶ 22.]

A search of Plaintiffs' Amended Complaint reveals that it does not contain the word "labor" or the words "labor market." This is problematic, given the fact that the Seventh Circuit **[*23]** has admonished courts to review only what is actually alleged. *See* *Banks, 977 F.2d at 1087* (instructing that the Court "is not able to review what [plaintiff] could have alleged, but is called upon to review only what he actually alleged").

Even if the Court reads between the lines and infers that Plaintiffs sufficiently alleged a labor market in their Amended Complaint, controlling precedent undercuts Plaintiffs' claim. As the NCAA points out, the Seventh Circuit, in upholding the grant of a motion to dismiss, has already rejected the claim that NCAA member schools could be purchasers of labor because the NCAA eligibility and recruiting requirements "prohibit member colleges from engaging in price competition for players." *Id. at 1091*. Specifically, the Seventh Circuit disagreed with the

[8] Although Plaintiffs challenge two NCAA bylaws—the one-year scholarship limit and the cap on the number of athletic-based discounts a school can offer—they do not differentiate between those bylaws when addressing the alleged labor and bachelor's degree markets. The Court presumes that Plaintiffs know what is best for their case and structured their opposition to the NCAA's motion accordingly. *See* *Greenlaw v. United States, 554 U.S. 237, 243-44, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)* ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties **[*22]** present . . . . Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.") Therefore, the Court will address each of the markets the Plaintiffs allege without distinguishing between the challenged bylaws.

contention that NCAA colleges could "purchase labor through the grant-in-aid athletic scholarships offered to college players when the value of the scholarship is based upon the school's tuition and room and board, not by the supply and demand for players." *Id*. Therefore, even if the Court accepts that Plaintiffs' Amended Complaint actually pleads a labor market, that market fails as a matter of law **[*24]** because the Seventh Circuit has already rejected the idea of a labor market in the amateur college sports context.

ii. Market for Bachelor's Degrees

a. Plaintiffs' Allegations in Amended Complaint

Plaintiffs' original complaint contained a heading titled "Relevant Market" and alleged that "[b]achelor's degrees from accredited colleges and/or universities constitute a distinct product market." [Dkt. 1 at 5 ¶ 15.] Plaintiffs removed that heading and allegation from their Amended Complaint, which the NCAA argues is a "deliberately evasive pleading strategy" to avoid addressing the relevant market issue. [Dkt. 93 at 15.] In response to the NCAA's motion, Plaintiffs confirm that they deliberately removed that language from their Amended Complaint "to clarify the legal point that no detailed allegations defining a relevant market were necessary." [Dkt. 96 at 25.]

Plaintiffs' decision to deliberately remove the relevant product market language from their Amended Complaint to clarify their (erroneous) belief that they were not required to plead a relevant market was a gamble, especially given the directly relevant authority in this Circuit. Moreover, Plaintiffs could have amended their pleading **[*25]** as a matter of course in response to the NCAA's motion to dismiss, which highlighted this deficiency and directed Plaintiffs to *Banks*. *Fed. R. Civ. Pro. 15(a)(1)*. Plaintiffs chose not to do so "because pleading [a] market in antitrust cases is a complicated and often time-consuming matter" and they wanted the Court's insight "given the complexity of the economics involved in these cases." [Dkt. 116 at 39; *see also* dkt. 116 at 37 ("[T]o be honest with you, we didn't spend a lot of time in the complaint on the market definition.").] This was another gamble because the Court does not provide insight or advisory opinions. It rules on the issues the parties present and moves on to the next case. *See* *Brownstone Publ'g, LLC v. AT&T, Inc., 2009 U.S. Dist. LEXIS 25485 *7 (S.D. Ind. 2009)* ("Motion practice is not an exercise in trial and error or maybe-maybe not where a party can reserve arguments to present later if earlier ones fail.").

Given the Seventh Circuit's admonition to review only what Plaintiffs actually allege in antitrust cases and Plaintiffs' admission that they deliberately removed the relevant market allegation from their Amended Complaint because they didn't believe they needed **[*26]** to plead it, [dkt. 96 at 25], the Court concludes that Plaintiffs have failed to plead a relevant product market for bachelor's degrees as a matter of law.

b. Plausibility of the Market for Bachelor's Degrees

Despite their admission that they purposefully removed the language regarding the relevant market for bachelor's degrees from their Amended Complaint, Plaintiffs contend that their Amended Complaint still adequately pleads "the market for the *sale* of bachelor's degrees." [Dkt. 96 at 22 (original emphasis).] Plaintiffs cite various paragraphs from their Amended Complaint to support their contention, specifically quoting the following:

> "The vast majority of salaried positions in the United States require the applicant to possess a bachelor's degree. No reasonable substitute exists for a bachelor's degree from an accredited college or university. Accredited colleges and universities compete for customers, i.e. students on a variety of dimensions including but not limited to price, reputation, job placement, and course offerings. A hypothetical entity that had a monopoly on bachelor's degrees would be able to raise the price of bachelor's degrees significantly for a non-transitory period **[*27]** of time without losing customers."

[Dkt. 96 at 23 (quoting dkt. 84 at 7 ¶ 19).]

The NCAA argues that Plaintiffs' market for the sale of bachelor's degrees fails because colleges and universities do not simply sell degrees to anyone willing to pay tuition. [Dkt. 93 at 10.] Instead, even if a student gains admission to the school and obtains a scholarship, he or she still must earn a bachelor's degree by satisfying the school's particular requirements for grades, credit hours, etc. [Dkt. 93 at 15 n.5.]

To survive the NCAA's Motion to Dismiss, the Amended Complaint must contain "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some *viable* legal theory." _Banks, 977 F.2d at 1093_ (original emphasis); *see also* _Iqbal, 129 S.Ct. at 1949_ (the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face'") (quoting _Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929_) (emphasis added).

The Court agrees with the NCAA that the "market" for bachelor's degrees is implausible as a matter of law because people cannot simply purchase bachelor's degrees at Division I colleges and universities. Notwithstanding **[*28]** pop culture lyrics to the contrary, you can't just "mess around and get [a] college degree." Bruno Mars, "Lazy Song," *Doo-Wops & Hooligans*, Atlantic Records (2011). Instead, earning a bachelor's degree requires the student to attend class, take required courses, and maintain certain grades, among many other things. *See* _Banks, 977 F.2d at 1090_ ("NCAA student-athletes are required to attend class, maintain a minimum grade point average, and enroll and complete a required number of courses to obtain a degree."). Plaintiffs do not dispute that bachelor's degrees cannot be bought or sold outright. [Dkt. 116 at 30, 37.] Because student-athletes still must fulfill certain academic requirements to obtain a degree, and the degree itself cannot be bought or sold outright, Plaintiffs' alleged market for the sale of bachelor's degrees is implausible.

As a final point, the heart of Plaintiffs' claim is speculation that but for the NCAA bylaws at issue they would have successfully negotiated for a four-year, unconditional athletic scholarship. That unconditional scholarship would have given them the opportunity to attend their university tuition-free, regardless of their ability to continue to play **[*29]** sports. Plaintiffs who receive *that* opportunity would *then* have the opportunity to earn a tuition-free bachelor's degree by meeting the academic requirements to do so. Contrary to Plaintiffs' proposed "market for the sale of bachelor's degrees," earning a degree does not automatically result from receiving the four-year unconditional scholarships Plaintiffs desire. Consequently, Plaintiffs' Amended Complaint does not contain allegations necessary to sustain recovery under a viable legal theory.[9]

For the reasons detailed herein, the Court concludes that Plaintiffs' Amended Complaint fails to state a discernible market. Therefore, the Court grants the NCAA's motion to dismiss and dismisses Plaintiffs' entire action.[10]

E. Dismissal With Prejudice

The NCAA requests that the Court dismiss Plaintiffs' Amended Complaint with prejudice. [Dkt. 93 at 26.] Plaintiffs request that they be given another opportunity to re-plead their claim if the Court grants the NCAA's motion. [Dkt. 116 at 38.]

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[9] Because the Court concludes that Plaintiffs have failed to allege a relevant product market, it need not address the NCAA's argument that Plaintiffs have failed to allege injury to competition. [Dkt. 93 at 18-19.] Additionally, the Court rejects the NCAA's standing argument that the Amended Complaint does not allege that the Plaintiffs were injured by the NCAA Division I bylaws at issue. [Dkt. 93 at 22-25.] Plaintiffs allege that they initially received an athletic scholarship to attend their respective universities but that those scholarships were not renewed after they could no longer play sports, causing them to pay tuition through other means. [Dkt. 84 at 14-15 ¶¶ 43-50.] They further allege **[*30]** that had they been free to negotiate a four-year scholarship, they would have avoided those costs. Those allegations are sufficient to establish antitrust standing at this stage in the proceedings.

[10] As detailed in footnote one, *supra*, the Court must dismiss the entire action because no one besides the named Plaintiffs have a legally protected interest in the litigation at this time. _Wiesmueller, 513 F.3d at 786_; _Sheridan, 530 F.3d at 592, 596_; _Banks, 977 F.2d at 1085-86_.

Pursuant to *Federal Rule of Civil Procedure 15(a)(1)(B)*, a plaintiff may amend its complaint as a matter of course in response to a motion to dismiss. *Brown v. Bowman, 2011 U.S. Dist. LEXIS 34894 *53-54 (N.D. Ind. 2011)*. The 2009 notes **[*31]** to that rule emphasize that this amendment "will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim."

If a plaintiff does not or cannot amend its complaint as a matter of course, *Rule 15(a)(2)* provides that it may amend its pleading again only with the opposing party's written consent or with the Court's leave. *Rule 15(a)(2)* further provides that the Court should give leave "when justice so requires." The Court is not required to give Plaintiffs another chance to plead their claim if they have already had multiple attempts to cure deficiencies in their pleadings. *Emery v. Am. Gen. Fin., 134 F.3d 1321, 1323 (7th Cir. 1998)*. If an amended complaint does not differ significantly from an original complaint, it presumably represents the plaintiff's best effort to state a claim against the defendant. *Katz v. Household Int'l, 91 F.3d 1036, 1038 n.2 (7th Cir. 1996)*.

Plaintiffs have already had two opportunities to plead their claim against the **[*32]** NCAA, and their first opportunity to re-plead followed a fully briefed motion to dismiss that, among other things, challenged Plaintiffs' product market allegations. [Dkt. 24 at 17.] The NCAA consented to Plaintiffs request to re-plead their complaint after the claim was transferred to this Court, [dkt. 81 at 1], but subsequently filed another motion to dismiss, [dkt. 91]. Plaintiffs chose not to exercise their right to amend their pleading as a matter of course pursuant to *Rule 15(a)(1)(B)* in response to the NCAA's new responsive pleading and, instead, chose to brief the motion to dismiss and adjudicate the issues. Plaintiffs also acknowledge making the deliberate choice to remove specific allegations as to a relevant market from their Complaint.

The Court is not required to give Plaintiffs another chance to plead their claim because they have already had multiple attempts to cure deficiencies in their pleadings. *See Emery, 134 F.3d at 1323*. Further, Plaintiffs have not given any indication that they could, in fact, successfully amend their complaint to cure the defects identified above, even if given the opportunity to do so. Considering the procedural history of this case, particularly **[*33]** the fact that Plaintiffs have already had the opportunity to re-plead their allegations after a fully briefed motion to dismiss, the Court, in its discretion, dismisses Plaintiffs' claim with prejudice.

IV.

CONCLUSION

For the reasons detailed herein, the Court **GRANTS** the NCAA's Motion to Dismiss, [dkt. 91], and **DISMISSES** Plaintiffs' Amended Complaint **WITH PREJUDICE**. Given this ruling, the NCAA's Motion for Protective Order, [dkt. 114], and Plaintiffs' Motion to Compel Discovery, [dkt. 121], are **DENIED AS MOOT**. Final judgment shall issue accordingly.

09/01/2011

/s/ Jane Magnus-Stinson

Hon. Jane Magnus-Stinson, Judge

United States District Court

Southern District of Indiana

LexisNexis®

Sterling Merch., Inc. v. Nestlé, S.A.

United States Court of Appeals for the First Circuit

September 1, 2011, Decided

No. 10-1925

Reporter

656 F.3d 112 *; 2011 U.S. App. LEXIS 18214 **; 2011-2 Trade Cas. (CCH) P77,586

STERLING MERCHANDISING, INC., Plaintiff, Appellant, v. NESTLÉ, S.A., PAYCO FOODS CORPORATION, AND NESTLÉ PUERTO RICO, INC., Defendants, Appellees.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Salvador E. Casellas, U.S. District Judge.

Sterling Merch., Inc. v. Nestle, S.A., 724 F. Supp. 2d 245, 2010 U.S. Dist. LEXIS 62814 (D.P.R., 2010)

Core Terms

merger, ice cream, antitrust, market share, distributors, percent, sales, prices, retail, anticompetitive, competitor, consumers, output, district court, products, brand, discount, monopolization, merged, impairments, consumer price, manufacturer, damages, antitrust violation, anti trust law, per-unit, largest, monopoly power, contracts, argues

LexisNexis® Headnotes

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

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

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

A court of appeals' review of a grant of summary judgment is de novo, taking all facts and reasonable inferences in the light most favorable to the nonmoving party.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN2[] **Standing, Requirements**

The United States Supreme Court has articulated a six-factor test that governs whether a plaintiff has standing to bring an antitrust action. The relevant factors are: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws (antitrust injury); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages. Although a court technically balances the six factors to determine if standing is appropriate, the United States Court of Appeals for the First Circuit has emphasized the causation requirement. Additionally, the absence of antitrust injury will generally defeat standing.

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

Evidence > Burdens of Proof > Allocation

HN3[] **Private Actions, Remedies**

A plaintiff bears the burden of proving antitrust injury.

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

HN4[] **Private Actions, Remedies**

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should be the type of loss that the claimed violations would be likely to cause, and should therefore reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The plaintiffs must show not only that they were injured as a result of the defendant's actions and that those actions constituted an antitrust violation, but also that their injury is the type of injury the antitrust violation would cause to competition.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] **Private Actions, Remedies**

A competitor may suffer injury even when there is no injury to competition or to consumers, and so lack standing to bring an antitrust claim. Even if a competitor is hurt because the merger of its rivals makes them more efficient or able to compete more aggressively, that harm is not an antitrust violation, and the competitor lacks standing. Further, unlike consumers, competitors have incentives to bring antitrust suits for purposes which are anti-competitive, for example to induce the defendant competitor to moderate their competition. As a result, there is reason for courts to be properly skeptical of many rivals' suits, particularly when the practices are not obviously "exclusionary."

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

HN6[] **Private Actions, Remedies**

Injury to competition is usually measured by a reduction in output and an increase in prices in the relevant market. The antitrust injury doctrine requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.

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

HN7[] Private Actions, Remedies

It is axiomatic that antitrust laws are concerned with protecting against impairments to a market's competitiveness and not impairments to any one market actor. It is also true that an antitrust plaintiff's post-violation successes do not necessarily preclude compensation for damages proximately caused by an antitrust violation.

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

HN8[] Private Actions, Remedies

Even if a plaintiff makes an adequate showing of harms to competition through increased consumer prices or reduced output, the plaintiff has to show those market impairments were the result of antitrust violations in order to demonstrate antitrust injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

HN9[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Because vertical exclusive dealing agreements can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today. Given their capacity to enable markets to operate more efficiently and benefit consumers, such agreements are not subject to per se treatment, but are instead subject to rule of reason analysis. Indeed, courts tend to be skeptical of such claims because it is not in the long-term interest of the company that grants the "exclusive deal" to drive out of business competitors of the grantee.

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

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The rule of reason calculus requires that an antitrust plaintiff make a burdensome showing that (1) the agreements in question involved the exercise of power in a particular economic market, (2) that this exercise impaired the competitiveness of the market, and (3) that those impairments outweighed efficiencies or other economic benefits.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

HN11[] Exclusive & Reciprocal Dealing, Exclusive Dealing

In applying the rule of reason calculus to exclusive dealing arrangements, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent, and while high numbers do not guarantee success for an antitrust claim, low numbers make dismissal easy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN12[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

For purposes of determining whether an antitrust violation arises from exclusive dealing arrangements, short contract terms and low switching costs generally allay most fears of injury to competition.

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

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

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

It is not easy to think of a rule of reason antitrust analysis that does not depend on showing adverse effects on competition in a properly defined relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

HN14[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Once a firm has integrated vertically into distribution by acquiring one or more existing distributors, it may reduce costs by dealing only with its wholly owned distributors. A distributor terminated for this reason might certainly suffer injury-in-fact, but it would not suffer antitrust injury as long as there were alternative sources of the product.

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

HN15[] **Actual Monopolization, Claims**

To prevail on a monopolization claim, a plaintiff must show that the defendant (1) has monopoly power in the market, and (2) has engaged in impermissible "exclusionary" practices with the design or effect of protecting or enhancing its monopoly position.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN16[] **Actual Monopolization, Monopoly Power**

Whether a defendant has monopoly power depends on the defendant's ability to lessen or destroy competition in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN17[] **Actual Monopolization, Monopoly Power**

Where a plaintiff remains profitable and in fact has expanded its market share since allegedly anticompetitive conduct has begun, it faces an uphill battle in proving such a dangerous probability of achieving monopoly power exists.

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

HN18[] **Attempts to Monopolize, Elements**

Under First Circuit law, attempted monopolization claims are presumptively implausible where the challenged conduct has been in place for at least two years and the remaining market remains robustly competitive as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share.

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Judges: Before Lynch, Chief Judge, Lipez and Thompson, Circuit Judges.

Opinion by: LYNCH

Opinion

[*115] LYNCH, Chief Judge. Sterling Merchandising, Inc., sued Nestlé Puerto Rico, Inc. (Nestlé PR), and a group of Nestlé corporations including Nestlé, S.A., Nestlé Holdings, Inc. and Payco Foods Corporation (Payco). The suit alleges various federal Clayton Act, *15 U.S.C. §§ 12-27*, and Sherman Act, *15 U.S.C. §§ 1-7*, antitrust violations and pendent Puerto Rico law claims stemming from Nestlé PR's 2003 merger with Payco and later activities. Payco had been both Sterling's and Nestlé PR's competitor in the Puerto Rico ice cream distribution **[**2]** market.

The district court granted summary judgment on all of the federal antitrust claims on the grounds that Sterling lacked standing because its evidence failed to demonstrate, inter alia, that it had suffered a cognizable antitrust injury. See *Sterling Merch., Inc. v. Nestle, S.A.., 724 F. Supp. 2d 245 (D.P.R. 2010)*. As an alternative holding, the district court also granted summary judgment on the merits of Sterling's antitrust causes of action. Id. The pendent claims were then dismissed. Sterling appeals. We affirm on the ground of Sterling's lack of standing, particularly its failure to show antitrust injury.

I.

Nestlé, S.A. is the largest ice cream manufacturer in the world and operates in Puerto Rico through its sales and marketing subsidiary, Nestlé PR. Nestlé PR entered the ice cream distribution market in 1998. After Nestlé PR merged with Payco, another ice cream distributor, in June 2003, Nestlé PR and Sterling were the two largest ice cream distributors in Puerto Rico, though there were several other distributors and some retailers bypassed Puerto Rico distributors altogether.

Sterling, the smaller distributor, sued the larger, Nestlé PR, alleging Nestlé PR engaged in anti-competitive **[**3]** practices from June 2003 through at least October 2009, when the evidence closed.

A. The Pre-2003 Merger Ice Cream Distribution Market in Puerto Rico

Sterling was founded in 1993 as a Puerto Rico ice cream distributor. It immediately became the island-wide exclusive distributor of Edy's brand ice cream, the most popular brand in Puerto Rico. Other distributors in the ice cream market included Payco Foods Corporation, and Mantecados Nevada, Inc. In 1998, five years after Sterling's formation, Nestlé PR joined the distribution market by buying Mantecados Nevada's assets.

From 1998 until the 2003 merger of Payco and Nestlé PR, the ice cream distribution market in Puerto Rico was competitive, and neither Payco, Nestlé PR, nor Sterling dominated the market. Sterling maintained Edy's as its flagship brand, which Sterling received from the Dreyer's ice cream manufacturing company. In the late 1990s, Dreyer's began giving Sterling a per-unit discount, tying the discount to Sterling's previous-year sales. Before the merger at issue, Sterling and Dreyer's negotiated a $0.75 per unit promotional support for Edy's. Sterling says this was done to improve its position in competing with Payco and Nestlé **[**4]** PR/Nevada. In 2003, Dreyer's also assigned to Sterling its new "Skinny Cow" products. Despite the competitive market and its exclusive distribution rights to Edy's, Sterling's financial performance declined from 2001 until 2003. During that period, Sterling's sales dropped from $8.07 million to $7.01 million.

Nestlé PR also suffered from poor financial performance before its 2003 merger. It had roughly $8 million in losses as of May 2002, and sought ways to improve its financial outlook. It contemplated merger, including with Sterling, as a route to profitability, **[*116]** and eventually did merge with Payco.

B. The 2003 Nestlé PR/Payco Merger and the Separate Nestlé Acquisition of Dreyer's

In June 2003, Nestlé PR acquired 50 percent of Payco, which was only in the distribution business. Nestlé did not acquire the remaining 50 percent of Payco's shares until September 2005. The merger was reviewed by the Puerto Rico Office of Monopolistic Affairs (PROMA), which approved the merger conditioned on particular stipulations, none of which is alleged to have been subsequently breached, and which continue to be effective. For example, one stipulation is that Nestlé may not transfer Edy's to another distributor **[**5]** without the approval of PROMA unless Sterling has, in the interim, acquired distribution rights to either Breyer's or Blue Bunny ice cream.

Separately, but also in June 2003, Nestlé, S.A., Nestlé PR's parent, acquired a controlling interest in Dreyer's, the manufacturer of Edy's brand ice cream products. Nestlé, S.A. acquired 100 percent ownership of Dreyer's in January 2006. Sterling has remained Edy's exclusive distributor despite Nestlé, S.A.'s acquisition of Dreyer's. The end result is that Nestlé, S.A. manufactures Edy's, which is the most lucrative of Sterling's distribution products and its flagship brand, while Nestlé PR, Nestlé, S.A.'s subsidiary, is Sterling's largest competitor at the distribution level.

C. The Post-Merger Market

The merger of Nestlé PR and Payco appears to have had significant costs to the defendant merged companies. Immediately after the 2003 merger, the merged Nestlé PR (including Payco) had an 85 percent market share in the ice cream distribution market; that share fell to 70 percent by 2007. The merged entities have also lost a number of their major exclusive arrangement retail customers to Sterling.

Shortly after the 2003 merger, for example, Sterling **[**6]** acquired exclusive rights to distribute ice cream products to Puerto Rico retail customers Grande and Pitusa, both of which were Payco customers prior to the merger. In 2007, Supermercados Econo, Inc., the largest retail seller of ice cream in Puerto Rico and formerly a retail customer of Payco, also signed exclusivity agreements with Sterling and others. Supermercados Econo's agreements have resulted in the merged Nestlé PR losing its sales with Econo stores. Further, the merger itself caused at least one of Payco's product lines, Wells' Dairy Inc.'s Blue Bunny brand, to terminate its distribution agreement with the merged Nestlé PR/Payco on the grounds that the merger constituted a material breach of the

Blue Bunny distribution agreement and would, in Wells' Dairy Inc.'s view, negatively affect the distribution of Blue Bunny products.

As the district court found, "some products distributed by Nestlé PR/Payco lost market share and access to important locations," and during the first six months of joint Nestlé PR/Payco operations the merged company lost $5 million in revenue to Sterling and other competitors. *Id. at 260*. That trend has continued beyond the initial six-month period following **[**7]** the merger.

By contrast, Sterling's market share and sales, which were stagnant before the Nestlé PR/Payco merger, have significantly improved since the merger. Before the merger, Sterling's net sales had declined from $8.07 million in 2001 to $7.59 million in 2002, and to $7.01 million in 2003. After the merger of its competitors, Sterling's sales rose year over year from 2003 through 2008, at an average of 11 percent **[*117]** a year. Sterling's profits and operating revenue rose commensurately with sales.

Both before and after the merger, Sterling acquired distribution rights to other retailers and rights to distribute other brands, including Good Humor, J & J Snacks, Rich's Ice Cream, and Turkey Hill. Puerto Rico is not a market where only a small number of brands are sold. Rather, as Sterling's acquisitions of distribution rights to new brands demonstrate, there are a number of manufacturers of ice cream available to distributors in Puerto Rico. And during this period, on Sterling's own evidence, the overall sales of ice cream products in dollar terms increased in Puerto Rico.

Sterling put only limited evidence into the record of its market share, but its expert did acknowledge that "[i]t's **[**8]** grown over the 2003 to the present" time period. The record evidence shows that Sterling's share of the market has risen from 14.7 percent in 2003 to more than 22 percent in 2008. This data also shows a steady increase in Sterling's market share during the entire period of alleged monopolistic behavior by defendants.

Sterling's strong financial performance has led it to increase the size of its facilities and upgrade. Since the 2003 Nestlé PR/Payco merger, it has constructed a new warehouse with twice the square footage of its previous warehouse. Due both to the increased size of the facility and to technology upgrades, the new warehouse could increase Sterling's distribution capacity by as much as eight times over the previous warehouse.

Sterling has maintained its exclusive distribution agreement with Edy's after both Nestlé PR's merger with Payco, and Nestlé, S.A.'s acquisition of Dreyer's, Edy's manufacturer. In 2004, Dreyer's (already having been acquired by Nestlé, S.A.) reduced Sterling's per-unit discount from $0.75 to $0.60, citing increased costs of raw materials. Also in 2004, Dreyer's took the line of "Skinny Cow" products from Sterling, but not the Edy's brand, and now distributes **[**9]** the Skinny Cow line through Nestlé PR.

Faced with the obvious problem that its growing success after the merger makes it difficult to show injury to itself, Sterling alleged that in a but-for-2003-merger world, it would have thrived even more than it did. Sterling presented a two-part injury and damages theory to explain how it would have been even better off absent Nestlé PR's allegedly anticompetitive behavior.

First, it alleged that Nestlé PR's post-merger exclusivity agreements with a large number of grocery stores, by foreclosing Sterling from those stores, cost it $21-29 million in sales it otherwise would have made. Second, Sterling argued that absent this market foreclosure, it would have earned higher profits on those sales it actually made because its increased market share would have allowed it to be a more efficient operation. Sterling also alleged it lost sales when Dreyer's took the "Skinny Cow" product line away from Sterling and assigned it to Payco a year after the Nestlé PR/Payco merger, and lost profits on actual sales when Dreyer's reduced its per-unit discount on Edy's products. These allegations are not supported by Sterling's expert's damages model, which does **[**10]** not specifically discuss damages from these alleged violations.

II.

The district court granted summary judgment on all counts largely because it found Sterling, on the undisputed evidence, had not demonstrated any antitrust injury.

As to injury to competition during the post-merger period, the district court concluded the Puerto Rico ice cream distribution **[*118]** market had in fact expanded. Id. The court found no evidence that the Nestlé PR/Payco merger or the merged companies' activities had resulted in restricted output. Nor did the court find any evidence that prices to consumers had in fact been raised in this period, much less that the raise could be tied to illegal anticompetitive behavior. Id. The court noted that no price study had been done by Sterling's experts, and that what little information there was available regarding pricing showed that consumer prices on some products had in fact decreased during the relevant period. Id.

The district court found that Sterling's claims of any injury to itself "either by [Nestlé PR's] exclusives or by product price increases" were severely undermined by its "increased profits, sales, and market share" in the post-merger period. *Id. at 259*.

The **[**11]** court concluded that in light of these facts, Sterling could not show that any antitrust injury resulted from Nestlé PR/Payco's behavior.

The district court also rejected Sterling's damages model. *Id. at 262*. That model attempted to extrapolate from Sterling's 42-50 percent market share in two small slivers of the market to the conclusion that Sterling would have had a 42-50 percent market share throughout Puerto Rico absent Nestlé PR's purportedly anticompetitive actions. The court held that the model failed to meet Sterling's burden of proving damages for two reasons. First, the model adopted sub-markets with no exclusive agreements whatsoever as the benchmark for comparison, but this was an inaccurate point of comparison as exclusivity agreements are not per se illegal and have long been a lawful part of the ice cream distribution market in Puerto Rico. *Id. at 260-62*. Second, Sterling's market share was not anywhere near 42-50 percent before the merger, "and it is unrealistic to posit that the company's sales and market presence would have grown four-fold had the Nestlé PR/Payco merger never occurred." *Id. at 262*.

The court further concluded that even had Sterling shown any injury **[**12]** to itself, it had not shown any antitrust injury, that is, that it was injured by anticompetitive activity and that its injury was "sufficiently direct, nonspeculative, and measurable to the extent that causality is not in doubt." *Id. at 258*. The court found that Sterling failed to demonstrate that any of the allegedly anticompetitive activity charged by Sterling--purportedly illegal use of exclusivity agreements to excessively foreclose the market, a price squeeze from reducing Dreyer's per-unit discount to Sterling, and allegedly illegal foreclosure from distribution contracts for new Dreyer's products-had been proven to injure Sterling.

As to exclusivity contracts, the district court found that they had been used in Puerto Rico since the 1990s, that Nestlé PR's reliance on them had actually decreased in the years after the 2003 merger,[1] and that the agreements themselves did not have any anticompetitive hallmarks such as long duration, below-cost pricing, or excessive foreclosure of the market. *Id. at 260-61, 264-66*. The court noted **[*119]** that in the post-merger period, Sterling had acquired new distribution rights to new retail markets to which, before the merger, either Nestlé PR or **[**13]** Payco had exclusive access. The court also observed that the entry of additional distributors to the market since the 2003 merger indicated that Nestlé PR's exclusivity contracts have not served to impair the competitive structure of the market. *Id. at 264*.

As to Sterling's claims of a price squeeze after Nestlé PR acquired Dreyer's, the manufacturer of Edy's, the district court found that while Sterling's concerns were "legitimate from a business point of view, they do not involve any overt anti-competitive act" because the per-unit cost to Sterling had **[**14]** not "significantly increased." *Id. at 261*. It

[1] Rates of market foreclosure by Payco exclusive accounts rose from 28.2 percent in 2004 to 30.8 percent in 2005, but declined to 29.4 percent in 2006 and 19.5 percent in 2007; the agreements were mostly for one to two years. Sterling argued that foreclosure rates were higher than these figures in certain sub-regions of Puerto Rico. The district court rejected this attempt at "gerrymandering of markets . . . to artificially show high levels of foreclosure" given that Sterling had identified the relevant market as the entirety of Puerto Rico in its complaint. *Sterling Merch., Inc. v. Nestle, S.A.., 724 F. Supp. 2d 245, 265 (D.P.R. 2010)*.

further reasoned that sales volume had increased and consumer prices stayed "stable," "strongly suggesting that the competitive structure of the market has not been harmed, thus precluding antitrust injury." Id.

As to the allegations that new Nestlé PR/Payco products had been denied to Sterling, the district court found Sterling could not show any "tangible damages" because it had expanded its sales and increased its market share following the merger despite the fact that it "was not in rapid expansion before the merger." Id. The court further reasoned that, in any event, Nestlé PR had no legal duty to offer its brands, such as the "Skinny Cow" line, to Sterling. *Id. at 270*. It also observed that Sterling had not been terminated as a distributor of Edy's brand ice cream even after Nestlé PR acquired Dreyer's and became Edy's manufacturer. *Id. at 271-72*. Nor had Nestlé PR taken "any steps to make distributing Edy's unprofitable for Sterling." *Id. at 272*.

Finally, the court also rejected Sterling's monopolization and attempted monopolization claims under *§ 2* of the Sherman Act on the merits because Sterling had failed to show, as it must, either **[**15]** that Nestlé PR wielded monopoly power, or that there was a "dangerous probability" that Nestlé PR would acquire such power. *Id. at 266-72*.

Finally, the court also rejected Sterling's monopolization and attempted monopolization claims under *§ 2* of the Sherman Act on the merits because Sterling had failed to show, as it must, either that Nestlé PR wielded monopoly power, or that there was a "dangerous probability" that Nestlé PR would acquire such power. *Id. at 266-72*.

III.

HN1[] Our review of the grant of summary judgment is de novo, taking all facts and reasonable inferences in the light most favorable to Sterling, the nonmoving party. See *White v. R.M. Packer Co., 635 F.3d 571, 575 (1st Cir. 2011)*.

Sterling argues that its evidence sufficed to show that Nestlé PR has put a "stranglehold" on the Puerto Rico ice cream distribution market by: (1) acquiring its former competitor, Payco; (2) entering into "strategically deployed exclusivity contracts" that lock up lucrative and geographically efficient grocery stores albeit without foreclosing more than 30 percent of the market; and (3) acquiring Dreyer's, the manufacturer of Sterling's star product line, and causing Dreyer's to reduce from 75 cents **[**16]** to 60 cents the discount it once gave Sterling on its wholesale price. Sterling argues these practices have "harmed interbrand competition" and also "injured Sterling by foreclosing it from sales it would have made in the absence of exclusive dealing contracts and increasing Sterling's input and operational costs" by reducing the wholesale discount it once received and "forcing route structure inefficiencies."

Sterling insists it has demonstrated antitrust injury because it would have done even better for itself than it has were it not for the merger, the removal of a portion of Dreyer's wholesale discounts on Edy's products, and Nestlé PR's post-merger exclusivity arrangements. Sterling argues that in such a but-for world, purchasers would have been offered more choices in more locations at more competitive prices, and Sterling would have gained **[*120]** more market share. Sterling also argues that it would have been able to use more efficient delivery routes, thereby lowering its per-unit costs.[2] Sterling attributes its actual increased sales to the fact that Wells' Dairy Inc.'s Blue Bunny product and distribution line was "driven out" of the market after the Nestlé PR/Payco merger, which **[**17]** has benefitted Sterling in the short term.[3]

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[2] Sterling also claims that Nestlé PR's post-merger exclusivity agreements were "unremunerative," but Sterling does not develop the argument or cite to evidence to support this allusion to predatory pricing, and did not adequately raise this argument to the district court.

[3] Sterling also attributes its financial performance to the fact that the pendency of both this litigation and an investigation of Nestlé by the Department of Justice has caused Nestlé PR and its subsidiaries to "restrain themselves from unleashing the full brunt of their power to completely destroy competition."

Nestlé PR responds **[**18]** that Sterling has failed to show either that it had suffered any injury or that Nestlé PR's allegedly anticompetitive actions had caused such injury. Nestlé PR cites the lack of evidence of injury to competition or consumers, Sterling's post-2003 financial performance, the evidence of Sterling's entry into outlets previously controlled by Payco, the merged Nestlé PR's declining use of exclusivity agreements, and the unrealistic and speculative economic forecast Sterling used as its but-for scenario.

Nestlé PR also argues that whatever Sterling might show about the effect of Nestlé PR's actions on Sterling, the case law requires Sterling to show that its loss comes from acts that reduce output and/or raise prices to consumers. *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1096-97 (1st Cir. 1994)*. Nestlé PR points out that while Sterling claims in its amended complaint that consumers saw "increased retail prices and constricted retail options," it never actually produced evidence to support either reduced output or increased prices to consumers. Sterling's expert, Dr. Overstreet, acknowledged in testimony that he had done no analysis of consumer pricing, or of any potential causes **[**19]** of any increased prices, preventing Sterling from proving that any increased price either existed or resulted from anticompetitive conduct by Nestlé PR. Nor did Sterling produce any evidence of reduced output. In fact, Nestlé argues, there was evidence to the contrary of increased output and reduced prices.

HN2[] The Supreme Court has articulated a six-factor test that governs whether a plaintiff has standing to bring an antitrust action. The relevant factors are:

> (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury"); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.

RSA Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10, 14 (1st Cir. 2001) (quoting **[*121]** *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999))*; see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. **[**20]** "Although we technically balance the six factors to determine if standing is appropriate, this Court has emphasized the causation requirement." *RSA Media, 260 F.3d at 14* (citation omitted). Additionally, "the absence of 'antitrust injury' will generally defeat standing." Id. Sterling has not satisfied these tests and particularly has not shown antitrust injury.

HN3[] The plaintiff bears the burden of proving antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. ***HN4***[] Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Id. The injury should be "the type of loss that the claimed violations . . . would be likely to cause," id. (alteration in original) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*, and should therefore "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," id. Plaintiffs must show not only that they were injured as a result of the defendant's actions and that those actions constituted an antitrust violation, but also that their injury is the type of injury **[**21]** the antitrust violation would cause to competition.

HN5[] A competitor may suffer injury even when there is no injury to competition or to consumers, and so lack standing. Even if a competitor is hurt because the merger of its rivals makes them more efficient or able to compete more aggressively, that harm is not an antitrust violation, and the competitor lacks standing. See 2 Areeda & Hovenkamp, ***Antitrust Law***, ¶ 348a, at 387 (2d. ed. 2000). Further, unlike consumers, competitors have incentives to bring antitrust suits for purposes which are anti-competitive, for example to induce the defendant competitor to

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At oral argument, Sterling raised for the first time the argument that the real danger of Nestlé PR's conduct is the injury that might come to pass in the future, whether or not it has suffered injury now, such as to entitle it to injunctive relief. No such argument was raised in the appellate briefs or in the district court. We decline to address this new argument that Sterling need not show antitrust injury to obtain injunctive relief. This argument has been doubly waived. See *Cortés-Rivera v. Dep't of Corr. & Rehab, 626 F.3d 21, 27 (1st Cir. 2010)*.

moderate their competition. Id. As a result, there is reason for courts to be "properly skeptical of many rivals' suits, particularly when the practices are not obviously 'exclusionary.'" Id.

HN6[] Injury to competition is "usually measured by a reduction in output and an increase in prices in the relevant market." *Sullivan, 34 F.3d at 1097* (emphasis in original); see also *Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)* ("The [Supreme Court's] antitrust injury doctrine . . . 'requires every plaintiff to show that its loss comes from acts that reduce output or raise prices **[**22]** to consumers.'" (quoting *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992))*).

The overriding theme of Sterling's case is that, as a result of its merger with Payco, Nestlé PR has monopoly power in the Puerto Rico ice cream distribution market, and has exercised that power. What the undisputed facts demonstrate is that, together, Payco and Nestlé PR had an 85 percent share of the distribution market at the time of their 2003 merger, but that the market share of the merged entity has since fallen to 70 percent. This was not surprising; Nestlé PR's ice cream distribution division had been suffering heavy losses, and hoped the merger would give it viable ice cream distribution business. Still, a 70 percent market share is considerable. Nonetheless, we conclude, as did the district court, that Sterling has not shown the market has suffered a reduction in output or an increase in consumer prices. It has not shown an impairment of competition or antitrust injury from the sum of its theories.

[*122] Sterling failed to provide evidence that consumer prices increased during the relevant period. Its main economic expert, Dr. Overstreet, asserted, without evidentiary **[**23]** support, that Nestlé PR's acquisition of Payco allowed it to "maintain prices above . . . levels that likely would be found in a more competitive market." Dr. Overstreet testified, however, that he did not undertake an analysis of consumer ice cream prices in Puerto Rico, and he stated that there is "probably some dearth of consistent and reliable information about it." Sterling's attempt to show increased prices to consumers was unsupported by basic evidence such as price studies for the Puerto Rico ice cream market, and is unavailing.[4]

In fact, the evidence suggests that, if anything, consumer prices decreased during the relevant period. Evidence suggests that both Sterling and Blue Bunny adopted a strategy of reducing prices in order to entice retailers to break away from [Nestlé PR's] exclusive contracts. While there was no evidence offered of what happened to retail prices islandwide, there is reason to believe consumers benefitted from these price wars. And independent evidence at least shows that, in some supermarkets, the retail cost of Edy's was lowered. Further, the **[**25]** evidence is that, while inflation in Puerto Rico averaged 11.9 percent annually between 2003 and 2007, the consumer prices for both Blue Bunny and Edy's ice cream were lower in 2007 than they were in 2001.

The evidence regarding output is similar. Sterling did not set forth any evidence from which an inference can be drawn that there was a reduction in output within the relevant market during the relevant period, let alone a reduction attributable to Nestlé PR's alleged violations, or that Sterling consumers were "forced to choose between less preferred brands or visit[] another store" as a result of anti-competitive actions.

The lack of evidence of antitrust injury in the form of either increased consumer prices or reduced output is consistent with the lack of evidence that Sterling itself has been negatively affected by Nestlé PR's purported

[4] At oral argument, Sterling pointed for the first time to evidence that purportedly shows consumer ice cream prices in Puerto Rico increased during the relevant period. Sterling had not cited these documents in its appellate brief. In any event, they do not show consumer prices increased. Sterling points to deposition testimony of its president, which indicates that Sterling had, at one time in 2006, increased prices by 15 percent to some of its retailers. But Sterling's president explicitly stated that the increase was limited, and that he "held pricing back at key retailers through 'roll backs.'" In any case, there is no evidence that the limited **[**24]** number of price increases to retailers were ever passed on to consumers. Sterling also points to a July 24, 2003 email from a Payco officer that opaquely refers to aligning Nestlé PR prices with Payco prices following the 2003 merger, but this evidence does not show such a price increase actually occurred, and again speaks only to prices to retailers, not consumers. The only evidence Sterling cites that actually relates to consumer prices is a chart detailing pricing of various ice cream brands at Econo supermarkets from June 2003 until August 2006. But that chart shows consumer prices remained relatively constant during the three year period.

violations. ***HN7***[] It is axiomatic that antitrust laws are concerned with protecting against impairments to a market's competitiveness and not impairments to any one market actor. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. It is also true that "an antitrust plaintiff's post-violation successes do not necessarily **[**26]** preclude compensation for damages proximately caused by an antitrust violation." *Pierce v. Ramsey Winch Co., 753 F.2d 416, 436 (5th Cir. 1985)*. Nonetheless, that Sterling's **[*123]** sales, profits, and market share have increased during the relevant period provides further indication that no antitrust injury exists here.[5]

Sterling tries to sidestep these deficiencies by arguing **[**27]** that the types of harm it alleges suffice as alternatives to the classic evidence of antitrust injuries. However, the cases Sterling cites as recognizing alternate types of antitrust injuries actually discuss behavior that would obviously result in higher prices and lower output. See *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 778-79 (7th Cir. 1999)* (total denial of an essential input, in service of a cartel that would raise prices and reduce output); *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 12-15 (1st Cir. 1979)* (termination of an exclusive distributorship by competitors who had conspired to divide a retail market between them, which is per se illegal behavior designed to raise prices and reduce output). This case is nothing like the cases cited.

HN8[] Even had Sterling made an adequate showing of harms to competition through increased consumer prices or reduced output, Sterling would have to show those market impairments were the result of antitrust violations in order to demonstrate antitrust injury. But Sterling has failed to show that any of Nestlé PR's conduct violates antitrust provisions.

We first reject Sterling's argument that Nestlé PR's exclusive **[**28]** dealing agreements have impaired competition in the market or caused any injury to Sterling. ***HN9***[] Because vertical exclusive dealing agreements "can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 65 (1st Cir. 2004)*. Given their capacity to enable markets to operate more efficiently and benefit consumers, such agreements are not subject to per se treatment, but are instead subject to rule of reason analysis. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *Stop & Shop Supermarket, 373 F.3d at 62*; 11 Areeda & Hovenkamp, ***Antitrust Law***, ¶¶ 1802-07 (2d. ed. 2005). "Indeed, courts tend to be skeptical of such claims because it is not in the long-term interest of the company that grants the 'exclusive deal' to drive out of business competitors of the grantee." *Stop & Shop Supermarket, 373 F.3d at 66*.

HN10[] The rule of reason calculus requires that Sterling make a burdensome showing that (1) the agreements in question involved the exercise of power in a particular economic market, (2) that this exercise impaired **[**29]** the competitiveness of the market, and (3) that those impairments "outweighed efficiencies or other economic benefits." *Id. at 61*. Sterling's argument fails under this test for a number of reasons.

As a practical matter, ***HN11***[] in applying the rule of reason calculus to exclusive **[*124]** dealing arrangements, "foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent," and while high numbers do not guarantee success for an antitrust claim, "low numbers make dismissal easy." *Id. at 68*. It is undisputed that Nestlé PR/Payco's rates of market foreclosure through exclusivity arrangements with Puerto Rico retailers rose to a high of 30.8 percent for a single year, 2005, and have otherwise remained below 30 percent.

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[5] Despite its increased sales, profits, and market share, Sterling argues it suffered damages because it would have earned far more were it not for Nestlé PR's exclusive agreements. It points to its 42 percent and 50 percent market share in retail stores that have no exclusive agreements as plausible benchmarks for what its market-wide performance would be in the absence of exclusive agreements. But this damages model assumes that the proper "but-for" market is one without any exclusive agreements. That assumption is erroneous, as these agreements are often efficient and pro-competitive, have been in use in Puerto Rico since before the merger, and, as discussed below, are not illegal in this case. In a market devoid of any exclusivity agreements, Sterling may perform better, but Sterling is not entitled to such a market.

Significantly, the Nestlé PR/Payco agreements are almost all of one or two year duration, and there is turnover. ***HN12***[] "Short contract terms and low switching costs generally allay most fears of injury to competition." 11 Areeda & Hovenkamp, ***Antitrust Law***, ¶ 1802, at 94. Sterling points to Nestlé PR's five-year, 90 percent exclusive contract with Ralph's as support for its claim. But that agreement is not entirely exclusive; it allows other distributors at least limited **[**30]** access. In any event, its duration is aberrational, and is on its own insufficient to sustain Sterling's claim.

HN13[] "It is not easy to think of a rule of reason analysis that does not depend on showing adverse effects on competition in a properly defined relevant market." *Stop & Shop Supermarket, 373 F.3d at 69*. Sterling has not shown that Nestlé PR's exclusive agreements have yielded adverse effects on competition. Sterling and Nestlé PR and other distributors compete to obtain such exclusivity agreements with retail vendors; such agreements have been present in the Puerto Rico market since at least the 1990s. Sterling was able to win over several of Nestlé PR's largest customers, including the large chains Grande and Pitusa, and in 2007, the largest retail seller of ice cream, Supermercados Econo, Inc., switched distributors and defendants lost all of their sales in those stores. It is also significant that there are other avenues of distribution available, and new competitors entering the market. And, as noted, Sterling's own market share has increased during the relevant market period.

There is no evidence that the challenged exclusivity agreements impair competition, nor that any such **[**31]** impairment outweighs gained market efficiencies. See *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 9 (1st Cir. 2004)* (rejecting distributor's antitrust claim regarding competitor's exclusive agreements because distributor failed to show "that so many potential outlets are foreclosed to it or other competitors by long-term exclusive dealing contracts or other tactics that survival or new entry is infeasible").

As to Dreyer's price support for Edy's, Sterling provides no authority supporting its argument that Dreyer's was required to maintain Sterling's $0.75 per-unit discount in perpetuity simply because Dreyer's had been purchased by Nestlé, S.A. There is no basis to conclude that Dreyer's would have continued the discount in perpetuity, whether or not it was acquired by Nestlé. Sterling attempts to analogize its case to JTC Petroleum to impose a stricter duty on Dreyer's now that it is a Nestlé subsidiary. But in that case the defendant successfully prevented the plaintiff's suppliers from selling it any of the needed input. See *JTC Petroleum, 190 F.3d at 778-79*. The $0.15 reduction in Sterling's discount is hardly analogous. Dreyer's stated legitimate **[**32]** business reasons not to continue this temporary arrangement. And as the district court pointed out, the net present price of Edy's to Sterling is 10 percent less than it was in 2000, despite an annual inflation rate that averaged 11.9 percent between 2003 and 2007.

Further, we have previously noted that ***HN14***[] "once a firm [like Nestlé PR] has integrated vertically into distribution by acquiring **[*125]** one or more existing distributors [like Payco], it may reduce costs by dealing only with its wholly-owned distributors. A distributor terminated for this reason might certainly suffer injury-in-fact, but it would not suffer antitrust injury as long as there were alternative sources of the product."[6] *Serpa Corp., 199 F.3d at 11*. (quoting 2 Areeda & Hovenkamp, ***Antitrust Law*** ¶ 381c, at 114 (Supp. 1999)) (internal quotation marks omitted). Given that, it is difficult to conceive how it could be illegal for Dreyer's to reduce a negotiated $0.75 per-unit discount to $0.60. This rationale disposes of Sterling's next argument as well: there is no antitrust violation lurking in Nestlé, S.A.'s reassignment of certain Dreyer's product lines from Sterling to Nestlé PR.

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[6] Alternative sources exist here. The parent **[**33]** company of Nestlé PR is Nestlé, S.A. The major competitor of Nestlé, S.A. on the manufacturing level is Unilever, which has used Sterling as a distributor in Puerto Rico during some of the time period at issue.

We note that the Puerto Rico Office of Monopolistic Affairs (PROMA) approved the 2003 Nestlé PR/Payco merger upon Nestlé PR's agreement to seek PROMA's approval before transferring the distribution rights to Edy's ice cream (but not any other Dreyer's brand) from Sterling to another competitor unless Sterling had, in the interim, acquired distribution rights to either Breyer's or Blue Bunny ice cream.

Our conclusion that Sterling has failed to show it has suffered the requisite injury to maintain this suit also encompasses its monopolization and attempted monopolization claims under *§ 2* of the Sherman Act.

HN15[] To prevail on its monopolization claim, Sterling must show that Nestlé PR (1) has monopoly power in the Puerto Rico ice cream distribution market, and (2) "has engaged in impermissible 'exclusionary' practices with the design or effect of protecting or enhancing its monopoly position." *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996)* **[**34]** (quoting Hovenkamp, Federal Antitrust § 6.4a (1994)) (internal quotation marks omitted).

HN16[] Whether a defendant has monopoly power depends on the defendant's "ability to lessen or destroy competition" in the relevant market. *Id. at 196* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. Despite Nestlé PR's significant market share, Sterling has failed to demonstrate Nestlé PR has such an ability, or that it has engaged in impermissible practices causing the required injury. If anything, the undisputed facts--that Nestlé PR's own market share is decreasing, that Sterling's market share is steadily on the rise, and that consumer prices have not increased--evidence the opposite conclusion.

Sterling nonetheless argues there are high barriers to entry which enhance Nestlé PR's ability to engage in market foreclosure. Although distribution businesses do not commonly involve high barriers to entry, Sterling says many exist here, including: the cost of establishing a Direct Store Delivery system; the substantial capital required to purchase trucks and freezers, particularly because ice cream products must be kept at minus 20 degrees Fahrenheit; and the difficulty of establishing **[**35]** route density. Sterling acknowledges that there have been new entries to distribution of ice cream in Puerto Rico, but says the new businesses, such as Palm Industries, Inc., are not successful.

However, there is other evidence of successful new entries. As the district court noted, Gianni New York, LLC, has entered the market since Nestlé PR's 2003 merger with Payco, distributing to Supermercados Amigo, Inc., one of the largest supermarket chains in Puerto Rico, as **[*126]** well as to two other large chains, Wal-Mart and Supermercados SuperMax. Also, retailers can import ice cream products directly from the United States, bypassing distributors. Both the United States military bases in Puerto Rico and Supermercados Econo, Inc. have adopted that practice. And some suppliers of ice cream in Puerto Rico have their own distribution operation, helping to ensure consumer access and choice.

Regarding the attempted monopolization claim, Sterling "must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, 506 U.S. at 456*. Sterling alleges that Nestlé PR's **[**36]** market share, coupled with its corporate parent's control of Edy's brand ice cream, Sterling's largest product line, create a dangerous probability that it will achieve monopoly power. But ***HN17***[] where a plaintiff remains profitable and in fact has expanded its market share since the allegedly anticompetitive conduct has begun, it faces an uphill battle in proving such a dangerous probability exists. See *Springfield Terminal Ry. Co. v. Canadian Pac. Ltd., 133 F.3d 103, 110 (1st Cir. 1997)* (rejecting attempt to monopolize claim on basis of plaintiff's strong financial performance).

HN18[] Under our circuit law, attempted monopolization claims are "presumptively implausible" where, as is the case here, "the challenged conduct has been in place for at least two years and the remaining market remains robustly competitive as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share." Id. (quoting Areeda & Hovenkamp, 3A ***Antitrust Law*** ¶ 807f, at 360-61). That rule applies here. More than six years have passed since the Nestlé PR/Payco merger, and Sterling has been unable to establish any injury to itself or the competitiveness of the market.[7]

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[7] Given our conclusions, **[**37]** we need not consider the statements of Nestlé PR's officers that Sterling argues evidences Nestlé PR's specific intent to monopolize.

We add that there was no abuse of discretion in the district court's striking of untimely sections of Sterling's expert's report. See *Macaulay v. Anas, 321 F.3d 45, 51-53 (1st Cir. 2003)* (finding no abuse of discretion where district court excluded "supplemental" expert report after close of lengthy discovery period).

IV.

Summary judgment was properly granted. We affirm.

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United States v. Comcast Corp.

United States District Court for the District of Columbia

September 1, 2011, Decided; September 1, 2011, Filed

Civil Case No. 11-106 (RJL)

Reporter

808 F. Supp. 2d 145 *; 2011 U.S. Dist. LEXIS 98448 **; 2011-2 Trade Cas. (CCH) P77,584

UNITED STATES OF AMERICA, STATE OF CALIFORNIA, STATE OF FLORIDA, STATE OF MISSOURI, STATE OF TEXAS, and STATE OF WASHINGTON, Plaintiffs, v. COMCAST CORP., GENERAL ELECTRIC CO., and NBC UNIVERSAL, INC., Defendants.

Subsequent History: Judgment entered by *United States v. Comcast Corp., 2011 U.S. Dist. LEXIS 116381 (D.D.C., Sept. 1, 2011)*

Prior History: *In re Comcast Corp., 25 F.C.C.R. 2133, 2010 FCC LEXIS 1431 (F.C.C., 2010)*

Core Terms

arbitration, public interest, parties, compliance, provisions, violations, Antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN1[] **Settlements, Antitrust Procedures & Penalties Act**

Before entering any consent judgment offered by the United States in an antitrust action under *15 U.S.C.S. § 16(e)*, a district court must determine whether entry of the judgment is in the public interest. To make that determination, the court shall consider: (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. *15 U.S.C.S. § 16(e)*.

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For GENERAL ELECTRIC COMPANY, NBC UNIVERSAL, INC., Defendants: Deborah L Feinstein, Justin P. Hedge, William **[**2]** Joseph Baer, LEAD ATTORNEYS, ARNOLD & PORTER, Washington, DC.

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

Opinion by: RICHARD J. LEON

Opinion

[*146] **MEMORANDUM ORDER**

BACKGROUND

This case is before the Court on the United States' Motion to Enter Final Judgment [Dkt. #25]. In January 2011, plaintiffs United States of America ("the Government") and the States of California, Florida, Missouri, Texas, and Washington ("plaintiffs"), brought a civil anti-trust [1] action to permanently enjoin a proposed joint venture and related transactions, purportedly worth $30 billion, between defendant Comcast Corporation ("Comcast" or "defendant") and General Electric Company ("GE" or "defendant") that would allow Comcast, the largest cable company in the United States, to control, among other **[*147]** things, popular video programming which included NBC Television Network ("NBC broadcast network") and the cable networks of NBC Universal, Inc. ("NBCU" or "defendant"). Complaint ("Compl."), Jan. 18, 2011 [Dkt. #1]. The Government simultaneously issued a Competitive Impact Statement contending that under the proposed merger, Comcast would obtain majority control of highly valued video programming that would prevent rival video-distribution **[**3]** companies from competing against the post-merger entity. *See* Competitive Impact Statement at 1, Jan. 18, 2011 [Dkt. #4].

On February 20, 2011, this Court signed a Stipulation and Order [Dkt. #21], pursuant to which the defendants agreed to abide by the provisions of a proposed Final Judgment that would allow the merger to go forward, while also putting into place certain remedies for what the Government alleged was anti-competitive behavior. Defendants also agreed to comply with the requirements of the Antitrust Procedures and Penalties Act ("APPA"), *15 U.S.C. § 16*, including publishing — at defendants' expense — newspaper notice of the merger, a summary of its

[1] The Government brought suit under Section 15 of the Clayton Act, *15 U.S.C. § 25*, to "prevent and restrain [defendants] from violating Section 7 of the Clayton Act, *15 U.S.C. § 18*." Compl. ¶ 11. Plaintiff states brought suit under Section 16 of the Clayton Act, *15 U.S.C. § 26*. *Id.*

terms, and a copy of the proposed Final Judgment. Stipulation and Order at ¶¶ 2-3; *see also* P1. United States' Response to Public Comments, June 6, 2011 [Dkt. #23]. On April 18, 2011, defendants filed a Report and Certification of Compliance with Tunney **[**4]** Act Requirements ("Report") [Dkt. #22], in which they certified compliance with *Section 2(g) of the APPA* and detailed communications by or on behalf of defendants with the United States regarding the Final Judgment. *See* Report at 1. On June 6, 2011, the Government filed a Response to Public Comments ("Response") [Dkt. #23] in which it summarized and responded to the eight public comments filed after the sixty-day notice required by the APPA. Resp. at 2. After analyzing the public comments, the United States professed a continued "belie[f] that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint." *Id.* at 1.

Then, on June 29, 2011, the Government filed a Certificate of Compliance with Provisions of the Antitrust Procedures and Penalty Act [Dkt. #24], wherein it certified compliance with all requirements of *APPA Sections 16(b)-(h)* and requested that the Court make the necessary public-interest determinations required by *15 U.S.C. § 16(e)* and, ultimately, enter the proposed Final Judgment.

This Court held a fairness hearing on July 27, 2011. *See* Minute Entry, Case 11-cv-106, July 27, 2011. The parties were given **[**5]** the opportunity to present oral argument and to answer the Court's questions. Upon conclusion of the fairness hearing, the Government filed a Supplemental Statement In Support of Entry of the Final Judgment ("Supp. Stmt."), Aug. 5, 2011 [Dkt. #26], in which it further explained the proposed Final Judgment and renewed its request for this Court to enter Final Judgment.

Upon review of the pleadings, the record, and the applicable law, the Court determines that entry of the proposed Final Judgment is in the public interest and therefore GRANTS the Government's Motion for Entry of Final Judgment [Dkt. #25]. However, given a number of potential uncertainties regarding the Final Judgment's implementation, and consistent with this Court's "jurisdiction to issue orders and directions necessary and appropriate to carry out or construe any provision of the Final Judgment and to 'enforce compliance, and to punish violations of its provisions,'" Supp. Stmt. at 6 (quoting Final Judgment § IX), I hereby order that certain future steps, described herein, be **[*148]** taken for no less than two years to ensure that the public interest continues to be served.

STANDARD OF REVIEW

HN1[] Before entering any consent judgment **[**6]** offered by the United States under *15 U.S.C. § 16(e)*, this Court must determine whether entry of the judgment "is in the public interest." To make that determination, the Court shall consider:

> "(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." *15 U.S.C. § 16(e)*.

ANALYSIS

On July 27, 2011, the Court held a public hearing during which the Government and defendants presented arguments as to why entry of Final Judgment was in the public interest. In essence, both sides relied **[**7]** upon their assessment that the Final Judgment was carefully crafted by all parties to facilitate a merger, consistent with the existing antitrust laws, that carefully protected the public's interest by maintaining the competitive equilibrium of the emerging online-video market.

While asking the parties questions at that hearing, however, I grew increasingly concerned that the Government's non-appealable arbitration mechanism for online video distributors ("OVDs") did not serve the public interest. *See, e.g.*, Fairness Hearing Transcript ("Tr."), July 27, 2011, at 23. Moreover, I was unsure whether the proposed Final Judgment adequately empowered the Department of Justice to enforce the terms of the agreement. *See, e.g., id.* at 5-6.

Not surprisingly, the Government filed a Supplemental Statement after the hearing in which it described, in detail, the dual-track arbitration mechanism OVDs may use to acquire Comcast and NBCU content under certain conditions. [2] *See* Supplemental Statement ("Supp. Stmt.") [Dkt. #26]. To start, the Government clarified that OVDs have two options for arbitration: the FCC process, and the new process outlined in the proposed Final Judgment. *Id.* at 2. Arbitration **[**8]** under the FCC Order, they stressed, is a matter of right, *see* Supp. Stmt. at 4 (citing FCC Order, App. A, §§ IV.A.3, VII.A, VII.C), and is appealable, whereas arbitration under the proposed Final Judgment is not. [3] *Id.* at 4-5. And although an OVD which is dissatisfied with its result in an FCC arbitration may *not* then take a second bite at the apple by requesting arbitration under the proposed Final Judgment, an OVD whose requested arbitration under the proposed **[*149]** Final Judgment is denied [4] by the Department of Justice may still proceed as a matter of right with arbitration under the FCC Order. *See* Supp. Stmt. at 5.

Of course, the Government contends that because the "FCC is the expert communications industry regulator . . . OVD requests will ordinarily proceed through the FCC [arbitration] process." Supp. Stmt. at 5; *see also id.* at 2. Even if this is true, however, the Government concedes that there is still "some uncertainty about the ability of OVDs to obtain timely relief under the FCC Order." *Id.* at 5. Thus, it remains to be seen how well the FCC arbitration process will work for OVDs, and how many of the OVDs who request — and are denied — arbitration under the new streamlined approached created by the proposed Final Judgment will pursue relief under the FCC Order.

Moreover, because of the way the Final Judgment is structured, the Government's ability to "enforce" the Final Judgment, and, frankly, this Court's ability to oversee it, are, to say the least, limited. Indeed, notwithstanding **[**10]** the fact that the Final Judgment vests the Government with the "responsibility" to investigate and report to the Court the complaint of an OVD alleging "fraud or malfeasance" in the proposed arbitration process, Supp. Stmt. 6 (citing Final Judgment § IX); *see also* Tr. at 5-6, 8-9, the Government, at the public hearing, freely admitted that "[w]e can't enforce this decree." Tr. at 11:14. In addition, it is undisputed that neither the FCC nor the Department of Justice has any experience yet in administering either course of arbitration in the online-video-distribution context. *See, e.g.*, Supp. Stmt. at 5; *see also* Tr. at 10:8 (Government's admission that "this is a nascent market" and that "[t]hese are nascent competitors"). And despite the Government's assurances that "this Court retains jurisdiction to issue orders and directions necessary and appropriate to carry out or construe any provision of the Final Judgment," Supp. Stmt. at 6, and "to enforce compliance, and to punish violations of its provisions," *id.* (citing Final Judgment § IX), I am not completely certain that these safeguards, *alone*, will sufficiently protect the public interest in the years ahead.

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[2] The Government's Supplemental Statement also offers a helpful and satisfactory explanation of the logistics and benefits of "baseball-style" arbitration. *See* Supp. Stmt. at 3 n.4.

[3] The Government contends, however, that arbitration under the proposed Final Judgment offers a valuable tradeoff: expedited and final resolution. *See, e.g.*, Supp. Stmt. at 2, 5-6.

[4] Under the arbitration proposed in the Final Judgment, an OVD must first seek permission from the United States to arbitrate under this "alternative" yet "complementary" mechanism. Supp. Stmt. at 4-5 (citing Proposed Final **[**9]** Judgment § VII.C). If the Government allows arbitration to move forward, any arbitration award is non-appealable. *Id.* at 4. If the Government denies an OVD's request to arbitrate, the OVD may still initiate arbitration under the FCC Order, which is available as a matter of right and is appealable. *Id.* at 3-4.

Accordingly, since neither **[**11]** the Court nor the parties has a crystal ball to forecast how this Final Judgment, along with its arbitration mechanisms, will actually function, *see* Tr. at 22, I believe that certain additional steps are necessary to monitor implementation of the Final Judgment to ensure that it satisfies the public-interest requirement mandated by statute. *See* *15 U.S.C. § 16(e)*. Therefore, pursuant to the authority Section IX of the Final Judgment vests in this Court, and to ensure that the Final Judgment is, and continues to be, in the public interest, it is hereby

ORDERED that for no less than two years, the parties shall create and maintain a report which details (a) how many OVDs initiate arbitration under the FCC Order and the result of those arbitrations; (b) how many times OVDs appeal the result of their arbitration, and to which judicial bodies, if any, they appeal; (c) how many OVDs seek permission from the Department **[*150]** of Justice to arbitrate under the Final Judgment and how many are granted permission; and (d) how many times the United States denies an OVD's request to initiate arbitration under the Final Judgment, and how many of those denied subsequently elect to initiate arbitration under **[**12]** the FCC Order. It is further

ORDERED that the United States shall prepare this report and share it with all parties in advance of a yearly hearing before this Court; and it is further

ORDERED that the parties shall convene for an annual hearing with this Court to explain and discuss the report and any other non-arbitration-related issues that may have arisen during the previous year to ensure that the Final Judgment does, and continues to, satisfy the public interest.

SO ORDERED.

/s/ Richard J. Leon

RICHARD J. LEON

United States District Judge

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United States v. Comcast Corp.

United States District Court for the District of Columbia

September 1, 2011, Decided; September 1, 2011, Filed

CASE: 1:11-cv-00106

Reporter
2011 U.S. Dist. LEXIS 116381 *; 2011-2 Trade Cas. (CCH) P77,585; 2011 WL 5402137

UNITED STATES OF AMERICA, STATE OF CALIFORNIA, STATE OF FLORIDA, STATE OF MISSOURI, STATE OF TEXAS, and STATE OF WASHINGTON, Plaintiffs, v. COMCAST CORP., GENERAL ELECTRIC CO., and NBC UNIVERSAL, INC., Defendants.

Subsequent History: Modified by, Judgment entered by *United States v. Comcast Corp., 2013 U.S. Dist. LEXIS 132001 (D.D.C., July 31, 2013)*

Prior History: *United States v. Comcast Corp., 808 F. Supp. 2d 145, 2011 U.S. Dist. LEXIS 98448 (D.D.C., 2011)*

Core Terms

Programming, Video, Network, arbitration, Broadcast, Cable, Affiliate, terms, Comparable, provisions, consumers, negotiate, local television station, Channel, Offers, documents, business day, distribute, commence, furnish, rights, joint venture, conditions, commercial arbitration, television, receives, Communications, retransmission, Partnerships, Subsidiaries

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Judges: Richard J. Leon, United States District Judge.

Opinion by: Richard J. Leon

Opinion

FINAL JUDGMENT

WHEREAS, Plaintiffs, the United States of America and the States of California, Florida, Missouri, Texas, and Washington, filed their Complaint on January 18, 2011, alleging that Defendants propose to enter into a joint venture that will empower Defendant Comcast Corporation to block competition from video programming distribution competitors in violation of Section 7 of the Clayton Act, as amended, *15 U.S.C. § 18*, and Plaintiffs and Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiffs require Defendants to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged **[*3]** in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Defendants, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended, *15 U.S.C. § 18*.

II. DEFINITIONS

As used in this Final Judgment:

A. "AAA" means the American Arbitration Association.

B. "Affiliated" means directly or indirectly controlling, controlled by, or under common control with a Person.

C. "Broadcast Network" means The Walt Disney Company (ABC), CBS Inc. (CBS), News Corporation (FOX), NBCU (NBC and Telemundo), or any other Person that provides live or recorded Video Programming for broadcast over a group of local television stations.

D. "Broadcast **[*4]** Network Peer" means (1) CBS Inc. (CBS), News Corporation (FOX), or The Walt Disney Company (ABC); or (2) any of the top four Broadcast Networks, measured by the total annual net revenue earned by the Broadcast Network from the broadcast of live or recorded Video Programming over a group of local television stations. Defendants are not Broadcast Network Peers, even if they are one of the top four Broadcast Networks.

E. "Business Model" means the primary method by which Video Programming is monetized (*e.g.*, ad-supported, subscription without ads, subscription with ads, electronic sell through, or pay per view/transactional video on demand).

F. "Cable Programmer" means Time Warner, Inc., The Walt Disney Company, News Corporation, Viacom, Inc., NBCU, or any other Person that provides Video Programming for distribution through MVPDs. A Person that provides Video Programming to MVPDs solely as a Broadcast Network or as a Network Affiliate, O&O, or local television station operating within its licensed territory is not a Cable Programmer.

G. "Cable Programmer Peer" means (1) News Corporation, Time Warner, Inc., Viacom, Inc., or The Walt Disney Company; or (2) any of the top five Cable Programmers, **[*5]** measured by the total annual net revenue earned by the Cable Programmer from its cable networks, as reported by SNL Kagan (or another source commonly relied upon in the television industry), excluding revenues earned from regional sports networks. Defendants are not Cable Programmer Peers, even if they are one of the top five Cable Programmers.

H. "Comcast" means Comcast Corporation, a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania, its successors and assigns, and its Subsidiaries (whether partially or wholly owned), divisions, groups, Partnerships, and Joint Ventures, and their directors, officers, managers, agents, and employees.

I. "Defendants" means Comcast, General Electric, and NBCU, acting individually or collectively, as appropriate. Where the Final Judgment imposes an obligation to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Defendant individually and to any Joint Venture established by any two or more Defendants.

J. "Department of Justice" means the United States Department of Justice Antitrust Division.

K. "Experimental Deal" means an agreement between an OVD and a Peer for a term of **[*6]** six months or less.

L. "Film" means a feature-length motion picture that has been theatrically released.

M. "Final Offer" means a proposed contract identifying the Video Programming Defendants are to provide to OVDs pursuant to Section IV.A or IV.B of this Final Judgment and containing the proposed price, terms, and conditions on which Defendants will provide that Video Programming.

N. "General Electric" means General Electric Company, a New York corporation with its principal place of business in Fairfield, Connecticut, its successors and assigns, and its Subsidiaries (whether partially or wholly owned), divisions, groups, Partnerships, and Joint Ventures, and their directors, officers, managers, agents, and employees.

O. "Hulu" means Hulu, LLC, a Delaware limited liability company with its headquarters in Los Angeles, California, its successors and assigns, and its Subsidiaries (whether partially or wholly owned), divisions, groups, Partnerships, and Joint Ventures, and their directors, officers, managers, agents, and employees.

P. "Internet Access Service" means a mass-market retail communications service by wire or radio that provides the capability to transmit data to and receive data **[*7]** from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. Internet Access Service does not include virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services (if those services are separate from Internet Access Services).

Q. "MVPD" means a multichannel video programming distributor as that term is defined on the date of entry of this Final Judgment in *47 C.F.R. § 76.1200(b)*.

R. "NBCU" means NBC Universal, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its Subsidiaries (whether partially or wholly owned), divisions, groups, Partnerships, and Joint Ventures, and their directors, officers, managers, agents, and employees.

S. "Network Affiliate" means a local television station that broadcasts some or all of the Video Programming of Defendants' Broadcast Networks (*i.e.*, **[*8]** NBC or Telemundo). A Network Affiliate is owned and operated by Persons other than Defendants.

T. "O&O" means a local television station owned and operated by Defendants that broadcasts the Video Programming of one of Defendants' Broadcast Networks (*i.e.*, NBC or Telemundo).

U. "OVD" means any Person that distributes Video Programming in the United States by means of the Internet or another IP-based transmission path provided by a Person other than the OVD. This definition (1) includes an MVPD that offers Video Programming by means of the Internet or another IP-based transmission path outside its MVPD footprint as a service separate and independent of an MVPD subscription; and (2) excludes an MVPD that offers Video Programming by means of the Internet or another IP-based transmission path to homes inside its MVPD footprint as a component of an MVPD subscription.

V. "Peer" means any Broadcast Network Peer, Cable Programmer Peer, or Production Studio Peer, its successors, assigns, and any Person that is managed or controlled by any Broadcast Network Peer, Cable Programmer Peer, or Production Studio Peer. Defendants are not Peers.

W. "Person" means any natural person, corporation, company, **[*9]** partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

X. "Plaintiff States" means the States of California, Florida, Missouri, Texas, and Washington.

Y. "Production Studio" means Time Warner, Inc. (Warner Bros. Television and Warner Bros. Pictures), News Corporation (20th Century Fox Television and 20th Century Fox), Viacom, Inc. (Viacom's television production subsidiaries and Paramount Pictures), Sony Corporation of America (Sony Pictures Television and Sony Pictures Entertainment), The Walt Disney Company (Disney-ABC Studios and the Walt Disney Motion Pictures Group), NBCU (Universal Pictures, Focus Films, and Universal Studios), and any other Person that produces Video Programming for distribution through Broadcast Networks or Cable Programmers.

Z. "Production Studio Peer" means (1) News Corporation, Viacom, Inc., Sony Corporation of America, Time Warner, Inc., or The Walt Disney Company; or (2) any of the top six Production Studios, measured by the total annual net revenue earned by the Production Studio from the sale or licensing of Video Programming. Defendants **[*10]** are not Production Studio Peers, even if they are one of the top six Production Studios.

AA. "Qualified OVD" means any OVD that has an agreement with a Peer for the license of Video Programming to the OVD (other than an agreement under which an OVD licenses only short programming segments or clips from the Peer), where the OVD is not Affiliated with the Peer.

BB. "Specialized Service" means any service provided over the same last-mile facilities used to deliver Internet Access Service other than (1) Internet Access Services, (2) services regulated either as telecommunications services under Title II of the Communications Act or as MVPD services under Title VI of the Communications Act, or (3) Defendants' existing VoIP telephony service.

CC. "Subsidiary," "Partnership," and "Joint Venture" refer to any Person in which there is partial (25 percent or more) or total ownership or control between the specified Person and any other Person.

DD. "Value" means the economic value of Video Programming based on, among other factors, the Video Programming's ratings (as measured by The Nielsen Company or other Person commonly relied upon in the television industry for television ratings), affiliate **[*11]** fees, advertising revenues, and the time elapsed since the Video Programming was first distributed to consumers by a Broadcast Network or Cable Programmer.

EE. "Video Programming" means programming provided by, or generally considered comparable to programming provided by, a Broadcast Network or Cable Programmer, regardless of the medium or method used for distribution, and includes programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); programming offered to viewers on an on-demand, point-to-point basis (also known as video on demand); pay per view or transactional video on demand; short programming segments related to other full-length programming (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and Films for which a year or more has elapsed since their theatrical release. For purposes of this Final Judgment, Video Programming shall not include programming over which General Electric possesses ownership or control that is unrelated to its ownership interest **[*12]** in NBCU.

III. APPLICABILITY

This Final Judgment applies to Defendants and all other Persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

Provision of Economically Equivalent Video Programming Terms to OVDs

A. At the request of any OVD, Defendants shall provide, for distribution to consumers through a linear feed (plus any associated video-on-demand rights), all Video Programming they provide to any MVPD in the United States with more than one million subscribers, on terms that are Economically Equivalent to the terms on which Defendants provide Video Programming to that MVPD.

For purposes of this Section IV.A:

1. "Economically Equivalent" means the price, terms, and conditions that, in the aggregate, reasonably approximate those on which Defendants provide Video Programming to an MVPD, and shall take account of, among other things, any difference in advertising revenues earned by Defendants through OVD distribution and those earned through MVPD distribution; any limitation of Defendants' legal rights to provide Video Programming as a linear feed over the Internet or other IP-based **[*13]** transmission path; any generally applicable, market-based requirements regarding minimum subscriber and penetration rates; and any other evidence concerning differences in revenues earned by Defendants in connection with the provision of Video Programming to the OVD rather than to an MVPD.

2. Defendants shall provide to any requesting OVD all Video Programming subject to Defendants' management or control and all Video Programming, including Video Programming owned by another Person, over which Defendants possess the power or authority to negotiate content licenses.

3. At the request of the OVD, Defendants shall provide any bundle of channels, and all quality formats (*e.g.*, high definition, 3D) and video-on-demand rights that Defendants provide to any MVPD in the United States with more than one million subscribers.

4. Subject to other provisions of this Section IV.A, Defendants shall not apply to an OVD any terms or conditions contained in Defendants' agreements with MVPDs that would not be technically or economically practicable if applied generally to Video Programming distributed by OVDs (*e.g.*, that the OVD distribute Video Programming over an MVPD system).

5. In any agreement they **[*14]** enter into with an OVD under this Section IV.A, Defendants may require that the OVD not distribute Defendants' Video Programming to consumers (a) if Defendants' Video Programming constitutes more than 45 percent of the OVD's Video Programming (measured by hours available to subscribers), and (b) until at least one Peer has agreed to provide Video Programming to the OVD (including, if the Defendants agree to provide NBC Video Programming to the OVD, at least one Broadcast Network Peer).

6. Defendants may condition their provision of Video Programming to an OVD under this Section IV.A on the OVD's (a) agreement not to distribute the Video Programming to consumers through a website promoting or communicating the availability or accessibility of pornography, gambling, or unlawful activities; (b) reasonable demonstration of its ability to meet its financial obligations; (c) demonstration of its ability to satisfy reasonable quality and technical requirements for the display and secure protection of Defendants' Video Programming; (d) agreement to limit the distribution of an O&O's Video Programming linear feed solely to that O&O's designated market area or "DMA"; or (e) agreement to limit **[*15]** the distribution of Defendants' Video Programming to the territory of the United States.

Provision of Comparable Video Programming to OVDs

B. At the request of any Qualified OVD, Defendants shall provide Comparable Video Programming to the Qualified OVD on terms that are Economically Equivalent to the price, terms, and conditions on which the Qualified OVD receives Video Programming from a Peer.

For purposes of this Section IV.B:

1. "Economically Equivalent" means price, terms, and conditions that, in the aggregate, reasonably approximate those on which the Peer provides Video Programming to the Qualified OVD, and shall take account of, among other things, any difference between the Value of the Video Programming the Qualified OVD seeks from Defendants and the Value of the Video Programming it receives from a Peer.

2. "Comparable" Video Programming means Defendants' Video Programming that is reasonably similar in kind and amount to the Video Programming provided by the Peer, considering the volume (*i.e.*, number of channels or shows) of Video Programming and its Value.

3. The following, among other types of Video Programming, are not Comparable:

a. first-day Video Programming and Video Programming **[*16]** distributed after Defendants' first-day distribution of that Video Programming to consumers;

b. repeat, prior-season Video Programming and original, first-run Video Programming;

c. non-sports Video Programming and sports Video Programming;

d. broadcast Video Programming and cable Video Programming;

e. Video Programming directed to children and Video Programming not directed to children;

f. local news Video Programming and Video Programming that is not local news;

g. Film and non-Film Video Programming; and

h. Film between one and five years from initial distribution and Film over five years from initial distribution.

4. In any agreement they enter into with an OVD under this Section IV.B, Defendants shall not be required to include exclusivity provisions for Comparable Video Programming even if the Qualified OVD's Peer agreement includes exclusivity provisions, *provided that* the price, terms, and conditions on which Defendants provide Video Programming to the Qualified OVD shall be adjusted so that, in the aggregate, they reasonably approximate the price, terms, and conditions on which the Peer provides Video Programming to the Qualified OVD.

5. If a Qualified OVD receives Video Programming **[*17]** from two or more Peers in any single Peer category (*i.e.*, Broadcast Network Peers, Cable Programmer Peers, or Production Studio Peers) and pursuant to the same Business Model, Defendants shall provide, pursuant to this Section IV.B, Video Programming Comparable to the Video Programming of one Peer in that category selected by the Qualified OVD. If a Qualified OVD receives Video

Programming from a Peer in two or more Peer categories, Defendants shall provide Video Programming Comparable to the Peer in both or all categories. If a Qualified OVD receives Video Programming from two or more Peers in the same Peer category but pursuant to different Business Models, Defendants shall provide Video Programming Comparable to each Peer pursuant to the Business Model specified in each Peer contract.

6. In responding to a request from a Qualified OVD to which Defendants have provided Video Programming under this Section IV.B, Defendants shall not be required to provide additional Video Programming unless the Qualified OVD enters into a Video Programming agreement with (a) a Peer in a different Peer category (*i.e.*, Broadcast Network Peers, Cable Programmer Peers, or Production Studio Peers), (b) **[*18]** the same Peer under a different Business Model, or (c) the same Peer for additional Video Programming pursuant to the same Business Model.

7. At the request of an OVD with which Defendants have an agreement to provide Video Programming that subsequently becomes a Qualified OVD, Defendants shall provide additional or different Video Programming so the Video Programming Defendants provide to the Qualified OVD (including any Video Programming the Defendants have previously agreed to provide to the OVD) is Comparable to that which the Qualified OVD receives from the Peer.

8. Defendants may require the Qualified OVD to distribute Video Programming obtained from Defendants pursuant to the Business Model under which the Qualified OVD distributes the Peer's Video Programming.

9. The number of Experimental Deals to which Defendants, at the request of Qualified OVDs, must respond by providing Comparable Video Programming is limited to the maximum number of Experimental Deals any single Peer has entered into with OVDs.

10. If a Cable Programmer Peer provides substantially all of its cable channels to a Qualified OVD for distribution to consumers through a linear feed, Defendants may meet their obligation **[*19]** under this Section IV.B to provide Comparable Video Programming by providing to the Qualified OVD and requiring the Qualified OVD to distribute substantially all of Defendants' channels.

OVD Rights to Commercial Arbitration

C. If, after negotiations, in which Defendants shall participate in good faith and with reasonable diligence, Defendants and any OVD fail to agree on appropriate Economically Equivalent terms on which Defendants must provide Video Programming under Sections IV.A or IV.B of this Final Judgment or on Comparable Video Programming under Section IV.B of this Final Judgment, the OVD may apply to the Department of Justice (but not to the Plaintiff States) for permission to submit its dispute with Defendants to commercial arbitration in accordance with Section VII of this Final Judgment. For so long as commercial arbitration is available for the resolution of such disputes in a timely manner under the Federal Communications Commission's rules and orders, the Department of Justice will ordinarily defer to the Federal Communications Commission's commercial arbitration process to resolve such disputes; *provided that* the Department of Justice reserves the right, in its sole discretion, **[*20]** to permit arbitration under this Final Judgment to advance the competitive objectives of this Final Judgment. Nothing in this Section IV.C shall limit the right of the United States to apply to this Court, pursuant to Section IX of this Final Judgment, either before or in place of commercial arbitration under Section VII of this Final Judgment, for an order enforcing Defendants' compliance or punishing their noncompliance with their obligations under Sections IV.A and IV.B of this Final Judgment.

Disposition of Control Over Hulu

D. Within ten days after entry of this Final Judgment, Defendants shall (1) delegate any voting and other rights they hold pursuant to their ownership interest in Hulu in a manner that directs and authorizes Hulu to cast any votes related to such ownership interest in an amount and manner proportional to the vote of all other votes cast by other Hulu owners; and (2) relinquish any veto right or other right to influence, control, or participate in the governance or management of Hulu; *provided that* such delegation and relinquishment shall terminate upon Defendants' complete divestiture of their ownership interests in Hulu.

E. Defendants shall not read, receive, **[*21]** obtain, or attempt to obtain any confidential or competitively sensitive information concerning Hulu or influence, interfere, or attempt to influence or interfere in the management or operation of Hulu. Notwithstanding the foregoing, Defendants may request and receive from Hulu regularly prepared, aggregated financial statements and information reasonably necessary for Defendants to exercise their rights to purchase advertising inventory from Hulu and to comply with their obligations under Section IV.G of this Final Judgment.

F. Defendants shall not obtain or acquire any ownership interest in Hulu beyond that which it possessed on January 1, 2011. Nothing in this Section IV.F shall prohibit Defendants from receiving a proportional or less than proportional distribution of Hulu equity securities in connection with any future conversion of Hulu into a corporation, *provided that* Defendants' economic share in Hulu may not increase in connection with such distribution.

G. Defendants shall continue to provide Video Programming to Hulu of a type, quantity, ratings, and quality comparable to that of the Broadcast Network owner of Hulu providing the greatest quantity of Video Programming to Hulu. **[*22]** Provided that the other current Broadcast Network owners of Hulu renew their agreements with Hulu, Defendants also either shall continue to provide Video Programming to Hulu on substantially the same terms and conditions as were in place on January 1, 2011, or shall enter into agreements with Hulu on substantially the same terms and conditions as those of the Broadcast Network owner whose renewed agreement is the most economically advantageous to Hulu.

Clear Delineation of Rights

H. Any agreement Defendants enter into with any Production Studio concerning Defendants' distribution of the Production Studio's Video Programming shall include, unless inconsistent with common and reasonable industry practice and subject to any agreements not prohibited by Section V.B of this Final Judgment, either (1) an express grant by the Production Studio to Defendants of the right to provide the Video Programming to OVDs, or (2) an express retention of that right by the Production Studio.

Document Retention and Disclosures

I. Comcast and NBCU shall furnish to the Department of Justice and the Plaintiff States quarterly electronic copies of any communications with any MVPD, OVD, Broadcast Network, Cable **[*23]** Programmer, or Production Studio containing allegations of Defendants' noncompliance with any provision of this Final Judgment.

J. Comcast and NBCU shall collect and maintain one copy of each of the following agreements, currently in effect or established after entry of this Final Judgment:

1. each affiliation agreement between Defendants and any Network Affiliate;

2. each agreement under which a Network Affiliate authorizes Defendants to negotiate on its behalf for carriage or retransmission on MVPDs;

3. each agreement for the carriage or retransmission of an O&O's or a Network Affiliate's (to the extent Defendants possess the power or authority to negotiate on behalf of the Network Affiliate) Video Programming on an MVPD; and

4. each syndication agreement under which Defendants provide Video Programming to an O&O or Network Affiliate for distribution to consumers.

K. Comcast and NBCU shall collect and maintain each document in their possession, custody, or control discussing an O&O's or a Network Affiliate's denial or threat to deny Video Programming to an MVPD or OVD. Defendants shall notify the Department of Justice and the Plaintiff States within 30 days of learning that an O&O or a **[*24]** Network Affiliate has denied or threatened to deny Video Programming to any MVPD or OVD.

L. Comcast and NBCU shall collect and maintain documents sufficient to show the compensation each O&O and each Network Affiliate (about which Comcast or NBCU possesses information) receives from any MVPD or OVD.

M. Comcast and NBCU shall collect and maintain complete copies of any final agreement or unsigned but operative agreement (1) under which Defendants provide Video Programming (other than short programming segments or clips) to any MVPD or OVD, and (2) for Defendants' carriage or retransmission on their MVPD of Video Programming from a Network Affiliate, a local television station, a Broadcast Network, or a Cable Programmer. For any ongoing negotiations that have not yet produced a final or operative agreement, Comcast and NBCU shall also collect and maintain electronic copies of the most recent offer made to Defendants by an MVPD or OVD seeking Video Programming or by a Network Affiliate, local television station, Broadcast Network, or Cable Programmer seeking carriage or retransmission on Defendants' MVPD, and Defendants' most recent response or offer to any such Persons.

N. Comcast and NBCU **[*25]** shall identify for the Department of Justice and the Plaintiff States semiannually

1. the name of each Person that in writing has requested or submitted to Defendants a contractual offer for Video Programming (other than short programming segments or clips) for distribution to consumers, the date of such Person's most recent written request or contractual offer, and the date of Defendants' most recent response or offer to such Person; and

2. the name of each Person that in writing has requested or submitted a contractual offer for carriage or retransmission of the Person's Video Programming on Defendants' MVPD, the date of such Person's most recent written request or contractual offer, and the date of Defendants' most recent response or offer to such Person.

O. Comcast and NBCU shall collect and maintain each document sent to or received from General Electric relating to (1) Defendants' provision of Video Programming to any MVPD or OVD, (2) any OVD's distribution of any Person's Video Programming to consumers, (3) carriage or retransmission of any Person's Video Programming on Defendants' MVPD, or (4) Defendants' compliance or noncompliance with the terms of this Final Judgment.

V. PROHIBITED **[*26]** CONDUCT

Discrimination and Retaliation

A. Defendants shall not discriminate against, retaliate against, or punish (1) any Broadcast Network, Cable Programmer, Production Studio, local television station, or Network Affiliate for providing Video Programming to any MVPD or OVD, or (2) any MVPD or OVD (i) for obtaining Video Programming from any Broadcast Network, Cable Programmer, Production Studio, local television station, or Network Affiliate, (ii) for invoking any provisions of this Final Judgment, (iii) for invoking the provisions of any rules or orders concerning Video Programming adopted by the Federal Communications Commission, or (iv) for furnishing information to the United States or the Plaintiff States concerning Defendants' compliance or noncompliance with this Final Judgment.

Contractual Provisions

B. Defendants shall not enter into any agreement pursuant to which Defendants provide Video Programming to any Person in which Defendants forbid, limit, or create economic incentives to limit the distribution of such Video Programming through OVDs, *provided that*, nothing in this Section V.B shall prohibit Defendants from entering into agreements consistent with common and reasonable **[*27]** industry practice. Evidence relevant to determining common and reasonable industry practice may include, among other things, Defendants' contracting practices prior to December 3, 2009, and the contracting practices of Defendants' Peers. Notwithstanding any other provision in this Section V.B, in providing Comparable Video Programming to a Qualified OVD under Section IV.B of this Final Judgment, Defendants may include exclusivity provisions only to the extent those provisions are no broader than any exclusivity provisions in the Qualified OVD's agreement with a Peer.

C. Defendants shall not enter into or enforce any agreement for Defendants' carriage or retransmission on their MVPD of Video Programming from a local television station, Network Affiliate, Broadcast Network, or Cable Programmer under which Defendants forbid, limit, or create incentives to limit the local television station's, Network Affiliate's, Broadcast Network's, or Cable Programmer's provision of its Video Programming to one or more OVDs, *provided that*, nothing in this Section V.C shall prohibit Defendants from

1. entering into and enforcing an agreement under which Defendants discourage or prohibit a local television **[*28]** station, Network Affiliate, Broadcast Network, or Cable Programmer from making Video Programming for which Defendants pay available to consumers for free over the Internet within the first 30 days after Defendants first distribute the Video Programming to consumers;

2. entering into and enforcing an agreement under which the local television station, Network Affiliate, Broadcast Network, or Cable Programmer provides Video Programming exclusively to Defendants, and to no other MVPD or OVD, for a period of time of not greater than 14 days; or

3. entering into and enforcing an agreement which requires that Defendants are treated in material parity with other similarly situated MVPDs, except to the extent application of other MVPDs' terms would be inconsistent with the purpose of this Final Judgment.

Control or Influence Over Other Persons

D. Except as permitted by Section V.B of this Final Judgment, Defendants shall not require, encourage, unduly influence, or provide incentives to any local television station or Network Affiliate to

1. deny Video Programming to (a) any MVPD that provides Video Programming to consumers in any zip code in which Comcast also provides Video Programming to consumers **[*29]** or (b) any OVD; or

2. provide Video Programming on terms that exceed its Value.

E. Notwithstanding any other provisions of this Final Judgment, including the definitions of "Defendant," "Comcast," "NBCU," "General Electric," "Subsidiary," "Partnership," or "Joint Venture," unless Comcast, NBCU, or General Electric possesses or acquires control over The Weather Channel, TV One, FearNet, the Pittsburgh Cable News Channel, or Hulu, or the right or ability to negotiate for any of those Persons or to influence negotiations for the provision of any such Person's Video Programming to MVPDs or OVDs, such Person is not a Defendant subject to the obligations of this Final Judgment.

F. Defendants shall not exercise any rights under any existing management or operating agreement with The Weather Channel to participate in negotiations for the provision of any of The Weather Channel's Video Programming to any MVPD or OVD, to advise The Weather Channel concerning any such negotiations, or to approve or obtain any information (other than aggregated financial reports) about any agreement between The Weather Channel and any MVPD or OVD. If, in the future, Defendants acquire the right to negotiate for The **[*30]** Weather Channel or to exercise any control or influence over The Weather Channel's negotiation of agreements with MVPDs or OVDs, Defendants shall provide The Weather Channel Video Programming to OVDs when required to do so under Sections IV.A or IV.B of this Final Judgment.

Practices Concerning Comcast's Internet Facilities

G. Comcast shall abide by the following restrictions on the management and operation of its Internet facilities:

1. Comcast, insofar as it is engaged in the provision of Internet Access Service, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's Internet Access Service. Reasonable network management shall not constitute unreasonable discrimination. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the Internet Access Service.

2. If Comcast offers consumers Internet Access Service under a package that includes caps, tiers, metering, or other usage-based pricing, it shall not measure, count, or otherwise treat Defendants' affiliated network traffic differently from unaffiliated **[*31]** network traffic. Comcast shall not prioritize Defendants' Video Programming or other content over other Persons' Video Programming or other content.

3. Comcast shall not offer a Specialized Service that is substantially or entirely comprised of Defendants' affiliated content.

4. If Comcast offers any Specialized Service that makes content from one or more third parties available to (or that otherwise enables the exchange of network traffic between one or more third parties and) its subscribers, Comcast shall allow any other comparable Person to be included in a similar Specialized Service on a nondiscriminatory basis.

5. Comcast shall offer Internet Access Service that is sufficiently provisioned to ensure, in DOCSIS 3.0 or better markets, that an Internet Access Service subscriber can typically achieve download speeds of at least 12 megabits per second. The United States or Defendants may petition this Court, based upon a showing that comparable Internet Access Service providers (*e.g.*, Persons using hybrid fiber-coax technology to provide service on a mass-market scale) have generally increased or decreased the speed of their services after the entry of this Final Judgment, to modify **[*32]** Comcast's required download speeds. This Section V.G does not restrict Comcast's ability to impose byte caps or consumption-based billing, subject to the other provisions of this Final Judgment.

6. Nothing in this Section V.G

a. supersedes any obligation or authorization Comcast may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits Comcast's ability to do so; or

b. prohibits reasonable efforts by Comcast to address copyright infringement or other unlawful activity.

VI. PERMITTED CONDUCT

Nothing in this Final Judgment prohibits Defendants from refusing to provide to any MVPD or OVD any Video Programming (1) for which Defendants do not possess copyright rights; (2) not subject to Defendants' management or control or over which Defendants do not possess the power or authority to negotiate content licenses; or (3) the provision of which would require Defendants' to breach any contract not prohibited by Sections V.B or V.C of this Final Judgment.

VII. ARBITRATION

A. Defendants shall negotiate in good faith and with reasonable diligence to provide Video Programming **[*33]** sought by an OVD pursuant to Sections IV.A and IV.B of this Final Judgment and, upon demand by an OVD approved by the Department of Justice pursuant to Section IV.C of this Final Judgment, shall participate in commercial arbitration in accordance with the procedures herein.

B. Defendants and an OVD may, by agreement, modify any time periods specified in this Section VII.

C. Any OVD seeking to invoke commercial arbitration under this Final Judgment must, pursuant to Section IV.C of this Final Judgment, apply to the Department of Justice for permission to do so. If the Department of Justice determines the commercial arbitration should proceed, the OVD shall furnish a written notice to Defendants and the Department of Justice expressly (1) waiving all rights to invoke any dispute resolution process under Federal Communications Commission orders and rules to resolve a dispute with Defendants concerning the same Video Programming; and (2) stating that the OVD consents to be bound by the terms in the Final Offer selected by the arbitrator. Arbitration under this Final Judgment is not available if a dispute between an OVD and Defendants concerning the same Video Programming is the subject of **[*34]** any Federal Communications Commission dispute resolution process. Defendants shall not (a) commence arbitration of any dispute under the arbitration procedures contained in this Final Judgment, or (b) upon receipt of the notice from the OVD that it intends to commence arbitration under this Final Judgment, commence any Federal Communications Commission dispute resolution process to resolve the same dispute with the OVD.

D. Arbitration pursuant to this Final Judgment shall be conducted in accordance with the AAA's Commercial Arbitration Rules and Expedited Procedures, except where inconsistent with specific procedures prescribed by this Final Judgment. As described below in Sections VII.P and VII.Q, the arbitrator shall select the Final Offer of either the OVD or the Defendants and may not alter, or request or demand alteration of, any terms of those Final Offers. The decision of the arbitrator shall be binding on the parties, and Defendants shall abide by the arbitrator's decision.

E. The AAA, in consultation with the United States, shall assemble a list of potential arbitrators, to be furnished to the OVD and Defendants as soon as practicable after commencement of the arbitration. Within **[*35]** five business days after receipt of this list, the OVD and Defendants each may submit to the AAA the names of up to 20 percent of the persons on the list to be excluded from consideration, and shall rank the remaining arbitrators in their orders of preference. The AAA, in consultation with the United States, will appoint as arbitrator the candidate with the highest ranking who is not excluded by the OVD or Defendants.

F. Defendants shall continue to provide Video Programming to an OVD pursuant to the terms of any existing agreement until the arbitration is completed. If the arbitrator's decision changes the financial terms on which Defendants must provide Video Programming to the OVD, Defendants or the OVD, as the case may be, shall compensate the other based on application of the new financial terms for the period dating from expiration of the existing agreement (plus appropriate interest).

G. Within five business days of the commencement of an arbitration, the OVD and the Defendants each shall furnish a writing to the other and to the Department of Justice committing to maintain the confidentiality of the arbitration and of any Final Offers and discovery materials exchanged during **[*36]** the arbitration, and to limit the use of any Final Offers and discovery materials to the arbitration. The writing shall expressly state that all records of the arbitration and any discovery materials may be disclosed to the Department of Justice.

H. Defendants shall not be bound by the provisions of this Section VII if an OVD commences arbitration under this Final Judgment more than 60 days prior to the expiration of an existing Video Programming agreement, or less than 30 days after an OVD first requests Defendants to provide Video Programming under Section IV.A or IV.B of this Final Judgment.

I. After an OVD receives approval from the Department of Justice, pursuant to Section IV.C of this Final Judgment, the OVD may commence arbitration by filing with the AAA and furnishing to Defendants and to the Department of Justice

1. an assertion that Defendants must provide Video Programming to the OVD pursuant to Section IV.A or IV.B of this Final Judgment; and

2. if the Qualified OVD's assertion is based, pursuant to Section IV.B of this Final Judgment, on Comparable Video Programming provided by a Peer or Peers, each agreement with any such Peers.

J. Simultaneously with the commencement of **[*37]** arbitration, the OVD must file with the AAA its Final Offer for the Video Programming it believes Defendants must provide.

K. Within five business days of the commencement of an arbitration, Defendants shall file with the AAA and furnish to the Department of Justice their Final Offer for the Video Programming sought by the OVD.

L. After the AAA has received Final Offers from the OVD and Defendants, it will immediately furnish a copy of each Final Offer to the other party.

M. At any time after the commencement of arbitration, the OVD and Defendants may agree to suspend the arbitration, for periods not to exceed 14 days in the aggregate, to attempt to resolve their dispute through negotiation. The OVD and the Defendants shall effectuate such suspension through a joint writing filed with the AAA and furnished to the Department of Justice. Either the OVD or the Defendants may terminate the suspension at any time by filing with the AAA and furnishing to the Department of Justice a writing calling for the arbitration to resume.

N. The OVD and the Defendants shall exchange written discovery requests within five business days of receiving the other party's Final Offer, and shall exercise reasonable **[*38]** diligence to respond within 14 days. Discovery shall be limited to the following items in the possession of the parties:

1. previous agreements between the OVD and the Defendants;

2. formal offers to renew previous agreements;

3. current and prior agreements between the Defendants and MVPDs or other OVDs;

4. current and prior agreements between the OVD and other Broadcast Networks, Cable Programmers, or Production Studios;

5. records of past arbitrations pursuant to this Final Judgment;

6. documents reflecting Nielsen or other ratings of the Video Programming at issue or of Comparable Video Programming; and

7. documents reflecting the number of subscribers to the OVD. There shall be no discovery or use in the arbitration of documents or information not in the possession, custody, or control of the OVD or the Defendants, of draft agreements or other documents concerning negotiations between the OVD and the Defendants (other than formal offers to renew previous agreements, pursuant to Section VII.N.2 of this Final Judgment), or of the costs associated with Defendants' production of their Video Programming.

O. In reaching his or her decision, the arbitrator may consider only documents exchanged **[*39]** in discovery between the parties and the following:

1. testimony explaining the documents and the parties' Final Offers;

2. briefs submitted and arguments made by counsel; and

3. summary exhibits illustrating the terms of Defendants' agreements with MVPDs or other OVDs or of the party OVD's agreements with other Broadcast Networks, Cable Programmers, or Production Studios.

P. Arbitrations under Section IV.A of this Final Judgment shall begin within 30 days of the AAA furnishing to the OVD and to the Defendants, pursuant to Section VII.L of this Final Judgment, each party's Final Offer. The arbitration hearing shall last no longer than ten business days, after which the arbitrator shall have five business days to inform the OVD and the Defendants which Final Offer best reflects the appropriate Economically Equivalent terms under Section IV.A of the Final Judgment.

Q. Arbitrations under Section IV.B of this Final Judgment shall be conducted in two stages, the first of which shall begin within 30 days of the AAA furnishing to the Qualified OVD and to the Defendants, pursuant to Section VII.L of this Final Judgment, each party's Final Offer. The first stage shall last no longer than ten business **[*40]** days, after which the arbitrator shall have five business days to inform the Qualified OVD and the Defendants which Final Offer encompasses the appropriate Comparable Video Programming under Section IV.B of this Final Judgment. Within five business days of the arbitrator's decision, the Qualified OVD and the Defendants shall file with the AAA, furnish to the Department of Justice, and exchange revised Final Offers containing proposed financial terms for the Comparable Video Programming selected by the arbitrator. The second stage of the arbitration shall commence within ten days of the exchange of the revised Final Offers and shall last no longer than ten business days, after which the arbitrator shall have five business days to inform the Qualified OVD and the Defendants which Final Offer best reflects the appropriate Economically Equivalent terms under Section IV.B of this Final Judgment.

VIII. COMPLIANCE INSPECTION

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department **[*41]** of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted

1. access during the Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide to the United States and the Plaintiff States hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment, including documents Defendants are required to collect and maintain pursuant to Sections IV.J, IV.K, IV.L, IV.M, or IV.O of this Final Judgment; and

2. to interview, either informally or on the record, the Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney **[*42]** General in charge of the Antitrust Division, Defendants shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, at the sole discretion of the United States (after consultation with the Plaintiff States), require Defendants to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of (1) the executive branch of the United States, (2) the Plaintiff States, or (3) the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a Defendant to the United States and the Plaintiff States, the Defendant represents and identifies in writing **[*43]** the material in any such information or documents to which a claim of protection may be asserted under *Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure*, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under *Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure*," then the United States and the Plaintiff States shall give the Defendant ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions. Notwithstanding the foregoing, the Plaintiff States shall have no right to apply to the Court for further orders or directions with respect to Sections IV.C, IV.D, IV.E, IV.F, V.G, or VII of this Final Judgment. In particular, the Plaintiff States shall not be able to apply to this Court to carry out, construe, modify, enforce, or punish violations of Sections IV.C, IV.D, IV.E, **[*44]** IV.F, V.G, or VII of this Final Judgment.

X. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States or the Plaintiff States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of the Defendants.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire seven years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: 9/1/11

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*

/s/ **[*45]** Richard J. Leon

United States District Judge

ClearPlay, Inc. v. Nissim Corp.

United States District Court for the Southern District of Florida

September 2, 2011, Decided; September 2, 2011, Entered on Docket

CASE NO. 07-81170-CIV-HUCK/BANDSTRA

Reporter

2011 U.S. Dist. LEXIS 99154 *; 2011 WL 3878363

CLEARPLAY, INC., Plaintiff, v. NISSIM CORPORATION and MAX ABECASSIS, Defendants.

Subsequent History: Summary judgment granted by *Clearplay, Inc. v. Nissim Corp., 2011 U.S. Dist. LEXIS 146861 (S.D. Fla., Dec. 21, 2011)*

Affirmed by *Clearplay, Inc. v. Nissim Corp., 2012 U.S. App. LEXIS 23339 (11th Cir. Fla., Nov. 14, 2012)*

Prior History: *Clearplay, Inc. v. Nissim Corp., 433 Fed. Appx. 782, 2011 U.S. App. LEXIS 14072 (11th Cir. Fla., 2011)*

Core Terms

infringement, patents, Players, Settlement, license agreement, Specifications, communications, baseless, license, preemption, products, patent infringement, warnings, filters, preempts, allegations, federal patent law, bad faith, unlicensed, tortious interference, patent law, summary judgment, non-compliance, manufacturers, immunity, asserts, compliance, press release, matter of law, objectionable

LexisNexis® Headnotes

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

HN1[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Under the Noerr-Pennington doctrine, those who petition the government, including adjudicatory bodies such as the courts, for redress are generally immune from antitrust liability. The immunity extends beyond actual litigation to pre-litigation communications.

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

Constitutional Law > Supremacy Clause > Federal Preemption

Patent Law > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The decision to permit state tort liability for only objectively baseless allegations of patent infringement rests on both federal preemption and the *First Amendment*. The federal patent laws preempt state laws that impose tort liability for a patent-holder's good faith conduct in communications asserting infringement of its patent and warning about potential litigation. In addition, the same *First Amendment* policy reasons that justify the extension of Noerr-Pennington immunity to pre-litigation conduct in the context of federal ***antitrust law*** apply equally in the context of state-law tort claims.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN3[] **Defenses, Bad Faith Enforcement**

Patent law "conflict preempts" state torts in the area of unfair competition that are based on conduct protected or governed by federal patent law. Federal patent law protects publicizing a patent in the marketplace and, related, communicating allegations of patent infringement. However, patent law protects this conduct only if undertaken not in bad faith. Bad faith must be alleged and ultimately proven, even if bad faith is not an element of the state law claim, in order to escape preemption by federal patent law.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN4[] **Defenses, Bad Faith Enforcement**

Federal patent law bars imposing liability on a patentee for communicating its warnings of license noncompliance and patent infringement so long as these warnings were not made in bad faith.

Constitutional Law > Supremacy Clause > Federal Preemption

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN5[] **Supremacy Clause, Federal Preemption**

Under the exacting test for *28 U.S.C.S. § 1338* jurisdiction, resolution of a patent law issue must be necessary to every theory of relief under at least one claim, whereas, under the test for patent preemption, the inquiry is whether federal patent law protects the conduct for which plaintiff seeks relief under state law.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Constitutional Law > Supremacy Clause > Federal Preemption

HN6[] **Defenses, Bad Faith Enforcement**

The bad faith required to avoid patent preemption encompasses both objective and subjective considerations. However, the bad faith standard cannot be satisfied unless the infringement allegations and/or publicizing of the patent were objectively baseless. Objectively baseless allegations are ones for which no reasonable litigant could realistically expect success on the merits. The party seeking to establish objective baselessness must offer clear and convincing evidence that the patentee had no reasonable basis to believe that its patent claims were valid or that they were infringed. A successful outcome in an underlying suit for infringement obviates a finding of objective baselessness; although, an unsuccessful outcome does not necessarily support objective baselessness.

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Judges: PAUL C. HUCK, United States District Judge.

Opinion by: PAUL C. HUCK

Opinion

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

This matter is currently before the Court on Defendants' Nissim Corporation and Max Abecassis' ("Nissim" [1]) Motion for Summary Judgment, (D.E. # 332, filed March 12, 2011). The Court held hearings on discrete issues raised by this Motion on August, 22, 2011 (in person) and on August 30, 2011 (by telephone). **[*2]** Nissim's principal argument in support of summary judgment is that its warnings of patent infringement were not, as a matter of law, made in bad faith and, therefore, the doctrines of patent law preemption and *Noerr-Pennington* immunity bar ClearPlay's state law claims premised on these warnings. For the reasons discussed below, the Court finds that federal patent law preempts ClearPlay's state tortious interference claims and preempts in part its state unfair competition claim and grants Nissim summary judgment on this issue. The Court also denies without prejudice Nissim's request for summary judgment as to ClearPlay's claim for breach of contract to allow for further development of the factual record.

I. BACKGROUND[2]

Defendant Nissim Corporation, founded and owned by co-Defendant Max Abecassis, holds patents in the area of video technology. At issue in this case and related cases before the Court are two forms of such technology: 1) objectionable content control, and 2) industry-standard digital video disc ("DVD") specifications ("DVD Specifications"). ClearPlay produces and sells DVD players, software and objectionable content filters for DVD Players.

A. The 2004 Case and Enforcement Litigation

[1] Abecassis is the founder, President and CEO of Nissim and inventor of its patents. For the sake of simplicity and unless otherwise indicated, this Order refers to both Nissim and Abecassis as "Nissim."

[2] For further background see the Court of Appeals for the Federal Circuit and Court of Appeals for the Eleventh Circuit opinions and this Court's rulings in this and related cases. *See* *ClearPlay Inc. v. Max Abecassis & Nissim Corp., 602 F.3d 1364 (Fed. Cir. 2010)*; *Nissim Corp. v. ClearPlay, Inc., 374 Fed. Appx. 987 (Fed. Cir. 2010)*; **[*3]** *ClearPlay Inc. v. Nissim Corp., No. 10-13469, 433 Fed. Appx. 782, 2011 U.S. App. LEXIS 14072 (11th Cir. July 7, 2011)*; and this Court's prior orders from case numbers 04-CV-21140 and 08-CV-80535.

The tortured history of the parties' litigation begins in 2004 when Nissim sued ClearPlay for patent infringement alleging that ClearPlay had violated certain Nissim patents relating to technology for editing video programs based on content (Case No. 04-CV-21140 or the "2004 Case"). ClearPlay counterclaimed for a declaratory judgment of non-infringement and patent invalidity. On the eve of trial, the parties settled and entered into a Settlement and License Agreement. In this agreement Nissim granted ClearPlay a limited, non-exclusive **[*4]** license under the patents in suit to, among other things, make and sell, certain DVD Players provided that the Players' objectionable content filters "substantially complied" with Nissim's specifications for coding such content, which are called the CustomPlay [3] OC (Objectionable Content) Specifications. Based on the settlement, on November 30, 2005, the Court dismissed the case and retained jurisdiction solely to enforce the terms of the Settlement and License Agreement. The Court's dismissal was with prejudice. Unfortunately, rather than amicably resolving the parties' dispute, the settlement unleashed the torrent of litigation summarized here.

In 2007, ClearPlay began releasing products subject to the Settlement and License Agreement and soon thereafter Nissim asserted that these products did not comply with the agreement's terms. On June 11, 2007, Nissim filed a Motion to Enforce the Settlement and License Agreement ("Motion to Enforce"), spawning what has been deemed the "Enforcement Litigation." Nissim alleged that ClearPlay filters released for use with ClearPlay's CP-007-USB Players ("007 Players") did not comply with the terms of the Settlement **[*5]** and License Agreement, that the 007 Players also did not comply with the agreement, and that ClearPlay's royalty reports were deficient. The first issue, upon the parties' consent, was referred to the Special Master, and regarding the last two issues, the Court found that ClearPlay had not materially breached the Settlement and License Agreement.

The Special Master determined that ClearPlay's filters substantially complied with Nissim's OC Specifications as required by the Settlement and License Agreement because an "artistic judgment" clause in the relevant portion of the agreement allowed ClearPlay to depart from the OC Specifications if in ClearPlay's judgment the material's relevance to the movie outweighed its objectionableness. [4] On March 31, 2009, this Court "ratified and affirmed" the Special Master's report and recommendation and denied Nissim's Motion to Enforce. Nissim appealed all of the Court's rulings. On appeal, the Federal Circuit reversed with regard to the issue of ClearPlay's filters, holding that the "artistic judgment exception would swallow the . . . rule" and remanded to determine, consistent with its opinion, whether ClearPlay's filters substantially comply with **[*6]** the OC Specifications as required by the Settlement and License Agreement. *Nissim Corp. v. Clearplay, Inc., 374 Fed. Appx. 987, 992 (Fed. Cir. 2010)*. Nissim filed, and this Court denied, various motions to circumvent the process of returning the filter dispute to the Special Master. Therefore, the issue of the filters' compliance with the Settlement and License Agreement in light of the Federal Circuit's mandate is presently ripe and will proceed before the Special Master.

B. This Action

At the same time as the Motion to Enforce, Nissim began the communications with third-party retailers and potential manufacturers of ClearPlay products that led to the instant case, 07-CV-81170. Nissim sent letters to Target, which was selling ClearPlay 007 Players, indicating that these players were not licensed under the Settlement and License Agreement and warning of an **[*7]** infringement action and posted a press release to the same effect. Target stopped selling the 007 Players. One of Nissim's letters to Target also warned of a different form of patent infringement. On December 10, 2007, ClearPlay filed the initial two-count complaint alleging tortious interference with its relationship with Target. The Court dismissed ClearPlay's complaint without prejudice, finding federal patent law preempted its claims.

In subsequent amended complaints, ClearPlay added claims based on Nissim's communications with other third parties. In early 2008 Nissim contacted Best Buy, which had agreed to carry another ClearPlay DVD player, CP-427-USB ("427 Player"), claiming that the 427 Players did not comply with the Settlement and License Agreement

[3] CustomPlay is a Nissim subsidiary.

[4] Section 1.4 of the License Agreement requires, *inter alia*, that ClearPlay's filters be "in substantial compliance with the CustomPlay Specifications, it being recognized by the parties that application of the CustomPlay OC Specifications requires flexibility of artistic judgment within the overall goal of maintaining consistency."

and infringed Nissim's patents and warning of an infringement action. In March of that year, BestBuy stopped selling 427 Players. In August 2008, Nissim contacted Samsung Electronics and repeated its allegation regarding ClearPlay's products' non-compliance with the Settlement and License Agreement, and ClearPlay alleges that as a result, Samsung discontinued business negotiations with ClearPlay. Subsequent amended complaints also **[*8]** added a breach of contract claim based on allegations of breach of various provisions of the Settlement and License Agreement and a claim for violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA").

Pursuant to Nissim's motion to dismiss ClearPlay's Second and Third Amended Complaints, the Court analyzed whether, in light of the federal pleading standard, ClearPlay's public assertions of patent infringement met the bad faith/objectively baseless standard required to avoid patent preemption. *See e.g. Globetrotter Software Inc. v. Elan Computer Group, Inc., 362 F.3d 1367, 1374 (Fed. Cir. 2004)* ("State [tort] law claims . . . can survive federal [patent law] preemption only to the extent that those claims are based on a showing of 'bad faith' action in asserting infringement.") As Nissim repeatedly highlights in its current motion, the Court observed that the issue of the ClearPlay filters' compliance with the Settlement and License Agreement had, as the Enforcement Litigation showed, presented a "fairly close question;" hence, Nissim's notifications of ClearPlay's products' infringement were not "objectively baseless." [5] (D.E. # 190-1, Aug. 7, 2009, Hrg. Tr. at 22.) **[*9]** Nonetheless, the Court, confined to the four-corners of the Third Amended Complaint, found ClearPlay's allegations sufficient to avoid patent preemption.

While the parties litigated the motions to dismiss, ClearPlay filed a motion for preliminary injunction. [6] The Court granted the injunction, and on interlocutory appeal, the Federal Circuit found it lacked subject-matter jurisdiction because the case did not arise under patent law. *See ClearPlay Inc. v. Max Abecassis & Nissim Corp., 602 F.3d 1364, 1366 (Fed. Cir. 2010)*; *28 U.S.C. § 1295(a)* (granting the Federal Circuit exclusive jurisdiction over district courts' final decisions under *28 U.S.C. § 1338*, which grants district courts "original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . .")

The Federal Circuit explained that *section 1338* jurisdiction is conferred when either (1) federal patent law creates the cause of action—not the case here with purely state law claims—or (2) plaintiff's right to relief depends on resolution of a substantial question of federal law, which means that resolution of at least one of plaintiff's claims requires deciding an issue of federal patent law. *See 602 F.3d at 1367* (citing and discussing *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808-09, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988))*. The Federal Circuit found that this case did not satisfy the second basis for *section 1338* jurisdiction. With regard to the tortious interference claims, each claim asserted a theory of relief that would not require the Court to address patent law. *Id. at 1368*. The Federal Circuit explained,

> For example, in each of those [tortious interference] claims ClearPlay asserts that Nissim falsely stated that the ClearPlay DVD players and related filtering technology were not covered by the license agreement. Resolution of that issue would not require the court to address any patent law question; it would require only that the court consider **[*11]** the provisions of the license agreement in light of the DVD Players and filters sold by ClearPlay. . . . ClearPlay could prevail on its claims by showing that the assertions that ClearPlay's products are unlicensed were false, without regard to whether sale of the products, if unlicensed, would infringe Nissim's patents. If ClearPlay could prove that its devices, even absent a license, did not infringe, that would be another arrow in its quiver, but even assuming the devices would infringe if unlicensed, ClearPlay would still have viable theories of liability under its complaint.

Id. at 1368-69. The Federal Circuit transferred the case to the Eleventh Circuit, which affirmed the injunction. *ClearPlay Inc. v. Nissim Corp., No. 10-13469, 433 Fed. Appx. 782, 2011 U.S. App. LEXIS 14072 (11th Cir. July 7,*

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[5] At the time of this and the Court's other observations regarding the sufficiency of ClearPlay's bad faith allegations, the Federal Circuit had not yet issued its ruling. The Federal Circuit opinion, *Nissim Corp. v. Clearplay, Inc., 374 Fed. Appx. 987 (Fed. Cir. 2010)*, only strengthens this Court's prior pronouncements regarding Nissim's statements' lack of "objective baselessness."

[6] The grounds for ClearPlay's **[*10]** injunctive relief are not relevant to this order.

2011). The implication of the Federal Circuit's jurisdictional ruling for the application and scope of patent preemption is discussed below.

C. The 2008 Case

In 2008 Nissim again sued ClearPlay for patent infringement, alleging that ClearPlay's DVD Players, including the 427 Players, infringe four Nissim patents with regard to the Players' implementation of industry-standard DVD Specifications. In this action, **[*12]** the 2008 Case, the Court ruled that the Settlement and License Agreement expressly excludes a license to implement the DVD Specifications and otherwise denied ClearPlay's Motion for Summary Judgment on multiple grounds unrelated to patent non-infringement or invalidity. The Court also held a *Markman* hearing, following which it construed one contested claim term from one of the patents at issue. Both the 2008 case and this case have been partially stayed, since November 24, 2009, pending the Federal Circuit's ruling in the Enforcement Litigation.

D. Nissim's Present Motion for Summary Judgment

Nissim has moved for summary judgment on all of ClearPlay's claims against it. ClearPlay's Third Amended Complaint asserts the following five counts: (1) Tortious Interference with Contractual Relationship (Target), (2) Tortious Interference with Contractual Relationship (Best Buy), (3) Tortious Interference with Potential Advantageous Business Relationships, (4) Breach of Contract (breach of various provisions of the Settlement and License Agreement), and (5) Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") violation. In response, Nissim asserts that the Federal Circuit's patent preemption **[*13]** doctrine and *Noerr-Pennington* immunity bar all counts because the undisputed facts show that Nissim's warnings of patent infringement contained in letters to ClearPlay business partners as well as in press releases were not objectively baseless. ClearPlay's tortious interference claims are based exclusively on Nissim's public notifications of infringement, whereas the breach of contract and FDUTPA claim assert multiple theories of relief, some based on the warnings of patent infringement and others based on Nissim's conduct and legal positions related to the Settlement and License Agreement. Nissim also argues that it should be granted summary judgment on ClearPlay's FDUTPA and breach of contract claim for additional reasons.

II. FACTS[7]

On June 11, 2007, the same day it filed its motion launching the Enforcement Litigation, Nissim sent Target a letter "Re: Unlicensed ClearPlay DVD Players Infringement of Nissim U.S. Patents ['678]; ['945]; ['472]; ['013]; ['401]." These are the patents covered by the Settlement and **[*14]** License Agreement. The letter indicated that Target was currently selling the 007 Players and that

> As part of a settlement of prior patent infringement litigation, Nissim had previously granted ClearPlay a conditional license to sell certain DVD players that adopt the "CustomPlay Specifications" . . . . However, the CP007-USB DVD players and the ClearPlay filters used by the players do not comply with the required standards and therefore are not covered by the license.

(D.E. # 185-7, June 11, 2007 Letter.) [8] The letter goes on to specify that the 007 Player "does not operate as advertised" because it does not filter entire categories and levels of explicitness, which the menu indicates can be filtered. The letter provides formal notice to Target that the 007 Player "is not licensed by Nissim, and therefore that Target's sales and offers to sell the ClearPlay CP007-USB DVD Player constitute infringements of the above-identified Nissim patents" and requests that Target discontinue sale of the infringing 007 Players. Also that day,

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[7] ClearPlay disputes the veracity and implications of the statements made in the below-summarized Nissim communications but it does not dispute the communications' content.

[8] Nissim's Statement of Undisputed Facts (D.E. # 332-1) at times miscites the docket entries for Nissim's communications. The Court uses the current docket entry numbers for the communications, which are all attached to ClearPlay's Third Amended Complaint (D.E. # 185).

Nissim issued a press release announcing the filing of its Motion to Enforce and "providing formal notice to all retailers and other third parties that the ClearPlay **[*15]** DVD Player [007 Player] is not licensed [for failure to comply with the Settlement and License Agreement]" and warning that sales of the 007 Player "constitute infringements of the Nissim patents." (D.E. # 185-10, June 11, 2007 Press Release.) On July 6, 2007, ClearPlay responded to Nissim's allegations in a letter to Target, stating that the 007 Player is "in full compliance with the settlement and license agreement." (D.E. # 185-12, July 6, 2007 Letter.)

On October 19, 2007, Nissim sent Target another letter Re: "Unlicensed DVD Devices Infringement of Nissim Patents ['678]; ['945]; ['013]; ['444]; ['805]; ['207]." [9] This letter differs significantly from the June 11th letter because it takes issue with Target's sale of DVD devices by manufacturers allegedly without a license from Nissim under its patents to implement the industry-wide DVD Specifications. It states that Target's private brand and certain identified third-party **[*16]** brands, all detailed in a list attached to the letter, are unlicensed because they do not hold a license for the DVD Specifications from Nissim. The October 19, 2007, letter also,

> demands that Target discontinue selling the unlicensed DVD players from ClearPlay model CP-007 USB unless and until those players are found by the court presiding over Nissim's current enforcement proceeding to be in compliance with the terms of the . . . Settlement and License Agreement. . . . The ClearPlay products are unlicensed and infringing products and should be removed from Target's shelves.

(D.E. # 185-13, Oct. 19, 2007 Letter.) Nissim's October letter explicitly threatens patent infringement litigation. It states that if Target does not provide certain written assurances within 14 days, then Nissim will file the attached complaint for patent infringement.

On November 1, 2007, ClearPlay sent Target a letter regarding Nissim's claims. The letter states that "ClearPlay believes that it is in compliance with all the material terms and conditions of the [Settlement and] License Agreement and has responded in kind to the Court [in the **[*17]** Enforcement Litigation]." (D.E. # 185-14, Nov. 1, 2007 Letter.) ClearPlay also informs Target that the 007 Player was designed and manufactured "to avoid the Nissim patents delineated in the DVD License and any of the essential claims in such patents." [10] One day later, on November 2, 2007, Target sent Nissim a letter, copying ClearPlay, indicating that pending the outcome of the Enforcement Litigation, it will cease sales of the ClearPlay players. (D.E. # 185-15, Nov. 2, 2007 Letter.) Nissim posted this news on its website. (D.E. # 185-17, Nov. 2, 2007 Press Release.)

On January 14, 2008, Nissim sent ClearPlay a letter (copying Best Buy and entitled "Unlicensed and Infringing ClearPlay DVD Players and Filters") regarding ClearPlay's 427 Player, then offered for sale at Best Buy. The letter states,

> Regrettably, for the same reasons as in the case of the CP007 player, the new CP427 players and the ClearPlay filters used by the CPP427 **[*18]** players also <u>do not comply</u> with the requirements of the Settlement Agreement between Nissim and ClearPlay. . . . Nissim hereby provides ClearPlay formal notice that the CP427 Player is also <u>not covered by</u> Nissim's license, and therefore that ClearPlay's and Best Buy's sales and offers to sell the CP427 player constitute infringements of Nissim's patents. . . .

(D.E. # 185-19, Jan. 14, 2008 Letter.) On February 22, 2008, Nissim sent a letter directly to Best Buy referencing the January 14 letter, which "gave ClearPlay formal notice that the CP427 player is not in compliance with the terms of the Settlement [and License] Agreement . . . . and that continued sale of the CP427 player constitutes an unlicensed infringement of the Nissim patents." (D.E. # 185-20, February 22, 2008 Letter.) The letter goes on to state that Best Buy's own license for the DVD Specifications excludes from its scope devices sold by third-parties and, moreover, excludes devices that infringe U.S. patent ['401] (not one of the DVD Specifications patents). Nissim sent Best Buy a follow-up letter shortly thereafter, on March 19, 2008, entitled "Best Buy Sales of ClearPlay Players - Infringement of Nissim U.S. Patents ['678], **[*19]** ['945], ['013], ['401], ['444], ['805], and ['207]." (D.E. # 185-21,

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[9] These are the patents covered by Nissim's DVD Specifications license.

[10] As indicated subsequently in this opinion, ClearPlay takes the position that both a) its products designed around Nissim's patents with regard to the DVD Specifications and b) Nissim's patents are not necessary for implementation of the DVD Specifications.

March 19, 2008 Letter.) This letter explicitly threatened infringement litigation and attached a draft complaint against Best Buy. On March 31, 2008, BestBuy agreed to suspend ClearPlay sales, and Nissim publicized this decision with a press release. (D.E. # 185-22, March 31, 2008 Press Release.)

Finally, later that year, Nissim approached Samsung, with whom ClearPlay was discussing manufacture of a DVD device using ClearPlay objectionable content software and filters. On August 11, 2008, Nissim sent Samsung a letter re: "Unlicensed and Infringing Products from ClearPlay Inc." (D.E. # 185-30 *filed under seal*, August 11, 2008 Letter.) The letter notes that Samsung's DVD Specifications license "expressly excludes the field of use under the Nissim Patent Portfolio known as 'CustomPlay' and excludes U.S. Patent ['401], which are infringed by use of ClearPlay enabled software and filters." On this basis, Nissim warns that Samsung would be liable for patent infringement were it to offer products utilizing ClearPlay's software and filters. ClearPlay's complaint alleges that as a result of Nissim's communication, Samsung **[*20]** discontinued negotiations with ClearPlay.

III. ANALYSIS

A. Patent Law Preemption

Nissim's principal argument in support of summary judgment is that its communications to third parties and the public at large contained warnings of patent infringement that were not objectively baseless and, therefore, ClearPlay's state law claims predicated on these warnings are barred by patent preemption and *Noerr-Pennington* immunity. In response, ClearPlay argues that Nissim's communications do not make statements related to Nissim patents, but, rather, statements regarding ClearPlay products' lack of compliance with the objectionable content specifications "OC Specifications" and Settlement and License Agreement, matters of contract interpretation. Thus, patent preemption and *Noerr-Pennington* immunity do not apply. In the alternative, ClearPlay claims, patent law only possibly preempts the communications' select statements regarding Nissim's patents. Before analyzing the patent law preemption of ClearPlay's claims, the Court will dispose of some preliminary issues.

1. Applicability of Noerr-Pennington Immunity

Nissim argues that both the Federal Circuit's patent preemption doctrine and the doctrine of **[*21]** *Noerr-Pennington* immunity bar ClearPlay's claims. The Court questions whether *Noerr-Pennington* immunity provides protection separate or distinct from the doctrine of patent preemption for pre-litigation communications alleging patent infringement, such as Nissim's communications here. ***HN1***[] Under the *Noerr-Pennington* doctrine, those who petition the government, including adjudicatory bodies such as the courts, for redress are generally immune from antitrust liability. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc., 508 U.S. 49, 56-57, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. The Eleventh Circuit and other Circuits have extended *Noerr-Pennington* immunity beyond actual litigation to pre-litigation communications. *See e.g. McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992)*. In one of its seminal cases on patent preemption, the Federal Circuit explained that the higher bad faith standard for patent infringement allegations is rooted not only in the *Supremacy Clause* but also the *First Amendment* underpinnings of the *Noerr-Pennington* doctrine, which had been extended to pre-litigation communications.

> ***HN2***[] Our decision to permit state tort liability for only objectively baseless allegations **[*22]** of infringement rests on both federal preemption and the *First Amendment.* The federal patent laws preempt state laws that impose tort liability for a patentholder's good faith conduct in communications asserting infringement of its patent and warning about potential litigation. In addition, the same *First Amendment* policy reasons that justify the extension of *Noerr* immunity to pre-litigation conduct in the context of federal ***antitrust law*** apply equally in the context of state-law tort claims.

Globetrotter Software, Inc., v. Elan Computer Group, Inc., 362 F.3d 1367, 1377 (Fed. Cir. 2004) (internal citation omitted). Moreover, the "objectively baseless" bad faith standard adopted by the Federal Circuit in *Globetrotter* is the same standard developed by the Supreme Court under the *Noerr-Pennington* doctrine. *See Professional Real*

Estate Investors, Inc., 508 U.S. at 60 (stating that in order to be the type of sham litigation required to escape *Noerr-Pennington* immunity, the litigation must be, first, "objectively baseless."); Globetrotter, 362 F.3d at 1377 ("Accordingly, the objectively baseless standard of *Professional Real Estate* applies to state-law claims based on communications alleging **[*23]** patent infringement.") Therefore, the Court concludes that a *Noerr-Pennington* immunity analysis is not needed here because that immunity would not provide any protection to Nissim's allegations of patent infringement beyond the protection already afforded by the Federal Circuit's patent preemption doctrine. [11] As such, the Court will only apply the Federal Circuit's patent preemption standard and case law in this opinion to determine whether ClearPlay's claims premised on Nissim's infringement warnings survive summary judgment.

2. *Scope of the Federal Circuit's Ruling*

ClearPlay's position that patent law does not preempt its claims is rooted in large part in the Federal Circuit's jurisdictional ruling in this case, discussed above. *See* ClearPlay Inc. v. Max Abecassis & Nissim Corp., 602 F.3d 1364 (Fed. Cir. 2010). ClearPlay argues that patent law does not preempt its claims because the Federal Circuit held that this case does not arise under patent law. ClearPlay's argument impermissibly conflates jurisdiction with the defense of preemption. Even though the **[*25]** Court does not have subject matter jurisdiction under 28 U.S.C. § 1338, federal patent law may, nonetheless, preempt some or all of the state claims at issue. A footnote in the Federal Circuit's opinion confirms:

> [T]o the extent that the principles of federal patent law apply to this case and conflict with relevant state tort law, those principles would provide the rules of decision as a matter of conflict preemption, regardless of the forum.

602 F.3d at 1367 n.1. Moreover, while appellate jurisdiction rests with the Eleventh Circuit, the Court will apply the Federal Circuit's substantial body of case law regarding patent preemption to this case. *See* Fisher Tool Co. v. Gillet Outillage, 530 F.3d 1063, 1068 (9th Cir. 2008) (finding plaintiff's state tort and Lanham Act claims based on patent infringement warnings barred under Federal Circuit precedent).

3. Patent Preemption of ClearPlay's Tortious Interference and FDUTPA Claims

a) Application to Communications of Patent Infringement Involving Settlement and License Agreement Non-Compliance

The Court now turns to the key question of federal patent law preemption of ClearPlay's state tortious interference and statutory unfair competition claims **[*26]** based on Nissim's communications. As noted above, the facts alleged in support of the FDUTPA claim, unlike those underlying the tortious interference claims, extend beyond Nissim's communications of patent infringement. Therefore, the Court finds that if patent law protects Nissim's communications, then ClearPlay's tortious interference claims are preempted in whole and the the FDUTPA claim is preempted in part, that is, preempted as to the theory of relief based on Nissim's communications. [12]

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[11] The Court also notes that while other Circuits have applied *Noerr-Pennington* immunity to bar not only anti-trust claims but also state tort claims, the Eleventh Circuit has done so only in a very specific context. *See* McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992) (holding that First Amendment underpinnings of the *Noerr Pennington* doctrine bar not only anti-trust claims but also a state unfair trade practices claim, which in that case was identical to the anti-trust claim); Atico Int'l USA, Inc. v. Luv N' Care, Ltd., Case No. 09-60397-CIV, 2009 U.S. Dist. LEXIS 73540, at *11 (S.D. Fla. Aug. 19, 2009) (citing "many circuit courts" that **[*24]** have used the *Noerr-Pennington* doctrine to bar state law claims and finding that *Noerr-Pennington* immunity bars state law claims for tortious interference and FDUTPA violation); *but see* Slip-n-Slide Records, Inc. v. TVT Records, LLC, No. 05-21113-CIV, 2007 U.S. Dist. LEXIS 9014, at * 21-22 (S.D. Fla. Feb. 8, 2007) (declining to extent *Noerr-Pennington* immunity to bar state tort claims wholly unrelated to an anti-trust claim). Therefore, judicial restraint also motivates the Court's decision to apply only the Federal Circuit's patent preemption doctrine, not *Noerr Pennington* immunity, to ClearPlay's state law claims, which are unrelated to anti-trust law.

[12] Nissim also argues that patent preemption should apply to ClearPlay's breach of contract claim. The Court acknowledges that certain theories of breach (breach of Sections 4.2 and 4.7, specifically) allege that Nissim violated the Settlement and License

Federal law may preempt state law in three ways—explicit preemption, **[*27]** field preemption, and conflict preemption—and the Federal Circuit has held that ***HN3***[] patent law "conflict preempts" state torts in the area of unfair competition that are based on conduct protected or governed by federal patent law. *Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1332-35 (Fed. Cir. 1998)*. Federal patent law protects publicizing a patent in the marketplace and, related, communicating allegations of patent infringement. *Hunter Douglas, Inc., 153 F.3d at 1336*; *Mikohn Gaming Corp. v. Acres Gaming, Inc., 165 F.3d 891, 897 (Fed. Cir. 1998)*; *see also Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1258 (Fed. Cir. 2008)* (finding that federal patent law preempted unfair competition claims as well as tortious interference claims all based on competitor's third-party letters asserting patent infringement). However, patent law protects this conduct only if undertaken not in bad faith. Bad faith must be alleged and ultimately proven, even if bad faith is not an element of the state law claim, in order to escape preemption by federal patent law. *Dominant Semiconductors, 524 F.3d at 1260*.

ClearPlay argues that patent law does not protect Nissim's communications **[*28]** to its business partners because these communications asserted non-compliance with the Settlement and License Agreement, a contractual issue unrelated to Nissim's patent rights and ClearPlay's business partners' alleged infringement. [13] The Court disagrees. The issues of ClearPlay's products' (specifically, its filters') non-compliance with the Settlement and License Agreement and these same products' infringement of Nissim's patents are closely intertwined. Nissim's theory in its third-party communications and press releases summarized above was that ClearPlay's products do not comply with the terms of the Settlement and License Agreement, and therefore, are unlicensed and infringe Nissim's patents. The Court finds that this theory makes perfect sense. The Court dismissed Nissim's claims for infringement and ClearPlay's counterclaims for non-infringement and patent invalidity in the 2004 case with prejudice. Therefore, if ClearPlay's products were found to be outside the scope of the Settlement and License Agreement, Nissim could also reasonably argue that the products infringe the patents covered by the Agreement.

The Court acknowledges that the application of the Federal Circuit's patent preemption doctrine to a patent holder's communications alleging infringement based on a licensee's products' non-compliance with a settlement and license agreement seems to be an issue of first impression. None of the Federal Circuit's decisions in this area concerns allegations of patent infringement based on non-compliance with a license agreement, particularly a settlement and license agreement. Nonetheless, the Court thinks that the rationale behind patent preemption applies with equal force in such situations. The purpose of the doctrine is protection of a patent-holder's good faith assertion of its statutory rights. *See Hunter Douglas, Inc., 153 F.3d at 1336* (citing and quoting, *inter* ***[*30]*** *alia, Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869 (Fed. Cir. 1997)* ("[A] patentee must be allowed to make its rights known to a potential infringer so that the latter can determine whether to cease its allegedly infringing activities, negotiate a license if one is offered or decide to run the risk of liability and/or the imposition of an injunction."); *Virtue v. Creamery Package Mfg. Co., 227 U.S. 8, 37-38, 33 S. Ct. 202, 57 L. Ed. 393, 1913 Dec. Comm'r Pat. 519 (1913)* ("Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal.")); *see also Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1353 (Fed. Cir. 1999)*. Nissim, like any other patent holder, was allowed to pursue its rights in good faith without fear of liability under state tort law. *See Fisher Tool Co. v. Gillet Outillage, 530 F.3d 1063, 1068 (9th Cir. 2008)* ("The purpose of the bad-faith requirement is to permit the patent-holder to assert his rights without fear that he might thereby violate . . . state tort laws.") In this case, Nissim could not have realistically warned of or alleged patent infringement by Target, **[*31]** Best Buy and/or Samsung without addressing ClearPlay's non-compliance with the Settlement and License Agreement. Therefore, the Court finds that ***HN4***[] federal patent law bars imposing liability on Nissim for communicating its

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Agreement by making its communications of infringement. Because the Court presently reserves ruling on summary judgment as to ClearPlay's breach of contract claim to allow for further development of the record as to the facts supporting the contractual issues, the Court also declines to rule at present on the issue of patent preemption of certain theories of breach of contract.

[13] ClearPlay also argues that Nissim's communications made statements **[*29]** "disparaging ClearPlay's products" and "mischaracterizing" the parties' litigation before this Court. The Court finds that the statements to which ClearPlay is referring, such as statements regarding the operation of ClearPlay's filters and the course of the 2004 case, are part and parcel of Nissim's allegations that ClearPlay's products do not comply with the Settlement and License Agreement and, hence, are infringing.

warnings of license non-compliance and patent infringement [14] so long as these warnings were not made in bad faith.

The Court reiterates that its decision finding ClearPlay's claims predicated on Nissim's notifications of license non-compliance and infringement potentially preempted does not conflict with the Federal Circuit's opinion in this case. There, the court found, for purposes of determining subject matter jurisdiction and based solely on the complaint's allegations, that each of ClearPlay's claims could theoretically be resolved without addressing patent law questions. *See* *ClearPlay, Inc. v. Nissim Corp., 602 F.3d 1364, 1367-69 (Fed. Cir. 2010)*. ***HN5***[] Under the exacting test for *§ 1338* jurisdiction "resolution of a patent law issue must be necessary to every theory of relief under at least one claim," *id. at 1369*; whereas, under the test for patent preemption, the inquiry is whether federal patent law protects the conduct for which plaintiff seeks relief **[*33]** under state law.

b) Bad Faith in Communicating Patent Infringement Involving Settlement and License Agreement Non-Compliance

HN6[] The bad faith required to avoid patent preemption encompasses both objective and subjective considerations. *Mikohn Gaming Corp. v. Acres Gaming, Inc., 165 F.3d 891, 897 (Fed. Cir. 1998)*. However, the bad faith standard cannot be satisfied unless the infringement allegations and/or publicization of the patent were "objectively baseless." *Globetrotter Software, Inc. v. Elan Computer Group, 362 F. 3d 1367, 1375 (Fed. Cir. 2004)*; *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1260 n.5 (Fed. Cir. 2008)*; *see also* *800 Adept, Inc. v. Murex Securities Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008)* ("Absent a showing that the infringement allegations are objectively baseless, it is unnecessary to reach the question of the patentee's intent.") Objectively baseless allegations are ones for which "no reasonable litigant could realistically expect success on the merits." *800 Adept, Inc., 539 F.3d at 1370* (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993))*. The Federal Circuit has stated that the party seeking **[*34]** to establish objective baselessness must offer "clear and convincing evidence" that the patentee had "no reasonable basis to believe that its patent claims were valid or that they were infringed." *800 Adept, 539 F.3d at 1370*. The Federal Circuit has also indicated that a successful outcome in an underlying suit for infringement obviates a finding of objective baselessness; although, an unsuccessful outcome does not necessarily support objective baselessness. *See* *Dominant Semiconductors, 524 F.3d at 1261*.

The Court finds that the record before it, including the proceedings to date in the Enforcement Litigation, establishes that Nissim's communications regarding license non-compliance and patent infringement were not objectively baseless. The Federal Circuit reversed this Court's and the Special Master's determination that ClearPlay's filters did not violate the Settlement and License Agreement's requirement of substantial compliance with Nissim's objectionable content specifications. The Federal Circuit's ruling lends support to Nissim's position that it had a reasonable basis to believe that ClearPlay's filters, and hence its products, did not comply with the Settlement and License **[*35]** Agreement. Even before the Federal Circuit ruled, the Court concluded that the history and course of the Enforcement Litigation demonstrated that the filter compliance issue presented a close question, and, hence, Nissim's position could not be "objectively baseless." The Court also finds that it was not objectively baseless for Nissim to assert that ClearPlay's business partners would infringe Nissim's patents if they sold or manufactured the ClearPlay products not in compliance with the Settlement and License Agreement's requirements. The Settlement and License Agreement was an agreement to settle the 2004 infringement case, which the Court dismissed with

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[14] The Court notes that the majority of these communications were made in Nissim's letters—that is, its letter to ClearPlay (the January 14, 2008 letter copying Best Buy) and its letters to ClearPlay retailers and manufacturers (June 11, 2007 letter to Target, October 19, 2007 letter to Target, February 22, 2008 letter to Best Buy, March 19, 2008 letter to Best Buy, and August 11, 2008 letter to Samsung). However, Nissim also communicated its patent rights and allegations of license non-compliance and infringement in press releases, which are also protected under patent law. Even Nissim's broad statement in its June 11, 2007 press release "providing formal notice to all retailers and other third parties" that the 007 Player was not compliant with the Settlement and License Agreement and warning that sales of this Player constitute infringement is protected **[*32]** so long as it was not made in bad faith. *See* *Globetrotter Software, Inc. v. Elan Computer Group, 362 F. 3d 1367, 1377 (Fed. Cir. 2004)* (stating federal patent law preempts state law that punishes merely "publicizing a patent in the marketplace[,] unless the plaintiff can show that the patentholder acted in bad faith.")(internal citation omitted).

prejudice. Therefore, Nissim had a reasonable basis to assert that ClearPlay products that do not comply with the Settlement and License Agreement would infringe the patents covered by said agreement.

ClearPlay's argument to the contrary is without merit. ClearPlay argues that it was objectively baseless for Nissim to state that ClearPlay's products were "unlicensed" because the Settlement and License Agreement was still in effect between them, and, hence, its products were "licensed." ClearPlay's argument and interpretation of "unlicensed" **[*36]** not only misses the point of Nissim's communications but is also belied by the language of these communications. Nissim's communications notify of its belief that ClearPlay's products are unlicensed because they "do not comply with the required standards [of the Settlement and License Agreement]" (D.E. 185-7, June 11, 2007 Letter); "do not comply with the requirements of the Settlement [and License] Agreement between Nissim and ClearPlay" and "[are] not covered by Nissim's license" (D.E. # 185-19, January 14, 2008 Letter.). Nissim does not deny the existence of the Settlement and License Agreement, only that the products fall outside the license granted in that agreement.

Based on the foregoing, the Court concludes that Nissim's communications that ClearPlay's products do not comply with the Settlement and License Agreement and hence ClearPlay and those who sold or manufactured these products would infringe its patents were not objectively baseless as a matter of law. Therefore, patent law preempts ClearPlay's tortious interference claims, which are premised in whole on these communications (Counts I, II and III of the Third Amended Complaint), and preempts the portion of ClearPlay's **[*37]** FDUTPA claim (Count V) premised on the same.

c) Allegations of Infringement re: Implementation of DVD Specifications

Nissim also asserts that its communications warned of another form of patent infringement. In addition to alleging that ClearPlay's products infringed for failure to comply with the Settlement and License Agreement, Nissim says that its communications also alleged that ClearPlay's products infringed because they use industry-standard digital video disc ("DVD") specifications ("DVD Specifications"), for which Nissim's patents are necessary, without a license from Nissim. Nissim asserts that these allegations of DVD Specifications infringement were also not objectively baseless and hence, patent preemption should bar ClearPlay's claims based on these allegations. By way of background, the Court notes that approximately ninety DVD player manufacturers have non-exclusive DVD Specifications licenses from Nissim. [15] Nissim's DVD-Device License Agreement (DVD Specifications) covers its U.S. Patents ['678], ['945], ['013], ['444], ['805] and ['207]. *See* Nissim's DVD Device License Agreement, D.E. # 185-14 at 8-21. The first three patents in this list, ['678], ['945] and ['013], **[*38]** were also covered by the Settlement and License Agreement, which granted a limited license for products implementing Nissim's objectionable-content specifications. Also, as indicated above, Nissim sued ClearPlay in the 2008 case alleging that ClearPlay's DVD Players, including the '427 Player, infringe Nissim's patents by implementing the DVD Specifications. The patents at issue in the 2008 case are all patents that were at issue in the 2004 case and under which ClearPlay has the limited license under the Settlement and License Agreement.

ClearPlay disagrees with Nissim's contention that the communications all allege infringement for implementation of the DVD Specifications, asserting that these communications only alleged non-compliance with the OC Specifications. However, ClearPlay also, in the alternative, takes the position that to the extent the letters warned of infringement regarding DVD Specifications implementation, these warnings were objectively baseless. The Court has carefully reviewed Nissim's letters **[*39]** to Target, Best Buy and Samsung as well as its related press releases and determines that all but two communications asserted ClearPlay's products' infringement based solely on non-compliance with the Settlement and License Agreement. The October 19, 2007 Target letter and March 19, 2008 Best Buy letter also assert that ClearPlay's products infringed due to their unlicensed implementation of the DVD Specifications. In the October letter Nissim asserted that Target would infringe Nissim's patents by selling DVD players manufactured by companies that did not have DVD Specifications licenses, including ClearPlay. In its response to this letter, ClearPlay denies such infringement because its players were specifically designed around the DVD Specifications. *See* D.E. # 185-14, Nov. 1, 2007 Letter. The March letter to Best Buy was "Re: . . .

[15] ClearPlay does not dispute this fact; although, as discussed below, ClearPlay disputes that Nissim's patents are necessary for implementation of the DVD Specifications.

Infringement of Nissim U.S. Patents ['678], ['945], ['013], ['401], ['444], ['805], and ['207]," all six patents allegedly necessary to the DVD Specifications, and the draft complaint for infringement attached to this letter includes counts under all six patents.

Therefore, the Court must also determine whether these two letters alleging ClearPlay's products' **[*40]** infringement due to unlicensed implementation of the DVD Specifications support ClearPlay's claims. The Court finds they do not. Though admittedly not directly on point, Federal Circuit authorities suggest that a finding that one of two infringement allegations was not made in bad faith precludes finding that the infringement allegations as a whole were asserted in bad faith. In *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1261 (Fed. Cir. 2008)*, a patentee's public warnings of infringement were found not objectively baseless when, in the underlying patent infringement suit, the adjudicator had found infringement of one of the patentee's patents yet also found non-infringement and invalidity with regard to other patents. *See also* *Globetrotter Software, Inc., 362 F.3d at 1375, 1377 (Fed. Cir. 2004)* (finding no bad faith for patentee's communications of infringement of three patents when only evidence of objective baselessness was that summary judgment was granted, but then reversed, for non-infringement of one patent at issue). The rationale underlying these authorities suggests that the Court's finding that Nissim's infringement warnings regarding ClearPlay's license **[*41]** non-compliance were not objectively baseless is sufficient to preempt claims based on warnings, contained in the very same communications, also alerting of ClearPlay's products' infringement regarding the DVD Specifications. This conclusion seems reasonable. As a practical matter, if ClearPlay's products were infringing with regard to one technology or one patent or series of patents, they were infringing regardless of whether they infringed with regard to another technology or patent(s). In other words, if Nissim has one good faith reason to assert ClearPlay's products' infringement, it does not matter from a retailer's or manufacturer's perspective whether the products infringe in other ways: these retailers and manufacturers would still be concerned about selling or manufacturing the allegedly infringing products.

In addition, the record establishes that Nissim's allegations of infringement for implementation of the DVD Specifications were independently not objectively baseless as a matter of law. Nissim points to various portions of the record to support its position that its communications of infringement for DVD Specifications implementation were not objectively baseless. One, **[*42]** it is undisputed that approximately ninety DVD player manufacturers are licensed under Nissim patents to implement the DVD Specifications. Two, Nissim's expert opined that Nissim's patents cover and that ClearPlay's '427 Player implements a DVD Specifications function known as "seamless branching." Nissim's expert declaration was submitted in the 2008 case. (D.E. #32 in 08-CV-80535, Expert Decl., *filed under seal*). In this declaration Nissim's expert attaches his earlier report regarding ClearPlay's player at issue in the 2004 case, and on the basis of this earlier report and an examination of the ClearPlay '427 Player, the expert concludes that the '427 Player has the ability to play DVDs that use the seamless branching function of the DVD Specifications and, hence, infringes claims of certain of Nissim's patents. Three, Nissim's counsel testifies that he personally tested both the '427 and '007 ClearPlay players and that these devices perform features, seamless branching as well as other features, that are encompassed by the DVD Specifications. (D.E. # 332-2, Carey Decl. at ¶ 19-20). ClearPlay has submitted evidence to the contrary. ClearPlay's expert opines that the "patents asserted **[*43]** by . . . [Nissim] to be necessary to implement the DVD Specifications . . . are not, in fact, necessary for or infringed by the implementation of the DVD Specifications." (D.E. # 345-2, LaBarge Decl. at ¶ 6.) Also, ClearPlay's co-founder testifies that following the Settlement and License Agreement, ClearPlay has designed all its players, including the 007 and 427 Players, to not implement the DVD Specifications features that Nissim claims are covered by Nissim's patents. (D.E. # 345-2, Jarman Decl. at ¶ 18-23).

This record unquestionably presents genuine issues of material fact as to ClearPlay's players' infringement of Nissim's patents based on implementation of the DVD Specifications. However, the matter before the Court is very different. The Court must determine whether Nissim's allegations of infringement based on ClearPlay's products implementation of the DVD Specifications were objectively baseless. The Court finds that these allegations were not objectively baseless as a matter of law. To establish that Nissim's actions were objectively baseless, ClearPlay "was required to offer clear and convincing evidence that [Nissim] . . . had no reasonable basis to believe that its patent **[*44]** claims were valid or that they were infringed." *800 Adept, Inc. v. Murex Securities Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008)* (reversing judgment on a jury verdict because there was no clear and convincing evidence such that a reasonable jury could find that defendant had no reasonable basis to believe that its patents were valid or infringed); *see also* *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1260 (Fed. Cir. 2008)* (indicating that the party challenging pre-litigation infringement communications must present affirmative evidence of bad faith under a clear and convincing standard to survive summary judgment). [16] Here, Nissim must have had no reasonable basis to assert that ClearPlay's '007 and '427 Players infringed its patents for implementation of the DVD Specifications as claimed in its letters. The opinions of Nissim's expert and counsel as well as the prevalence of Nissim's DVD Specifications licenses to DVD manufacturers and others establish that Nissim had a reasonable basis to believe that ClearPlay's products infringe its patents due to their implementation of the DVD Specifications, and the Court finds that the opinions of ClearPlay's expert and witness **[*45]** are not clear and convincing evidence to the contrary. *See* *800 Adept, Inc., 539 F.3d 1354* (finding no objective baselessness as a matter of law when patentee's assertion of validity was supported by patent examiner and expert opinion and assertion of infringement was supported by, among other things, a legal opinion from counsel); *Globetrotter Software Inc. v. Elan Computer Group, Inc., 362 F.3d 1367 (Fed. Cir. 2004)* (affirming summary judgment finding allegations of infringement were not objectively baseless when summary judgment on non-infringement was reversed due to, in part, genuine issues of material fact regarding infringement).

Therefore, Nissim's communications alleging infringement for implementation of the DVD Specifications were not made in bad faith, and, accordingly, federal patent law also bars ClearPlay's state law claims based on these communications.

B. Florida Deceptive and Unfair Trade Practices Act Claim

Nissim asserts that summary judgment on ClearPlay's FDUTPA claim is warranted because Nissim's infringement warnings to third-parties are not "trade or commerce" under the meaning of this statute. The Court has already found that patent law preempts the portion of ClearPlay's FDUTPA claim alleging that Nissim's third-party communications violated FDUTPA. As such, the Court need not further address this argument.

ClearPlay's FDUTPA claim also alleges that Nissim violated this statute by entering into the Settlement and License Agreement in bad faith and breaching this agreement. Without commenting on the viability on this claim, the Court **[*47]** notes that Nissim does not address this portion of the FDUTPA claim in its summary judgment motion and, hence, it remains viable following issuance of this instant order.

C. Breach of Contract Claim

ClearPlay's Third Amended Complaint alleges that Nissim breached multiple provisions of the Settlement and License Agreement, and Nissim has moved for judgment as a matter of law on all of these elements of ClearPlay's breach of contract claim. As indicated at the August 30, 2011, telephonic hearing in this matter, the Court believes that further development of the record is needed with regard to the facts underlying at least some elements of ClearPlay's claim. Accordingly, Nissim's request for judgment as a matter of law on ClearPlay's claim for breach of contract is denied without prejudice to allow Nissim to file a renewed motion for summary judgment, which will permit the parties to submit evidence and briefing as discussed at the August 30, 2011, telephonic hearing.

IV. CONCLUSION

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[16] In *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc., 444 F.3d 1356, 1369 (Fed. Cir. 2006)*, the Federal Circuit reversed summary judgment on state tortious interference and unfair competition claims based on patentee's letters publicizing its patents because the "question of whether any statements in the letters were 'objectively baseless' is genuinely disputed." The court in *Breckenridge* provided no indication of the facts that the patentee asserted to support no objective baselenessness, thus providing little guidance here, and also **[*46]** did not cite the clear and convincing standard followed by the Federal Circuit in *800 Adept, Inc. v. Murex Securities Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008)* and reiterated in *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1260 (Fed. Cir. 2008)*.

For the foregoing reasons, Nissim's motion for summary judgment is GRANTED IN PART and DENIED WITHOUT PREJUDICE IN PART. Federal patent law preempts Counts I, II and III for tortious interference with contractual **[*48]** or potential advantageous business relationships. Federal patent law also preempts in part Count V for violation of FDUTPA as indicated above. Following the submission of another motion for summary judgment and further evidence, the Court will examine whether Nissim is entitled to judgment as a matter of law with regard to ClearPlay's claim for breach of contract.

DONE and ORDERED in Chambers, Miami, Florida, September 2, 2011.

/s/ Paul C. Huck

PAUL C. HUCK

United States District Judge

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In re Puerto Rican Cabotage Antitrust Litig.

United States District Court for the District of Puerto Rico

September 13, 2011, Decided; September 13, 2011, Filed

MDL Docket No. 3:08-md-1960 (DRD)

Reporter

815 F. Supp. 2d 448 *; 2011 U.S. Dist. LEXIS 113980 **

IN RE PUERTO RICAN CABOTAGE ANTITRUST LITIGATION

Prior History: *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125, 2010 U.S. Dist. LEXIS 90338 (D.P.R., July 12, 2010)*

Core Terms

Settlements, Objectors, class member, attorney's fees, lodestar, cases, class representative, Plaintiffs', discovery, incentive award, multiplier, settlement agreement, class action, fee award, Defendants', antitrust, freeze, proposed settlement, calculated, instant case, courts, duration, awards, award fees, base rate, cabotage, expenses, cross-check, approving, assessing

LexisNexis® Headnotes

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN1[] **Basis of Recovery, American Rule**

The general "American Rule" is that each side bears its own litigation costs and that the prevailing party is not entitled to recover attorneys' fees or costs. However, the U.S. Supreme Court has recognized an equitable exception to this rule - known as the common fund or common benefit doctrine - that permits litigants or lawyers who recover a common fund for the benefit of persons other than themselves to obtain reasonable attorney's fees out of the fund, thus spreading the cost of the litigation to its beneficiaries. Class action lawsuits are the prototypical example of instances where the common fund doctrine can apply. In assessing requests for attorneys' fees, the court functions as a quasi-fiduciary to safeguard the corpus of the settlement fund for the benefit of the plaintiff class. The court is to act as a fiduciary who must serve as a guardian of the rights of absent class members. Additionally, *Fed. R. Civ. P. 23(h)* provides, in a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. However, a thorough judicial review of fee applications is required in all class action settlements.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN2[] **Class Attorneys, Fees**

Attorneys' fees are typically assessed through either the percentage of the fund method or through the lodestar method. The percentage of the fund method applies a certain percentage to the settlement fund whereas the lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN3[] **Class Attorneys, Fees**

The percentage of the fund methodology for attorneys' fees is favored in the First Circuit. The percentage-of-recovery method is generally favored because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. Under the percentage of the fund method, the court has extremely broad latitude to determine an appropriate fee award. Although the First Circuit has not set forth a comprehensive list of factors to be considered when evaluating an attorneys' fees request pursuant to this approach, other district courts within the First Circuit have analyzed factors set forth by the Second and Third Circuits. The United States District Court for the District of Puerto Rico follows suit and analyzes a counsel's request utilizing the following relevant factors: (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN4[] **Class Attorneys, Fees**

Analyzing the net dollars and cents results achieved by counsel for their clients is often the most influential factor in assessing the reasonableness of any attorneys' fee award. Generally speaking, there is an inverse relationship between an increase in the size of the settlement fund and the percentage fee award. The basis for this inverse relationship is the belief that in many instances the increase in the recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5[] **Class Attorneys, Fees**

When a lead counsel is requesting to withdraw a portion of a settlement fund today for compensation, the court finds it imprudent to rely upon a hypothetical and theoretical "maximized potential" value of what the settlement fund may reach on a future date. The court should be conservative in assessing the total value of the settlement fund and base those assessments on actual, tangible benefits that are able to be calculated in the present.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN6[] **Class Attorneys, Fees**

In the context of factors to be considered under the percentage of the fund method for attorneys' fees, the complexity of federal ***antitrust law*** is well known, and antitrust class actions are notoriously complex, protracted, and bitterly fought.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7[] **Class Attorneys, Fees**

In the context of factors to be considered under the percentage of the fund method for attorneys' fees, antitrust litigation in general, and class action litigation in particular, is unpredictable. The history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal. Further, whenever an attorney takes a case on a contingency basis, there is always the risk of non-payment. Certainly there are instances where diligent and experienced plaintiffs attorneys pour thousands of hours and dollars into their class action case only to recover little or nothing at trial or on appeal.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN8[] **Class Attorneys, Fees**

In the context of factors to be considered under the percentage of the fund method for attorneys' fees, the United States District Court for the District of Puerto Rico finds it useful to turn to objective academic studies in assessing awards in similar cases. Such studies provide good indicators of what the market would pay for class counsel's services because the data shows what attorneys have been paid in similar cases, and thus what class counsel could have expected when they decided to invest their resources in a case.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN9[] **Class Attorneys, Fees**

The percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN10[] **Private Actions, Costs & Attorney Fees**

Class action plaintiffs' attorneys provide an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent. Due to the expense, time, and difficulty of pursuing complex litigation, it would likely not be economical for an individual class member to pursue such litigation on their own. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation. Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources. The litigation is critical because it gives voice to relatively small claimants who may not be aware of statutory violations or have an avenue to relief. These considerations weight in favor of granting attorneys' fees under the percentage of the fund methodology, as private civil class action litigation is an important tool in enforcement of antitrust laws.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN11[] **Class Attorneys, Fees**

Attorneys' fee awards of 33a% should be reserved for cases which proceed to trial or settle on the eve of trial.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN12[] **Class Attorneys, Fees**

The First Circuit does not require a court to engage in calculating the lodestar method when awarding fees based upon the percentage of the fund method. Nevertheless, the United States District Court for the District of Puerto Rico finds that it is a pragmatic cross-check to ensure that the court is not creating a windfall for counsel. The lodestar cross-check ensures that fees awarded under the percentage of the fund method are reasonable in light of the amount of work counsel actually performed. The lodestar represents a presumptively reasonable fee. The lodestar cross-check is performed by multiplying the hours reasonably expended on the matter by the reasonable hourly billing rate which then provides the court with the lodestar calculation. In implementing this lodestar approach, the judge first calculates the time counsel spent on the case, subtracts duplicative, unproductive, or excessive hours, and then applies prevailing rates in the community (taking into account the qualifications, experience, and specialized competence of the attorneys involved. The proposed fee award is then divided by the lodestar calculation, resulting in a lodestar multiplier. The lodestar multiplier is compared to other multipliers employed in similar cases. If the multiplier is too great, the court should consider reducing its award calculated under the percentage of the fund method.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN13[] **Class Attorneys, Fees**

Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN14[] **Class Attorneys, Fees**

Generally in class action suits, once a settlement figure has been reached, defendants have little interest in how the fund is ultimately appropriated, including what percentage of the fund that plaintiffs' counsel receives. At this stage of the litigation, the lead counsel's interest begins to conflict with the class members'. Objectors thus aid the court in assessing plaintiffs' counsels' request for attorneys' fees to ensure that the class members' interests are protected. The Federal Rules of Civil Procedure contemplate the possibility of fees to objectors: *Fed. R. Civ. P. 23(h)* provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, and not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who represented objectors to a proposed settlement under *Rule 23(e)* or to the fee motion of class counsel. *Rule 23(h)*, Advisory Committee Notes to the 2003 Amendments. An objector whose arguments result in a reduction of attorney-fee and expense awards provides a benefit to the class and are thus entitled to attorneys' fees. Objectors who do not benefit the class, however, are not entitled to compensation.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN15[] **Class Attorneys, Fees**

Objectors must produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

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

HN16[] **Class Actions, Judicial Discretion**

Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit. Incentive awards are recognized as serving an important function in promoting class action settlements. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. Additionally, courts typically examine the following criteria when assessing incentive awards: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > General Overview

HN17[] **Class Actions, Compromise & Settlement**

Pursuant to *Fed. R. Civ. P. 23*, a court may approve a settlement that would bind class members only after a hearing and on finding that the settlement is fair, reasonable, and adequate. *Rule 23(e)(1)(c)*.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > General Overview

HN18[] **Class Actions, Compromise & Settlement**

The First Circuit has yet to espouse a set of determined factors for assessing the fairness, reasonableness, and adequacy of a proposed settlement. Thus, the United States District Court for the District of Puerto Rico follows other courts within the First Circuit that have utilized a modified version of the Grinnell factors set forth by the Second Circuit and adopted by the Third Circuit. The modified Grinnell factors are: (1) risk, complexity, expense, and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > General Overview

HN19[] **Class Actions, Compromise & Settlement**

If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of a settlement. However, while silence constitutes tacit consent to the settlement agreement, a lack of response from the class is typical. A substantial lack of response from absentee class members appears to be the norm rather than the exception. Potential objectors have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's pro rata benefit.

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For Linde Gas Puerto Rico, Inc., Civ. 08-1665, Consol Plaintiff: David C. Indiano-Vicic, Jeffrey M. Williams-English, LEAD ATTORNEYS, Indiano & Williams, PSC, San Juan, PR.

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For X-Press Freight Forwarders, Inc., Civ. 08-2027 and Civ. 08-2095, Consol Plaintiff, Counter Claimant: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, Counsel for Co-defendant Pipeliners, San Juan, PR; John F. Nevares, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San **[**6]** Juan, PR.

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For Marie Francis Kent, Civ. 08-2030, Consol Plaintiff: Kevin Bruce Love, LEAD ATTORNEY, Criden & Love, South Miami, FL.

For Luis Freire, Div. of KMA Associates of Puerto Rico, Inc., Civ. 08-1926, Foam Pack, Inc., Civ. 08-1925, Combe Products, Inc., Civ. 08-2003, Consol Plaintiffs: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, Counsel for Co-defendant Pipeliners, San Juan, PR.

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For Kevin Gill, Defendant: Lori R. Keeton, Richard S. Glaser, LEAD ATTORNEYS, PRO HAC VICE, Parker Poe Adams & Bernstein LLP, Charlotte, NC.

For Gregory Glova, Defendant: PHV Jack M. Knight, Jr., LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, Charlotte, NC.

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For Leonard Shapiro, Defendant: Roberto Buso-Aboy, LEAD ATTORNEY, Buso Aboy Law Office, San Juan, PR.

For Horizon Lines of Puerto Rico, Inc., Consol Defendant: Mauricio O. Muniz-Luciano, **[**13]** Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR.

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For Ernesto Vilanova-Velez, Civ. 08-2095 also known as Ernesto Villalona, Consol Defendant: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, Counsel for Co-defendant Pipeliners, San Juan, PR.

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For Banco Popular de Puerto Rico, Intervenor: Edelmiro Antonio Salas-Gonzalez, LEAD ATTORNEY, Urb. Villa Nevarez, San Juan, PR; Pedro E. Ruiz-Melendez, LEAD ATTORNEY, Pedro E. Ruiz Law Office, PSC, San Juan, PR.

For David C. Eddy, Intervenor: David C. Eddy, LEAD ATTORNEY, PRO HAC VICE, Nexsen Pruet, LLC, Columbia, SC.

For INEOS USA LLC, INEOS Polyethylene North America and INEOS Polymers, Inc., Intervenor Plaintiff: Manuel Sosa-Baez, Saldana, Carvajal & Velez-Rive, PSC., San Juan, PR; Thomas T. Hutcheson, PRO HAC VICE, Tom Van-Arsdel, Winstead PC, Houston, TX.

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For Various (Class Settlements), Interested Party: Ramon E. Dapena, San Juan, PR.

For Pan American Grain Co. Inc., Interested Party: Irma R. Valldejuli-Perez, San Juan, PR.

For Opt-Out Entities, Interested Party: John F. Malley-Vega, LEAD ATTORNEY, Malley Tamargo & Melendez-Sauri, **[**15]** San Juan, PR.

For Horizon Lines, LLC, Counter Defendant: Angelo M. Russo, PHV Amy B. Manning, PHV Tammy L. Adkins, Richard J. Rappaport, LEAD ATTORNEYS, PRO HAC VICE, McGuire Woods LLP, Chicago, IL; Carlos E. George-Iguina, Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR; Jose F. Sarraga-Venegas, LEAD ATTORNEY, Jose F. Sarraga Law Office, San Juan, PR; Tiffany Rider-Rohrbaugh, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC.

Judges: DANIEL R. DOMÍNGUEZ , U.S. District Judge.

Opinion by: DANIEL R. DOMÍNGUEZ

Opinion

[*453] **AMENDED OPINION AND ORDER**

Following a criminal investigation by United States Department of Justice's Antitrust Division (the "DOJ"), Plaintiffs filed suit under the Sherman Act, *15 U.S.C. §§ 1* and *3*. [1] The instant case is comprised of a compilation of cases sent to this District Court to be handled as a multi-district litigation.

Plaintiffs represent a Class comprised of direct purchasers of waterborne cabotage between Puerto Rico and the United States, its territories and possessions. Plaintiffs purchased the cabotage from Defendants, companies that provide cabotage services and several individual officers of those companies.

[*454] Plaintiffs allege that Defendants engaged in a conspiracy to illegally fix waterborne cabotage prices [2] between the U.S. and Puerto Rico from May 1, 2002 to April 17, 2008. Defendants collectively controlled approximately 86% of the cabotage market during that time period. [3] Plaintiffs further assert that Defendants colluded by conspiring to allocate customers and rig bids to customers in addition to fixing their rates, surcharges and other fees. (Docket **[**17]** No. 540-25). Pending before the Court is Lead Counsel for Plaintiffs' ("Lead Counsel") requests for an award of attorneys' fees, reimbursement of expenses and incentive award payments.

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[1] The criminal investigation led to Horizon Lines, LLC pleading guilty to one count of price fixing in violation of the Sherman Act and five guilty pleas from former employees of the Horizon and Sea Star Defendants. *See* United States v. Horizon Lines, LLC, No. 3:11-CR-0071, *Second Amended Judgment* (D.P.R., **[**16]** Apr. 28, 2011); United States v. Chisholm, No. 08-cr-00353, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); United States v. Serra, No. 08-cr-00349, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); United States v. Glova, No. 08-cr-00352, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); United States v. Gill, No. 08-cr-00351, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); and United States v. Baci, No. 08-cr-00350, *Plea Agreement* (M.D. Fla., Oct. 20, 2008).

[2] "Prices" in this context include both the negotiated costs of shipping and the various surcharges, such as fuel surcharges, imposed by cabotage providers.

[3] Horizon accounts for approximately 35% of the Puerto Rico cabotage market; Crowley and Sea Star account for approximately 30% and 21% of the market, respectively. Trailer Bridge, a Defendant that was ultimately dismissed from the instant matter (Docket No. 722), accounts for approximately 14% of the Puerto Rico cabotage market.

I. Procedural History

On August 25, 2010, the Court granted preliminary approval for the settlement reached with (1) Horizon Lines, Inc., Horizon Lines, LLC, Horizon Logistics Holdings, LLC, Horizon Logistics, LLC and Horizon Lines of Puerto Rico, Inc. (collectively, the "Horizon Defendants"); (2) Crowley Maritime Corp., Crowley Liner Services, Inc. (collectively, the "Crowley Defendants"); (3) Sea Star Line, LLC, American Shipping Group, Inc., Saltchuk Resources, Inc. and Leonard Shapiro (collectively, the "Sea Star Defendants"); **[**18]** and (4) Alexander Chisholm [4] ("Chisholm"). (Docket No. 800). Therein, the Court concluded that the settlement negotiations were conducted at arm's length and that the parties were sufficiently informed by the limited discovery that occurred. *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125 (D.P.R. 2010)*; (Docket Nos. 800 and 801).

The Horizon Settlement Agreement provides, *inter alia*, that the Horizon Defendants agreed to (1) pay $20,000,000 in cash to the Settlement Class; (2) offer Settlement Class Members (the "Class" or "Class Members") the option of freezing the base rates of any shipping contracts they have with the Horizon Defendants for two years, an option valued at $42.9 million; and (3) cooperate with Plaintiffs in litigating their claims against the remaining, non-settling Defendants. In return, Class Members agreed to release any claims **[**19]** against the Horizon Defendants related to the purchases of Puerto Rican Cabotage.

The Crowley and Sea Star Settlement Agreements are substantially identical to the settlement reached with the Horizon Defendants. However, the Crowley Defendants agreed to pay $13,750,000 in cash to the Settlement Class and the value of the base rate freeze offered by Crowley is $38.9 million. The Sea Star Defendants similarly agreed to pay $18,500,000 in cash to the Settlement Class and offer a base rate freeze option valued at $23.2 million.

The Chisholm Settlement Agreement provides that in exchange for a release of certain claims, Chisholm agreed to cooperate with Plaintiffs in further litigation against non-settling Defendants. The agreement generally provides that Chisholm will (a) furnish certain documents, **[*455]** data, or other items potentially relevant to Plaintiffs' claims; (b) allow himself to be interviewed by Plaintiffs; (c) provide declarations and affidavits; and (d) provide a deposition and testify at trial.

Lead Counsel mailed the Class a Notice, dated August 25, 2010 (Docket No. 874-1), stating that Plaintiffs' attorneys' fees would be based upon the value of both the cash portion of the Settlements **[**20]** and the value of non-cash, base-rate freeze option. The Notice further provides that counsel will only be compensated from the cash portion of the Settlements. [5]

On December 7, 2010, following a Final Fairness Hearing (Docket No. 876), the Court entered an *Order* (Docket No. 875) regarding final approval of the Crowley (Docket No. 680), Horizon (Docket No. 375), Sea Star (Docket No. 777) and Chisholm (Docket No. 597) Settlement Agreements (collectively, the "Settlement Agreements" or "Settlements"). In that filing, **[**21]** the Court indicated that its previous concerns [6] regarding various aspects of the

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[4] Alexander Chisholm was the Assistant Vice President of Yield Management for Sea Star. On October 20, 2008, Chisholm, along with four other individuals, pled guilt to government charges that he destroyed evidence concealing the alleged conspiracy. United States v. Chisholm, No. 08-cr-00353, *Plea Agreement* (M.D. Fla. Oct. 20, 2008).

[5] Paragraph 16 of the Notice states that "payment of attorneys' fees [will] not [] exceed one third of the Horizon, Crowley and Sea Star Settlement Funds plus the value of the non-cash portion of the Settlements." Paragraph 8 of the Notice defines the terms "Horizon Settlement Fund," "Crowley Settlement Fund," and "Sea Star Settlement Fund" as the settlement amounts in cash to be paid by each of the settling defendants (Horizon, Crowley and Sea Star). Therefore, the notice is clear that attorneys' fees would be computed as a percentage of the total value of the settlement (including the value of the non-cash portion) and will be paid from the cash portion of the Settlements.

[6] Specifically, the Court had expressed concern "that the notices may have inadvertently misled Class Members to believe that they could select both the base rate freeze and the cash option." The Court also was concerned that the INEOS Objectors needed additional "time and information to ascertain whether the settlement was adequate as to them." Both of these concerns,

Settlement Agreements had been assuaged during the Final Fairness Hearing. However, the Court declined to grant the motion for final approval of the Settlement Agreements (Docket No. 840) [7] as the Court harbored reservations regarding the attorneys' fees requested by Lead Counsel. [8] (Docket No. 839). The Court thus invited "Plaintiffs' Counsel to further brief the application of a 'percentage of the fund' approach to attorneys' fees in the instant case in light of the relevant jurisprudence regarding funds whose monetary value is difficult to determine." (Docket No. 875).

Subsequently, Lead Counsel filed a supplemental brief regarding their request for attorneys' fees. (Docket No. 886). Therein, Lead Counsel retreats from its previous request of an award consisting of 16% of the maximized potential value of the fund or $25,000,000 [9] and, instead, requests an **[*456]** award of 33a% of the actual value of the Settlements. The Settlements are comprised of a cash portion totaling, $52,250,000, and the value of the base-rate freeze option *actually selected by Class Members*, $13,600,000. Thus, the actual total value of the Settlements is $65,850,000 and Lead Counsel requests a third of that sum, or $21,950,000. Lead Counsel also petitions the Court to grant $1,035,702.92 in expenses and $20,000 in incentive awards for each of the six named Class Representatives **[**23]** (totaling $120,000).

V. Suárez, Inc., Central Produce El Jibarito, Inc. and Caribbean Produce Exchange, Inc., (Docket No. 906) along with Pan American Grain Co., Inc., Pan American Grain Manufacturing, Inc. and Pan American Grain Properties, Inc. ("Pan American" and collectively, the "Objectors") [10] (Docket No. 907) challenged Lead Counsel's request. Therein, several Class Members note that the requested 33a% of the common fund represents the upper limit of fees previously granted by this Circuit and others. They also note that the instant case was not as complex, lengthy in duration or labor intensive as cases in which such fees were awarded. Other Class Members **[**25]** note that those who elected the cash fund option shall bear the burden of paying the requested attorneys' fees. [11] However,

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however, were allayed through scrutiny of the Notices sent to Putative Class Members and the case law cited by the INEOS Objectors. Additionally, in the Final Fairness Hearing, **[**22]** the Court expressed doubts as to the explanation provided to the Court regarding the methodology utilized by Plaintiffs' expert; however, upon a subsequent review of the materials provided by the expert, the Court verified that all necessary information was included.

[7] The accompanying memorandum of law (Docket No. 841) is now deemed **NOTED.**

[8] The accompanying memorandum of law (Docket No. 839) is now deemed **NOTED.**

[9] Lead Counsel originally valued the total settlement at $157,250,000. The base rate freeze option was initially valued at $105 million by calculating all the Class Members that could potentially elect the base rate freeze option. Thus, Lead Counsel assumed that no Class Member would elect the cash settlement. By adding the cash settlement, $52,250,000, with the Lead Counsel's calculation of the base rate freeze option, $105,000,000, Lead Counsel valued the total settlement at $157,250,000. Lead Counsel's request for attorneys' fees in the amount of $25 million is approximately 16% of $157,250,000.

The Court cautioned Lead Counsel against this type of double counting. The Class Members can elect either to receive a portion of the cash settlement *or* the base rate freeze option thereby locking in lower shipping prices for two years. Class Members cannot elect both options. However, by assuming that all members would elect the base rate freeze option Lead Counsel significantly inflated the value of the base rate freeze option.

Moreover, the Court found it imprudent to rely upon a hypothetical and theoretical "maximized potential" value that the settlement fund may reach **[**24]** at a future date, when Lead Counsel is requesting to withdraw a portion of the settlement fund for their compensation on this certain date. A court must be conservative in assessing the total value of the settlement fund and base those assessments on actual, tangible benefits that are able to be calculate in the present. *See* ***Petruzzi's, Inc. v. Darling Delaware Co., 983 F. Supp. 595, 608 (D. Pa. 1997)*** (finding that "awarding fees on the basis of a hypothetical 'common fund' in the percentage sought by class counsel would be a perverse result.").

[10] "Objectors" includes Pan American Grain Co., Inc., Pan American Grain Manufacturing, Inc. and Pan American Grain Properties, Inc. ("Pan American") as the Court granted leave for Pan American to join the Objectors on January 18, 2011 (Docket No. 892).

[11] As Putative Class Members were advised that attorneys' fees were to be taken from the Settlements in the documents sent to them, the Court finds this argument unmeritorious for the same reasons it found other Objectors' arguments regarding the

on May 26, 2011 and on June 1, 2011, the Objectors moved to withdraw their opposition to Lead Counsel's requested attorneys' fees. (Docket Nos. 950 and 982).

Also on May 26, 2011, Objectors moved the Court to award the Objectors a percentage of the amount that Lead Counsel reduced its request **[**26]** for attorneys' fee, which is three million and fifty thousand dollars ($3,050,000). (Docket No. 951). Objectors argue that because of their direct efforts opposing Lead Counsel's initial fees request, the Settlements were enlarged by approximately three million dollars. Objectors claim that they are entitled to a percentage of the amount in which their efforts benefitted the Class. **[*457]** Objectors seek 33a% of $3,050,000; or, in the alternative, Objectors request the same percentage that the Court awards Lead Counsel. Lead Counsel supports the Objectors' request for fees. (Docket No. 986).

The Court held a hearing on the applicability of the Class Action Fairness Act on September 9, 2011. (Docket No. 1018). At this hearing, the Court ascertained that the base-rate freeze option actually selected by Class Members, valued at $13,600,000, does not constitutes a coupon settlement within the meaning of the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. §1712. Accordingly, CAFA does not specify whether the Court must employ the Lodestar method or the percentage of the fund method in calculating attorneys' fees in the instant matter. [12]

II. Attorneys Fees

HN1[] The general "American Rule" is that each side bears its own litigation costs and that the prevailing party is not entitled to recover attorneys' fees or costs. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)*. "[H]owever, the Supreme Court has recognized an equitable exception to this rule - known as the common fund or common benefit doctrine - that permits litigants or lawyers who recover a common fund for the benefit of **[**28]** persons other than themselves to obtain reasonable attorney's fees out of the fund, thus spreading the cost of the litigation to its beneficiaries." *In re Zyprexa Prods. Liab. Litig., 594 F.3d 113, 128 (2d Cir. 2010)*. "Class action lawsuits are the prototypical example of instances where the common fund doctrine can apply." *Victor v. Argent Classic Convertible Arbitrage Fund L.P., 623 F.3d 82, 86 (2d Cir. 2010)*.

In assessing requests for attorneys' fees, the Court functions "as a quasi-fiduciary to safeguard the corpus of the [settlement] fund for the benefit of the plaintiff class." *In re Fid./Micron Sec. Litig., 167 F.3d 735, 736 (1st Cir. 1999)* (citations omitted). *See* *Goldberger v. Integrated Res., 209 F.3d 43, 52 (2d Cir. 2000)* ("[T]he court is to act as a fiduciary who must serve as a guardian of the rights of absent class members.") (citation and quotation marks omitted). Additionally, *Federal Rule of Civil Procedure 23(h)* provides, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." However, "a thorough judicial review of fee applications is required in all class action **[**29]** settlements." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998)* (internal quotations omitted).

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sufficiency of the Notice lacking in merit. The Court has already found that Putative Class Members were informed and were granted ample information to make educated business decisions regarding whether to opt in or out of the Settlements and regarding their options if they indeed opted in.

[12] The Class Action Fairness Act also mandates that defendants **[**27]** provide notice of a proposed class action settlement to specific federal and state officials. *28 U.S.C. §1715*. Defendants, through the settlement administrator, provided the Attorney General of the United States, state officials in which each class member resides and the Attorney General for the Commonwealth of Puerto Rico with notice of the proposed Horizon Settlement on July 16th and 17th of 2009. (Docket No. 997). Defendants notified these same officials of the proposed Crowley and Sea Star Settlements on October 14, 2010. (Docket No. 997).

Prior to granting final approval of the proposed settlements, the Court notes that it has waited the statutorily required 90 days from the date of notification. *See* *28 U.S.C. §1715(d)*.

A. Percentage of the Fund

HN2[] Attorneys' fees are typically assessed through either the percentage of the fund method or through the lodestar method. *In re AT&T Corp., 455 F.3d 160, 164 (3d Cir. 2006)*. The percentage of the fund **[*458]** method applies a certain percentage to the settlement fund whereas the lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services. Id. The Court confirms that it shall employ the percentage of the fund approach, as opposed to the lodestar method, to Lead Counsel's requested attorney fees as *HN3*[] that methodology is favored in this Circuit. *See* *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995)*; *see also* *In re AT&T Corp, 455 F.3d at 164* ("[T]he percentage-of-recovery method is generally favored because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.")(internal quotations and citations omitted). Under the percentage of the **[**30]** fund method, the Court has "extremely broad" latitude to determine an appropriate fee award. *In re Thirteen Appeals, 56 F.3d at 309*.

Although the First Circuit has not set forth a comprehensive list of factors to be considered when evaluating an attorneys' fees request pursuant to this approach, other District Courts within this Circuit have analyzed factors set forth by the Second and Third Circuits. *See* *In re Lupron Marketing and Sales Prac. Litig., MDL 1430, 2005 U.S. Dist. LEXIS 17456, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005)*. This Court shall follow suit and analyze Lead Counsel's request utilizing the following relevant factors:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

Id.; *see also* *In re Relafen Antitrust Litig., 231 F.R.D. 52, 79 (D. Mass. 2005)*.

1. The Size of the Fund and the Number of Persons Benefited

HN4[] Analyzing the net dollars and cents results achieved by counsel for their clients is often the most **[**31]** influential factor in assessing the reasonableness of any attorneys' fee award. *See* *Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* (stating that the "most critical factor is the degree of success obtained."). The Court also observes that "[g]enerally speaking, there is an inverse relationship between an increase in the size of the settlement fund and the percentage fee award." *Larson v. Sprint Nextel Corp., 2010 U.S. Dist. LEXIS 3270 (D.N.J. 2010)*. "The basis for this inverse relationship is the belief that in many instances the increase [in the recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *In re Prudential, 148 F.3d at 339* (internal quotations omitted). *See* *In re Union Carbide Corp. Consumer Products Business Sec. Litigation, 724 F. Supp. 160, 166 (S.D.N.Y. 1989)* ("Obviously, it is not ten times as difficult to prepare, and try or settle a ten million dollar case as it is to try a one million dollar case, although the percentage contingent fee will return ten times as much."); *In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 486 (S.D.N.Y. 1998)* ("In many instances the increase **[**32]** [in the fund] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.").

The total actual value of the fund in the instant case is $65,850,000 [13] and the **[*459]** size of the class is potentially as high as 61,854. [14] Both of these numbers are substantial. The Settlements afford considerable benefits to a considerable number of Class Members. Accordingly, this factor weighs in favor of Lead Counsel's fees' request.

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[13] For purposes of evaluating the size of the fund, Lead Counsel returns to its previous argument that the total value of the settlement is $157,250,000. (Footnote 8). Lead Counsel arrives at this figure by adding the cash portion of the Settlements, $52,250,000, with their estimate that the base rate freeze options could have a maximized potential value of $105 million over a two year period. A handful of Class Members objected in a footnote to Plaintiffs' expert's calculation of the actual value of the Settlements, but the Class Members provided no contrary expert's opinion.

2. The Skill, Experience & Efficiency of the Attorneys Involved

The Court has nothing but the highest respect for Lead Counsel: they represent **[**34]** able and experienced attorneys from both the continental United States and Puerto Rico. Both Plaintiffs' counsel and opposing counsel are very experienced attorneys hailing from a variety of prominent law firms. Plaintiffs' counsel has proven themselves to be "honorable litigators devoted to the interests of their clients who [have] vigorously contested the case from its inception." *See* *In re Lupron, 2005 U.S. Dist. LEXIS 17456, 2005 WL 2006833, at *4*. Through counsel's skill and ingenuity, counsel has achieved a substantial recovery for the Class. Thus, counsel's caliber and experience weighs in favor of Lead Counsel's fee request.

3. The Complexity & Duration of the Litigation

HN6[] "The complexity of federal ***antitrust law*** is well known" and "antitrust class actions 'are notoriously complex, protracted, and bitterly fought.'" *In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003)*; Id. (citing *Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 719 (E.D.N.Y. 1989))*. The instant case has proved to be no exception. The present matter was complex, involving sophisticated inquiries into the antitrust laws which underlie this action and requiring many days of hearings relating to the intricacies **[**35]** of the Settlements.

However, the Court must note that, even after several years of litigation, the instant case has not yet proceeded to the discovery phase. While Lead Counsel is to be commended for achieving a significant settlement without the aid of discovery, and thus controlling litigation costs for both sides, the lack of discovery diminishes the complexity and duration of the litigation. *See* *In re Keyspan Corp. Sec. Litig., 2005 U.S. Dist. LEXIS 29068, at *30 (E.D.N.Y. Aug. 25, **[*460]** 2005)* (awarding 22.5% of the common fund in attorneys' fees where informal discovery was limited to the review of public documents and "did not involve intricate disputes over privilege or other difficult legal issues nor did plaintiffs have to undertake special means to procure evidence that was hard to obtain."); *In re Merrill Lynch Tyco Research Sec. Litig., 249 F.R.D. 124, 137 (S.D.N.Y. 2008)*(also awarding 22.5% of the common fund in attorneys' fees where plaintiffs' counsel had "relative ease of discovery" as counsel was not "forced to fight for access to documents" or overcome claims of privilege). Accordingly, the third factor points against an especially generous fee request of 33a% in a case **[**36]** that settled fully without necessitating any discovery.

4. The Risks of the Litigation

HN7[] "Antitrust litigation in general, and class action litigation in particular, is unpredictable....[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. at 475-476*. Further, whenever an attorney takes a case on a contingency basis, as Lead Counsel has done,

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The Court finds that the actual total value of the Settlements is $65,850,000. The actual total value of the Settlements is comprised of two components: the cash portion **[**33]** of the settlements, $52,250,000, and the value of the base-rate freeze option *actually selected by Class Members*, $13,600,000. ***HN5***[] When Lead Counsel is requesting to withdraw a portion of the settlement fund today for their compensation, the Court finds it imprudent to rely upon a hypothetical and theoretical "maximized potential" value of what the settlement fund may reach on a future date. The Court should be conservative in assessing the total value of the settlement fund and base those assessments on actual, tangible benefits that are able to be calculated in the present. *See* ***Petruzzi's, Inc. v. Darling Delaware Co. Inc., 983 F. Supp. 595, 608 (M.D. Pa.. 1996)*** (finding that "awarding fees on the basis of a hypothetical 'common fund' in the percentage sought by class counsel would be a perverse result.").

[14] On September 15, 2010, Lead Counsel commenced mailing the Long-Form Notice and Claim Form to 61,854 potential class members. These members were identified from the transactional records provided by the Horizon, Crowley and Sea Star Defendants.

there is always the risk of non-payment. Certainly there are instances where diligent and experienced plaintiffs attorneys pour thousands of hours and dollars into their class action case only to recover little or nothing at trial or on appeal. *See* *Robbins v. Koger Props. Inc., 116 F.3d 1441 (11th Cir. 1997)*(In a securities class action suit, the Eleventh Circuit Court of Appeals reversed an $81 million jury verdict in favor of plaintiffs, finding that plaintiffs' had no proof of loss causation).

The Court finds that Lead Counsel did take a risk pursuing the instant litigation on a contingency basis as there is always a risk of not being compensated **[**37]** for counsel's time and expenses. *In re Fidelity/Micron Sec. Litig., No. 95-12676, 1998 U.S. Dist. LEXIS 21698, 1998 WL 313735, at *3 (D. Mass. June 5, 1998)*("The case involved some risk, but that is true of almost any litigation."). However, the Court determines that Plaintiffs' counsels' level of risk was minimal. Lead Counsel filed the instant suit on April 22, 2008, a mere five days after the DOJ announced that it had begun investigating cabotage trade, specifically the Puerto Rico trade route on April 17, 2008. (Docket No. 1). On that same date, April 17, 2008, the Federal Bureau of Investigation (the "FBI"), acting at the DOJ's behest, executed search warrants and served subpoenas on each of the Horizon Defendants, Sea Star Defendants and Crowley Defendants. In order to obtain a search warrant, the DOJ, by definition, had to have probable cause to believe that it would obtain evidence of an antitrust violation as a result of executing the search warrant. Such a belief must be grounded in reasonably trustworthy information. Several months after this raid, on October 20, 2008, five high ranking executives from Horizon Defendants and Sea Star Defendants pled guilty to violating the Sherman Antitrust Act and **[**38]** provided details of the anti-competitive conspiracy.

Based upon the DOJ's raids of three large businesses, Lead Counsel had a probable basis to believe that there were antitrust violations at the time Lead Counsel filed this action. These suspicions would then have been confirmed a mere six months later when the five executives pled guilty. Although Plaintiffs' counsel undertook the instant action on a contingency fee basis, the investigation by the DOJ, which became public prior to the commencement of this litigation, mitigates counsels' risk. Lead Counsel had a strong **[*461]** basis to believe that at least some of the Defendants had colluded in violation of antitrust laws based upon the DOJ's conduct. Therefore, the Court finds that the risk of litigation factor weighs against granting attorneys' fees under the percentage of the fund methodology.

5. The Amount of Time Devoted to the Case by Counsel

Billing more than 30,000 hours, Lead Counsel and members of Plaintiffs' Steering Committee spent significant, but not excessive, time prosecuting the instant action. Throughout the pendency of this litigation, Lead Counsel has consistently advocated for Plaintiffs' rights and pursued settlement negotiations **[**39]** and agreements to the benefit of the Class. Generally, Lead Counsel performed legal and factual research, worked with economic experts and class representatives, drafted countless briefs and reviewed countless more opposing briefs. More specifically, Lead Counsel drafted five class action complaints and had to defend, and prevail, against several well-written and prima facie, colorable, non-frivolous motions to dismiss. Even after reaching a settlement agreement, Lead Counsel still had to oversee the claims administration process, assist Class Members with their proofs of claim and other inquiries as well as handle any appeals to the Settlements. Although Lead Counsel never engaged in formal discovery, this factor points in favor of Lead Counsel's fee request.

6. Awards in Similar Cases

HN8[] The Court finds it useful to turn to objective academic studies in assessing awards in similar cases. Such studies provide "good indicators of what the market would pay for class counsel's services because the [data] show[s] what attorneys have been paid in similar cases, and thus what class counsel could have expected when they decided to invest their resources in this case." *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig., 733 F. Supp. 2d 997, 1014 (E.D. Wis. 2010)*; **[**40]** *Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 864 (E.D. La. 2007)* (District Court looked to academic research "to determine an average percentage for cases of similar magnitude.").

A recent study analyzing eighteen years of available opinions involving settlements in class action litigation in state and federal courts found that the mean and median fees awarded in the First Circuit are 20%. Theodore Eisenberg and Geoffrey P. Miller, Attorneys' Fees & Expenses in Class Action Settlements: 1993-2008, 7 J. of Empirical Legal Stud. 248 (2010) (Table 4)("Eisenberg and Miller"). This same study also concluded that, in antitrust cases, the mean fee is 22% and that the median fee is 23%. Eisenberg and Miller, Table 5.

Eisenberg and Miller additionally list fee percentages in terms of the amount of the class' recovery in Table 7. The instant settlement fund's actual value is $65,850,000, placing it at the high end of Eisenberg and Miller's tranche of settlements between $38.3 million and $69.6 million. Eisenberg and Miller, Table 7. In this tier, the mean fee percentage for recoveries is 20.5% with a standard deviation of 10%. Thus, a fee in the range of 10.5% or 30.5% are reasonable when **[**41]** viewed against fee awards in comparable cases. *In re Lawnmower Engine, 733 F. Supp. 2d at 1014* (stating that Eisenberg and Miller suggest "that courts view fee requests falling within one standard deviation of the mean as generally reasonable unless reasons are shown to question the fee."); cf. *In re Relafen, 231 F.R.D. at 80-81* (While welcoming that "these thorough and objective studies...provide but a starting place...the court concludes it would be **[*462]** inappropriate to use a mean — an *average* — categorized according to the size of the settlement fund as the be all and end all of analysis.")(emphasis in the original).

More specifically, the Court investigates fees awarded in other, similar, individual cases within the First Circuit. Lead Counsel has cited several cases where fee awards between 30 and 33a% of the available fund were granted. *See In re Thirteen Appeals, 56 F.3d at 300*; *see also In re Relafen, 231 F.R.D. at 81*. However, the Court finds those cases distinguishable. *In re Thirteen Appeals* spanned a significantly longer time than the instant case, and involved two hundred and seventy component cases, whereas the instant MDL matter encompasses only approximately forty component **[**42]** cases. *See In re Thirteen Appeals, 56 F.3d at 307*. Similarly, the In re Relafen Court found that class counsel had put forth "exceptional efforts" in litigation that "required [an] all out effort" as Class Counsel succeeded, in part, in defeating a summary judgment motion. *See In re Relafen, 231 F.R.D. at 80*. Class counsel in In re Relafen also had a "*a mass of discovery*," including "hundreds of hours" consulting with experts, as well as the review of "hundreds of boxes of documents." Id. (emphasis added). The situation counsel faced in In re Relafen simply is not present in the instant litigation.

The Court has also located several cases within this Circuit on the lower end of the spectrum where the District Court awarded counsel 20% or less of the fund. *See* Turabao Med. Ctr. v. Beach, Nos. Civ. 96-2250, 96-8671, 96-2290, 96-8578, 96-2459, 96-8590, 96-8712 96-4010, 1997 WL 33810581, at *4-5 (D.P.R. Aug. 13, 1997) (awarding fees of 20% fees of the fund in a case where there was no formal discovery and no motion practice); *In re Fidelity/Micron Sec. Litig., No. 95-12676, 1998 U.S. Dist. LEXIS 21698, 1998 WL 313735, at *3, n.6 (D. Mass. June 5, 1998)*(awarding fees totaling 17.5% of the fund in a case where no significant **[**43]** discovery took place), remanded on other grounds, *167 F.3d 735*; *In re Tyco Int'l, Ltd., 535 F. Supp. 2d 249, 254 (D.N.H. 2007)* (awarding fees amounting to 14.5% of the fund in a case where "[i]t would be difficult to overstate the volume of discovery in this case" and "there was "aggressive, skillfully argued, and unusually challenging motion practice."); Mazola v. May Dept. Stores Co., 1999 WL 1261312, at *3 (D. Mass. Jan. 27, 1999) (Gertner, J.) (unreported opinion), (awarding fees of 10% of the fund where plaintiffs' counsel opposed and fought defendants for merely a couple of months. [15]).

The Court finds that the award in *In re Tyco* is not an apt comparison to the present cabotage litigation because In re Tyco had a settlement fund more than three times as large as the fund presently at issue. *See In re Indep. Energy Holdings PLC, No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003)* (***HN9***[] "[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the **[**44]** amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent."). Excluding In re Tyco, the litigation in the cited cases, as with the matter at hand, did not proceed to a formal discovery phase. While Turabao, *In re Fidelity*, and Mazola are comparable on the lack of formal discovery, these cases **[*463]** are less challenging than the instant case in the sense that they were either of a shorter duration or contained fewer dispositive motions.

[15] The District Court additionally granted plaintiffs' counsel $1.75 million in attorneys' fees to be paid directly by defendant.

Lead Counsel conceded in their first brief requesting fees that "[c]ourts in this Circuit frequently have recognized that fee awards in common fund cases typically range from 20 to 30 percent." (Docket No. 836). Hence, the 33a% requested by Lead Counsel exceeds the ceiling on typical percentage of the fund awards in the First Circuit. Thus, reviewing similar fee awards advocates against granting Lead Counsel's requested award of 33a%, but dissuades the Court from approving an award of 20% or less.

7. Public Policy Considerations

The Court's final inquiry centers on the public policy considerations. ***HN10***[] Class action plaintiffs' attorneys **[**45]** provide an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent. Due to the expense, time and difficulty of pursuing complex litigation, it would likely not be economical for an individual Class Member to pursue such litigation on their own. *See Alpine Pharma., Inc. v. Chas Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir. 1973)* ("In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation."); *In re Telectronics Pacing Sys. Inc., 137 F. Supp. 2d 1029, 1043 (S.D. Ohio 2001)* ("Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources.); Mazola, 1999 WL 1261312, at *4 ("The litigation is critical, because it gives voice to relatively small claimants who may not be aware of statutory violations or have an avenue to relief."). These considerations weight in favor of granting attorneys' fees under the percentage of the fund **[**46]** methodology, as private civil class action litigation is an important tool in enforcement of antitrust laws. *See Pillsbury Co. v. Conboy, 459 U.S. 248, 262-263, 103 S. Ct. 608, 74 L. Ed. 2d 430 (1983)* (The Supreme Court has previously "emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.").

B. Percentage of the Fund Analysis

In weighing all of these factors, the Court cannot approve the 33a% award requested by Lead Counsel. On the one hand, the Court notes that counsel has billed tens of thousands of hours in a complex matter and that counsel has effectively represented the Class in achieving a favorable and sizable settlement. These considerations, in addition to the public policy objectives of preventing collusion in the market place, point towards granting Lead Counsel's fee request. On the other hand, however, the Court is more persuaded by the fact that the instant matter settled before formal discovery proceedings commenced as discovery is often the most time intensive aspect of any complex litigation. Additionally, the Court maintains that attorneys' fee awards reasonably close to 33a% should be reserved **[**47]** for cases which actually proceed to trial or settle on the eve of trial. The instant case did not even reach the discovery phase much less approach a trial date. Furthermore, the Court observes that counsel took almost no risk in accepting the instant case. Lead Counsel filed this class action a mere five days after the DOJ's and the FBI's raid on several defendants' offices. As a result of these raids, Lead Counsel had reason to believe that there was a strong probability **[*464]** that there were antitrust violations. This probability was later increased by the various defendants' plea agreements, which accepted antitrust liability in either their personal or official capacity. [16]

An influential factor is fee awards granted previously in similar cases. When courts awarded fees of thirty percent or greater, the cases are generally longer in duration and more complex than the present case. When courts awarded fees of twenty percent or less, the amount of discovery was comparable, but the cases generally were shorter in duration and had fewer substantive motions than the present case. Thus, the Court determines that the correct

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[16] As mentioned previously, five former employees of the Horizon and Sea Star Defendants entered guilty pleas accepting criminal antitrust liability. *See* United States v. Horizon Lines, LLC, No. 3:11-CR-0071, *Second Amended Judgment* (D.P.R., Apr. 28, 2011); United States v. Chisholm, No. 08-cr-00353, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); United States v. Serra, No. 08-cr-00349, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); United States v. Glova, No. 08-cr-00352, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); United **[**48]** States v. Gill, No. 08-cr-00351, *Plea Agreement* (M.D. Fla., Oct. 20, 2008); and United States v. Baci, No. 08-cr-00350, *Plea Agreement* (M.D. Fla., Oct. 20, 2008).

percentage in this matter is between 20% and 30%. In further narrowing down this range, the Court found the Eisenberg and Miller study helpful in illuminating that the mean and median fee awards in this Circuit, and in antitrust cases in general, are in the low twenty percent range.

Upon careful review, the Court hereby **DENIES** Lead Counsel's fee request for 33a% and instead finds that an award of 23% of the of the total value of the Settlements, or more precisely, $15,145,500, is just. The Court concludes that 23% is appropriate particularly where a class action settles before undergoing **[**49]** a substantially protracted and costly discovery process. The Court reiterates that ***HN11***[] attorneys' fee awards of 33a% should be reserved for cases which proceed to trial or settle on the eve of trial.

C. Lodestar Cross-Check

HN12[] The First Circuit does not require a court to engage in calculating the lodestar method when awarding fees based upon the percentage of the fund method. *In re Thirteen, 56 F.3d at 307*. Nevertheless, the Court will perform the lodestar calculation as the Court finds that it is a pragmatic cross-check to ensure that the Court is not creating a windfall for Lead Counsel. *See New England Carpenters Health Benefits Fund v. First DataBank, Inc., 2009 U.S. Dist. LEXIS 97364, 7-8 (D. Mass. Oct. 20, 2009)*; Manual for Complex Litigation (Fourth) § 14.122 (2004) ("the lodestar is . . . useful as a cross-check on the percentage method . . . .); *Mesko v. Cabletron Sys. (In re Cabletron Sys. Sec. Litig.), 239 F.R.D. 30, 37 (D.N.H. 2006)* ("[I]t is now common practice to use the lodestar as a cross-check on the [percentage of the fund] award."); *In re Diet Drugs Prods. Liab. Litig., 553 F. Supp. 2d 442, 485 (E.D. Pa. 2008)*; *see also* Vaughn R. Walker & Ben Horwich, The Ethical Imperatives **[**50]** of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases, 18 Geo. J. Legal Ethics 1453, 1468, 1470 (2005) (advocating that courts have an ethical obligation to perform the Lodestar cross-check). The lodestar cross-check ensures that fees awarded under the percentage of the fund method are reasonable in light of the amount of work counsel actually performed. *See Lipsett v. Blanco, 975 F.2d 934, 937 (1st Cir. 1992)* ("[T]he lodestar **[*465]** represents "a presumptively reasonable fee.").

"The lodestar cross-check is performed by multiplying the hours reasonably expended on the matter by the reasonable hourly billing rate which then provides the court with the 'lodestar calculation.'" *In re Diet Drugs, 553 F. Supp. 2d at 485-486*. *See Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 293 (1st Cir. 2001)* ("In implementing this lodestar approach, the judge first calculates the time counsel spent on the case, subtracts duplicative, unproductive, or excessive hours, and then applies prevailing rates in the community (taking into account the qualifications, experience, and specialized competence of the attorneys involved)"). The proposed fee award is **[**51]** then divided by the lodestar calculation, resulting in a lodestar multiplier. The lodestar multiplier is compared to other multipliers employed in similar cases. If the multiplier is too great, the Court should consider reducing its award calculated under the percentage of the fund method. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306 (3d Cir. 2005)*.

In the instant matter, Lead Counsel arrived at a lodestar of $13,965,579.75 by multiplying the 30,000 hours plaintiffs' counsel expended by their hourly billing rates, [17] which are capped at $600 per hour. [18] Dividing the Court's proposed fee of 23% of the total fund, $15,145,500, by the lodestar yields a multiplier of 1.08. This low multiplier is certainly within the reasonable range. *See In re Relafen, 231 F.R.D. at 82* ("A multiplier of 2.02 is

[17] By dividing the total lodestar by the 30,000 hours billed, the Court calculates that Lead Counsel's average hourly rate is approximately $465.

[18] Lead Counsel has not provided the Court with detailed billing records supporting its claim of working more than 30,000 hours (Docket No. 836). Nevertheless, to save the Court from engaging in mathematical precision or bean-counting when calculating the lodestar cross-check, the Court may rely on summaries of hours submitted by counsel and not review actual billing records. *In re Rite Aid, 396 F.3d at 306-307*. Based upon the Court's common sense, experience, and familiarity with this case, the Court finds that expending over 30,000 billable hours is reasonable in the instant matter. The Court also notes that no party has challenged counsels' hours.

appropriate."); *In re Cendant Corp., 243 F.3d at 742* (holding that a lodestar multiplier of three would be reasonable and appropriate); *See*, e.g., *In re TJX Cos. Retail Sec. Breach Litig., 584 F. Supp. 2d 395, 408 (D. Mass. 2008)* (applying a lodestar multiplier of 1.97); *In re Tyco, 535 F. Supp. 2d at 271* (applying a lodestar multiplier of 2.697); *In re Visa Check, 297 F. Supp. 2d at 524* **[**52]** (applying a lodestar multiplier of 3.5); *see also* *In re Prudential, 148 F.3d at 341* (***HN13***[] "[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

The low multiplier of 1.08 indicates the relative closeness of the attorneys' fee calculated under the lodestar method and the percentage of the fund method. This lack of disparity confirms that **[**53]** the Court's fee award under the percentage of the fund method is reasonable and that the fee closely approximates the fair market value for counsel's services. The Court finds that the modest enhancement of the lodestar amount of 8%, using the 1.08 multiplier, is fitting for the same reasons supporting the 23% percentage of the fund award: the lack of formal discovery in the litigation and Lead Counsel's lack of risk in undertaking the litigation. These factors mitigate against increasing the 23% fee **[*466]** awarded under the percentage of the fund method in order to thus increase the multiplier. The Court concludes that a multiplier of 1.08 is appropriate in this matter.

With the lodestar cross-check supporting the Court's award of 23% under the percentage of the fund method, the Court **GRANTS IN PART AND DENIES IN PART** Lead Counsel's request for attorneys' fees (Docket Nos. 839 & 886). The Court hereby awards Lead Counsel fees of 23% of the total value of the Settlements, or more precisely $15,145,500. This sum shall be paid from the three settlements with the Horizon, Crowley and Sea Star Defendants.

III. Attorneys' Fees for Objectors

HN14[] Generally in class action suits, once a settlement figure **[**54]** has been reached, defendants have little interest in how the fund is ultimately appropriated, including what percentage of the fund that plaintiffs' counsel receives. At this stage of the litigation, Lead Counsel's interest begins to conflict with the Class Members'. Objectors thus aid the Court in assessing plaintiffs' counsels' request for attorneys' fees to ensure that the Class Members' interests are protected. *See* *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions, 278 F.3d 175, 202 (3d Cir. 2002)* (J. Rosenn, dissenting with respect to the imposition of sanctions upon objector's counsel)("The objecting lawyer independently can monitor the proposed settlement, costs, and fees for Class Counsel and, thus, aid the court in arriving at a fair and just settlement for the members of the class who individually are largely unrepresented."); *see also* *White v. Auerbach, 500 F.2d 822, 828 (2d Cir. 1974)* ("[I]t is well settled that objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements.").

The Federal Rules of Civil Procedure contemplate the possibility of fees to objectors:

> [*Rule 23(h)*] provides a format for all awards **[**55]** of attorney fees and nontaxable costs in connection with a class action, [and] not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as...attorneys who represented objectors to a proposed settlement under *Rule 23(e)* or to the fee motion of class counsel.

Fed. R. Civ. P. 23(h), Advisory Committee Notes to the 2003 Amendments. "An objector whose arguments result in a reduction of attorney-fee and expense awards provides a benefit to the class" and are thus entitled to attorneys' fees. *UFCW Local 880-Retail Food v. Newmont Mining Corp., 352 Fed. Appx. 232, 236 (10th Cir. 2009)*. Objectors who do not benefit the class, however, are not entitled to compensation. Id.; *see* *In re Cendant, 404 F.3d at 197* ("Only those attorneys who confer an independent benefit upon the class will merit compensation."); *Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1156 (8th Cir. 1999)* ("To recover fees from a common fund, attorneys must demonstrate that their services were of some benefit to the fund or enhanced the adversarial process.").

In the instant matter, Objectors request an award of 33a% **[**56]** of the three million and fifty thousand dollars ($3,050,000) they claimed to have secured for the Class Members. (Docket No. 951). Alternatively, Objectors seek the same percentage of the approximately three million dollars that the Court awarded to Lead Counsel. In support of this request, Objectors filed motions and affidavits certifying that, collectively, they expended 865.5 hours opposing Lead Counsel's requested attorneys **[*467]** fees. [19] (Docket Nos. 992 and 993).

Objectors have played an instrumental role in reviewing Lead Counsel's fees request and creating a benefit of the Class. Objectors have also aided the Court in its inquiry into the fairness of the proposed **[**57]** settlement. Most critically, Objectors opposed the method in which Lead Counsel had initially calculated the base rate freeze option. Lead Counsel originally valued the base rate freeze option at $105 million by calculating all the Class Members that could potentially elect that option. However, the Objectors persuasively argued that the value of the base rate freeze option should be calculated by including only the value of the base rate freeze option actually elected by Class Members (Docket Nos. 862 and 875). The Objectors further requested that the Court order Lead Counsel to produce the identities of the Class Members that had elected for the base rate freeze option and the volume of their cabotage purchases in order to provide a more accurate estimate of the value base rate freeze option (Docket No. 880).

In response to the Objectors' concerns, Lead Counsel recalculated the total value of the Settlements from $157,250,000 to $65,850,000. (Footnotes 8 and 12). With a lower settlement valuation, Lead Counsel lowered their fee request from 16% of $157,250,000, which is $25,000,000, to 33a% of $65,850,000, which is $21,950,000. Lead Counsel concedes that the lower fee request is "[b]ecause **[**58]** of the objections previously raised by the Objectors and the Court's reluctance to compute the award of attorney's fees on [the] basis of benefits not actually claimed by Class members." (Docket No. 910).

The Court recognizes Objectors' valiant efforts in scrutinizing Lead Counsel's proposed attorneys' fee and for clarifying that the actual value of the settlement is $65,850,000 and not the $157,250,000 as originally claimed by Lead Counsel. The Court determines that the Objector's direct efforts benefitted the Class Members by increasing the settlement fund by more than three million dollars. Therefore, the Court finds that Objectors are entitled to attorneys' fees. *Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 288 (7th Cir. 2002)* (***HN15***[] "[O]bjectors [must] produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class."); *see* *Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1051 (9th Cir. 2002)* ("Because objectors did not increase the fund or otherwise substantially benefit the class members, they were not entitled to fees.").

Although the Objectors' efforts benefitted the Class, Objectors' requested award of 33a%, or **[**59]** alternatively a percentage award equal to Lead Counsel's award, 23%, is clearly excessive. The Court finds this request exorbitant for a variety of reasons. First, Objectors substantive participation in this litigation was for a much more limited scope and duration than Lead Counsel's. Objectors did not have the responsibility of organizing the Class or defending against motions to dismiss or a host of Lead Counsel's other obligations. **[*468]** Second, it was the Court, and not the Objectors, that originated the argument that Lead Counsel was engaged in double counting as Class Members were not able to select both the base rate freeze option and the cash settlement option. The Court appreciates Objectors further development of this argument; however, the Court notes that Objectors are merely expanding upon the Court's previously expressed skepticism. Third, Objectors request over a million dollars in fees for billing 865.5 hours (Docket Nos. 992 and 993) in opposing Lead Counsel's fee request. Were the Court to grant this request, Objectors would be compensated at more than $1100 per hour. [20] Accordingly, the Court finds that an

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[19] Specifically, Pan American states that their counsel expended 139.5 hours opposing Lead Counsel's request (Docket No. 992); V. Suarez assert that its counsel expended 272.5 hours (Docket No. 993-1); Carribean Produce's counsel alleges that it expended 247.5 hours (Docket No. 993-2); and Central Produce claims that its counsel expended 206 hours (Docket No. 993-3). Thus, in total, Objectors billed 865.5 hours for opposing Lead Counsel's fee request.

The Objectors' informative motions are hereby **NOTED** (Docket Nos. 992 and 993).

[20] More precisely, Objectors would receive $1,162.91 per hour. The Court additionally concludes that the Objectors were overzealous in spending 865.5 hours for developing their arguments. As the Objectors made identical arguments common to all parties and sought an identical remedy, the Objectors should have pooled their resources to craft a single, cogent filing as opposed to duplicating their efforts.

award of 10% is reasonable and appropriate to reflect Objectors' **[**60]** time, effort, ingenuity and success in increasing the kitty for the benefit of the Class.

Thus, Objectors' request for attorneys' fees (Docket No. 951) is **GRANTED IN PART AND DENIED IN PART.** In recognition of the valuable service the Objectors provided by enlarging the settlement fund by more than three million dollars to the direct benefit of the Class Members, the Court hereby awards the Objectors 10% of the recovered amount, which is three hundred and five thousand dollars ($305,000). This sum shall be paid from the three settlements with the Horizon, Crowley and Sea Star Defendants. [21]

IV. Incentive Awards

HN16[] "Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit." *In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 189 (D. Me. 2003)*. *In re Lupron, 2005 U.S. Dist. LEXIS 17456, 2005 WL 2006833, at *7* ("Incentive awards are recognized as serving an important function in promoting class action settlements."). Courts "routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 400 (D.D.C. 2002)*(internal **[**62]** citations and quotations omitted). Additionally, courts typically examine the following criteria when assessing incentive awards:

> 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) **[*469]** enjoyed by the class representative as a result of the litigation.

Swack v. Credit Suisse First Boston, LLC, 2006 U.S. Dist. LEXIS 75470, 11-12 (D. Mass. Oct. 4, 2006)(internal quotations omitted).

Lead Counsel requests that the Court approve incentive awards in the amount of $20,000 for each of the six Class Representatives, thereby totaling $120,000. Lead Counsel argues that Class Representatives played a vital role in gathering facts, reviewing the complaint and other filings and preparing critical affidavits. While the Court notes the named plaintiffs' involvement in advancing the present litigation, the Court finds that the amount of the incentive award requested is excessive and unreasonable. [22] The Class Representatives did not undertake **[**63]** substantial risk or suffer notoriety or personal hardships by acting as a named plaintiff. There is "no indication that [the Class Representatives] assumed a risk or inconvenience not shared by the other class members which is of such magnitude to merit" an incentive award, and Plaintiffs "do not provide specific evidence of the purported risk's magnitude." *In re Laidlaw Sec. Litigation, 1992 U.S. Dist. LEXIS 13935, at *9 (E.D. Pa. Sept. 15, 1992)*; *In re AOL Time Warner ERISA Litig., 2007 U.S. Dist. LEXIS 79545 (S.D.N.Y. Oct. 26, 2007)*.

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[21] The Objectors have reached an agreement amongst themselves to divide any fee award based upon the respective volume of cabotage purchased by the Objectors from Defendants during the relevant period **[**61]** (Docket Nos. 989 and 990). Accordingly, the parties have agreed to that V. Suárez, Inc. will receive 57.41% of the award; Caribbean Produce Exchange, Inc. will receive 25.49%; Central Produce El Jibarito, Inc. will receive 11.37%; and Pan American will receive 5.36%. The Court will uphold this agreement and orders that the Objectors' award be distributed in accordance with these percentages. Accordingly, the Court **GRANTS** the Objector's request (Docket Nos. 989 and 990) and now finds as **MOOT** the Objector's prior request (Docket No. 988).

[22] The Court notes that Congress has expressed some skepticism about incentive awards. Congress made the following finding in the Class Action Fairness Act: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . (B) unjustified awards are made to certain plaintiffs at the expense of other class members." ***Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4***. Additionally, the Private Securities Litigation Reform Act of 1995 (PSLRA) prohibits granting incentive awards to class representatives in securities class actions. *See* *15 U.S.C. § 78u-4(a)(2)(A)(vi)*.

Although the Class Representatives invested some **[**64]** amount of time to the instant suit by suppling documents, reviewing Court filings and executing affidavits, the Class Representatives were not subjected to hundreds of interrogatories and countless depositions; in fact, no Class Representative was ever deposed as the instant litigation did not proceed to a discovery phase. *See* *Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720 (E.D.N.Y. 1989)*(denying incentive award to named plaintiff where plaintiff responded to document requests and was deposed, but did not otherwise "perform any extraordinary services to the class"); *In re Residential Doors Antitrust Litig., 1998 U.S. Dist. LEXIS 4292 (D. Pa. 1998)*(granting an incentive award of $ 10,000 to Class Representatives where Class Representatives cooperated in producing documents, answering interrogatories, and presenting representatives for depositions). Only the fifth factor, the lack of personal benefits obtained by the Class Representatives, support a higher incentive award for the Class Representatives.

Giving careful and deliberate consideration to all of these factors, the Class Representatives cannot be said to have been an active participant in the litigation to merit $20,000. **[**65]** Instead, the Court opines that a $8,000 incentive award per Class Representative is much more reasonable considering the level of involvement, time, effort and risk the Class Representative expended. Accordingly, the Court **DENIES** the request for $120,000 in incentive awards and **GRANTS** $8,000 in incentive awards per Class Representative, thereby totally $48,000. This sum shall be paid from the three settlements with the Horizon, Crowley and Sea Star Defendants.

[*470] V. Costs & Expenses

Lead Counsel has filed itemized, detailed and voluminous supporting evidence relating to the costs allegedly incurred (Docket Nos. 960, 964-979, 985, and their supporting exhibits). The Court has carefully reviewed these filings as the Court has "quasi-fiduciary" duty to Class Members while at the same time exercising its "wide latitude in shaping the contours" of an award of expenses. *See* *In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 736 (1st Cir. 1999)*. Upon careful review, the Court finds that these costs are reasonable and justifiable in light of the scope and duration of the litigation. Therefore, the Court hereby **GRANTS** Lead Counsel's request for expenses and awards Lead Counsel $1,035,702.92 in expenses **[**66]** (Docket Nos. 960 and 985). This sum shall be paid from the three settlements with the Horizon, Crowley and Sea Star Defendants. [23]

VI. FAIRNESS, REASONABLENESS & ADEQUACY OF THE SETTLEMENTS

HN17[] Pursuant to *Rule 23 of the Federal Rules of Civil Procedure*, the Court "may approve a settlement...that would bind class members only after a hearing and on finding that the settlement...is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)(C)*. [24] Although the Court outlined the contours of the Settlements above, out of an abundance of caution, the Court makes additional factual findings regarding the fairness, reasonableness, and adequacy of the Settlements.

In providing notice to the Class, Lead Counsel mailed 61,854 Long-Form Notices and Claim Forms to Class Members identified from Defendants' transactional records. Additionally, a press release was distributed to approximately 4,490 major press outlets in the United States and 250 journalists **[**67]** in the maritime shipping industry. Summary notices were also published in newspapers and magazine in September of 2010. Lead Counsel further established a mailing address, a website, and a toll-free telephone number, staffed with both English and Spanish speaking operators, where Class Members could obtain further information regarding the proposed Settlements.

In crafting the Horizon Settlement Agreement, Lead Counsel received the Horizon Defendants' financial records and was thus able to assess their ability or inability to pay a large sum or judgment. Upon close review of these

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[23] In accordance with the Class Notice, dated August 25, 2010 (Docket No. 874-1), the Crowley Settlement will not reimburse Lead Counsel for more than $250,000 in expenses.

[24] The Court held a Final Fairness Hearing on November 18, 2010 (Docket No. 876).

records, in consultation with a financial expert, Lead Counsel determined that Horizon Defendants' market capitalization had dropped almost 90% since 2007 and that Horizon Defendants' were highly leveraged, having almost no unencumbered assets. Horizon Defendants also had to obtain a costly amendment to an existing credit agreement in order to be able to commit the $20,000,000 cash portion of the Settlement. Moreover, at the request of the DOJ, the Court drastically lowered Horizon's criminal fine from $45,000,000 to $15,000,000 out of a concern for Horizon's continued viability and its ability to pay restitution **[**68]** to the Class Members in the instant matter. [25]

[*471] Similarly, Lead Counsel received confidential information from Crowley Defendants' concerning their market share. Lead Counsel engaged a financial expert to evaluate this information and assess Crowley Defendants' portion of any potential damages suffered by the Class. Furthermore, Lead Counsel and Crowley Defendants had two mediation sessions with an experienced mediator in **[**69]** complex litigation and antitrust matters.

Lead Counsel also held arm's length negotiations with Sea Star Defendants where they vigorously challenged the Class' damages claim. Lead Counsel engaged a financial expert and a forensic financial expert to analyze Sea Star Defendants' publicly available information as well as confidential internal information provided by Sea Star Defendants. Like Horizon Defendants, Sea Star Defendants are highly leveraged, with virtually no unencumbered assets. Lead Counsel also conducted two mediation sessions with Sea Star Defendants where Sea Star Defendants indicated that there were significant limitations on their ability to a pay a substantial settlement amount. Further, Sea Star Defendants are subject to liability from multiple other lawsuits. Moreover, Lead Counsel considered the Court's skepticism of Plaintiffs' ability to maintain a claim against one of the Sea Star Defendants, Saltchuck Resources, Inc., due to lack of evidence against this particular Defendant.

Regarding Chisholm, a personal, non-corporate co-defendant, Lead Counsel has agreed to dismiss all claims against Chisholm under the Chisholm Settlement Agreement. In exchange, Chisholm has **[**70]** agreed to fully cooperate in aiding Lead Counsel in this, and other related, cabotage litigation. Chisholm's participation significantly improved Plaintiffs' ability to prove the extent of the conspiracy. Lead Counsel reviewed Chisholm's financial records and based upon his assets and loss of income upon being incarcerated, Lead Counsel concluded that he did not have the ability to pay any monetary amount.

The Court echos its previous analysis from when it granted the Settlements preliminary approval on August 25, 2010. *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. at 142* and (Docket Nos. 800 and 801). Therein, the Court concluded that the settlement agreements were negotiated at arm's length as the negotiations were "long and arduous, spanning a considerable time-period" and that a resolution was "reached after a great deal of dispute between the parties as to the terms of the agreements." (Docket No. 801). The Court also concluded that the parties were sufficiently informed by the informal discovery that occurred.

The Final Fairness Hearing assuaged all of the Court's concerns regarding the Settlements themselves (Docket No. 876). The Court found that the Long-Form Notices **[**71]** sent to Class Members were sufficiently clear that Class Members had the option of selecting either the base rate freeze or the cash option when opting into the Settlements. The Court also determined that the Putative Class Members were provided with adequate information to make an educated decision whether or not to opt in or out of the Settlements **[*472]** within allotted the time period. The only remaining issue at the conclusion of the Final Fairness Hearing was Plaintiffs' counsel's utilization of a maximized potential value of the base-rate freeze option, in conjunction with the cash settlement, to determine the size of the fund from which the reasonable attorneys' fee amount could be calculated. (Footnotes 8 and 12).

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[25] On March 22, 2011, Horizon pled guilty to one count of violating the Sherman Antitrust Act and the Court imposed a criminal fine of $45,000,000 to be paid in gradually increasing installments over four years. United States v. Horizon Lines, LLC, No. 3:11-CR-0071, *Judgment* (D.P.R., Mar. 22, 2011)(Docket No. 29). The following month, however, the Court reduced Horizon's fine, at the request of the United States, by two-thirds to $15,000,000. The $15,000,000 fine is similarly payable in gradual installments over four years, in an effort ensure sufficient cash flow to continue operations and to ensure that Horizon would be able to compensate the Class. United States v. Horizon Lines, LLC, No. 3:11-CR-0071, *Second Amended Judgment* (D.P.R., Apr. 28, 2011)(Docket No. 37).

A. Grinnell/Tyco Analysis

HN18[] The First Circuit has yet to espouse a set of determined factors for assessing the fairness, reasonableness, and adequacy of a proposed settlement. Thus, the Court will follow other courts within this Circuit that have utilized a modified version of the Grinnell factors set forth by the Second Circuit and adopted by the Third Circuit. *See In re Tyco, 535 F.Supp.2d at 259-60*. The modified Grinnell factors are:

> (1) risk, complexity, expense and duration **[**72]** of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

Id.

(1) Risk, Complexity, Expense and Duration of the Case

As the Court has already stated, the present case is a complex antitrust matter that has been pending for more than three years; however, the Court notes that the parties have been in settlement negotiations for two of those three years. While the present case involved relatively low risk due to the DOJ's investigation, the Defendants' credible "filed-rate" doctrine defense, which may potentially shield Defendants from civil liability, provides heightened risk for Lead Counsel. Additionally, the parties' expenses to date have been reasonable, but further litigation will result in an exponential rise in litigation costs as the litigants enter into discovery. Following discovery, if Plaintiffs survive motions for summary judgment, a trial may take as long as a month, which will likely be followed with a lengthy appellate review process. **[**73]** This factor is somewhat mixed, but, on the whole, the furculum favors approval of the Settlements.

(2) Comparison of the Proposed Settlement with the Likely Result of Continued Litigation

The actual value of the fund, $65,850,000, accounts for approximately 1.583% [26] of the total affected Puerto Rican cabotage sales for the relevant period. Other courts have approved settlements with similar percentages. *See In re Pressure Sensitive Labelstock Antitrust Litig., 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008)* (approving the settlement where the cash portion of the settlement was approximately 1.5% of total sales); *In re Linerboard Antitrust Litig., 321 F. Supp. 2d at 627* (approving the settlement where the settlement represented 1.62% of total sales). However, the Court finds that the percentage of the settlement relative to the total sales is not a particularly prudent figure in assessing the adequacy of the proposed Settlements.

Other courts have **[**74]** examined proposed settlements as a percentage of the alleged damages, which is a more reliable analysis. *See In re Tyco, 535 F. Supp. 2d at 261* (finding that the proposed settlement represented **[*473]** approximately 27% of the alleged damages which constituted an "outstanding recovery for the class"). In the instant case, Lead Counsel did not estimate the Class' actual damages (Docket No. 540-25), thus, the Court cannot calculate what this percentage may be.

As a general rule, the Court is loathe to analyze hypothetical situations such as this one and finds predicting the likely result of continued litigation a Sisyphean task. Nevertheless, it is likely that the parties would vigorously litigate class certification, liability and damages as well as summary judgment motions in preparation for a complex trial. To the best of our knowledge, there are no glaring deficiencies, or smoking guns, in the Plaintiffs' arsenal that may substantially inflate or deflate a potential jury verdict. Beyond these broad characterization applicable to most multi-

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[26] Plaintiffs estimated that Defendants' total volume of commerce of Puerto Rican cabotage to be $4,159,800,000 during the relevant period (Docket No. 886-2). The actual value of the Settlements, $65,850,000, divided by this sum is approximately 1.583%.

district litigation, the Court's crystal ball is murky and unable to forecast the outcome of summary judgment motions not presently before the Court nor **[**75]** the precise result of a jury verdict for a trial that has not yet been conducted. Accordingly, this factor counsels slightly in favor of approving the Settlements as a means to ending what could be protracted and complex litigation with an uncertain result.

(3) Reaction of the Class to the Settlement

The Class's reaction has been very positive. 61,854 notices were sent to the Class Members identified from the Defendants' transactional records and press releases were widely disseminated in both English and Spanish. There were only three objections to the Settlements and none of the objections challenged the adequacy of the proposed settlement amount itself. Two of the objections related to the proposed attorneys' fees and incentive awards, while the third objection from INEOS only sought more information in order to decide whether or not to participate in the Settlements or opt-out. [27] Three objections, with none of the three challenging the amount of the Settlements, out of a potential Class of 61,854, certainly weighs in favor of approval. *See* *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 118 (2d Cir. 2005)* (***HN19***[]) "'If only a small number of objections are received, **[**76]** that fact can be viewed as indicative of the adequacy of the settlement.'" (quoting 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.41, at 108 (4th ed. 2002)). However, we note that while "silence constitutes tacit consent to the [settlement] agreement," *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993)*, courts have found that a lack of response from the class is typical. *See* *In re Traffic Exec. Ass'n—E. R.Rs., 627 F.2d 631 (2d Cir. 1980)* ("A substantial lack of response from absentee class members appears to be the norm rather than the exception."); *see also* *Bolger, 2 F.3d at 1313 n.15* ("[P]otential objectors...have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's pro rata benefit.").

(4) Stage of the Litigation & the Amount of Discovery Completed

This case has passed the motion to dismiss phase, but has not yet entered into a formal discovery phase. Lead Counsel has, nevertheless, conducted substantial **[**77]** informal discovery which included scrutinizing the pleadings and filing in the DOJ's parallel criminal cases. Lead Counsel has also engaged an economic expert and a forensic financial analyst to ascertain potential **[*474]** damages. Additionally, Defendant Chisholm, a participant in the alleged conspiracy, cooperated with Lead Counsel and supplied valuable insider information. Although formal discovery did not occur, the Court can still conclude the parties had sufficient information to make a well informed decision about the Settlements. *See* *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. at 141* (The Court previously found that the "parties were sufficiently informed by the limited discovery which has occurred in the instant case."). Thus, this factor favors approval of the Settlements.

(5) Quality of Counsel & Conduct During Litigation & Settlement Negotiations

The Court previously addressed this issue when granting preliminary approval to the Settlements. The Court stated that:

> The negotiations for settlement in the instant case were long and arduous, spanning a considerable time-period. Further, the settlement agreements were reached after a great deal of dispute between parties as **[**78]** to the terms of the agreements. Accordingly, the Court finds that the negotiation of the settlement agreements indeed occurred at arm's length.

Id. at 141. Based upon the Court's prior finding, this factor also supports approving the Settlements.

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[27] The Court notes that INEOS, and any other Class Member, retained the option to opt-out of the Class and separately litigate against, or settle with, with the Defendants.

The Court will also briefly address Defendants' ability to withstand a greater judgment. The evidence shows that Horizon and Sea Star Defendants are both experiencing serious financial hardships and are highly leveraged. As the Court mentioned previously, Horizon Defendants' had to obtain a costly amendment to an existing credit agreement in order to fund the proposed settlement. The Court also notes that as a result of the severity of Horizon's financial condition, the Court reduced Horizon's criminal fine, at the request of the United States, from $45,000,000 to $15,000,000. [28] These Defendants' precarious financial situation counsel in favor of resolving this matter quickly and thus approving the Settlements.

With all of the above factors supporting approval, the Court **[**79]** concludes that the proposed Settlement Agreements are fair, reasonable, and adequate.

VII. CONCLUSION

The Court has determined awarding Lead Counsel 23% of the total value of the Settlements, $15,145,500, is reasonable and appropriate. The Lodestar cross-check supports the Court's fee award. The Objectors have performed a valuable service in assessing Lead Counsel's fee request resulting in compensation for each and every Class Member. The Court has thus found that the Objectors are entitled to a fee of 10% of the $3,050,000 they have helped recover for the benefit of the Class. The Court has also approved incentive awards of $8,000 per Class Representative, for a total of $48,000, and approved Lead Counsel's request for expenses in the amount of $1,035,702.92. Lastly, in compliance with *Rule 23 of the Federal Rules of Civil Procedure*, the Court has concluded that the proposed Settlements are fair, reasonable, and adequate.

As the Court has determined that the attorneys' fees, costs and expenses are all reasonable for the reasons stated above, the Court is now satisfied that the Settlement Agreements are fair, reasonable, and adequate. Thus, the Court hereby **[*475]** **GRANTS** final approval (Docket **[**80]** No. 840) to the pending Settlement Agreements for the reasons stated above.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13th day of September, 2011.

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ

U.S. District Judge

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[28] *See* United States v. Horizon Lines, LLC, No. 3:11-CR-0071, *Judgment* (D.P.R., Mar. 22, 2011)(Docket No. 29) and *Second Amended Judgment* (D.P.R., Apr. 28, 2011)(Docket No. 37).

In re Polyurethane Foam Antitrust Litig.

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

September 15, 2011, Decided; September 15, 2011, Filed

Case No. 1:10 MD 2196

Reporter

799 F. Supp. 2d 777 *; 2011 U.S. Dist. LEXIS 104419 **; 2012-1 Trade Cas. (CCH) P77,755

In Re: Polyurethane Foam Antitrust Litigation. This document related to: ALL CASES

Prior History: *In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 2011 U.S. Dist. LEXIS 85032 (N.D. Ohio, 2011)*

Core Terms

conspiracy, allegations, conclusory, conspiratorial, Complaints, diligence, Defendants', employees, Purchaser, antitrust, concealment, notice, foam, class certification, factual allegations, pricing, Carpet, fraudulent concealment, interviews, Leniency, tolling, motion to dismiss, Plaintiffs', limitations period, legal conclusion, price-fixing, discovery, customer, reside, cases

LexisNexis® Headnotes

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

HN1[] **Complaints, Requirements for Complaint**

A court evaluates complaints in light of the plausibility pleading standard articulated in Twombly and reaffirmed in Iqbal. According to this standard, a plaintiff must provide allegations plausibly suggesting (not merely consistent with) the defendant's liability. However, this standard neither imposes a probability requirement nor requires ultra specific factual allegations. Rather, the factual allegations must be enough to raise a right to relief above the speculative level, or raise a reasonable expectation that discovery will reveal evidence of the defendant's liability.

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

HN2[] **Complaints, Requirements for Complaint**

Courts use a two-step process when evaluating the facial plausibility of a complaint. First, a court must dispose of those allegations not entitled to a presumption of truth, namely, threadbare recitals of the elements of a cause of action that are supported by mere conclusory statements. A plaintiff may not proceed to discovery on a complaint containing only conclusions about the defendant's liability. Even under this standard, however, legal conclusions still play a role, albeit a limited one. Specifically, legal conclusions can provide the framework of a complaint but must be supported by factual allegations, and cannot themselves be dressed up as factual allegations. Determining whether a legal conclusion "masquerades" as a factual allegation requires a court to consider whether there exists elsewhere in the complaint factual allegations supporting the allegation.

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

HN3[] **Complaints, Requirements for Complaint**

Courts use a two-step process when evaluating the facial plausibility of a complaint. Second, a court must examine those allegations, not swept aside as factually-unsupported legal conclusions, to gauge whether the remaining allegations, accepted as true, plausibly give rise to an entitlement to relief. A plausible claim is not merely "possible," or "conceivable," but rather permits a court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A Section 1 claim supported only by allegations of parallel behavior does not permit such an inference to be drawn, for alleging parallel decisions to resist competition is not suggestive of a conspiracy.

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

HN4[] **Complaints, Requirements for Complaint**

Though the plausibility pleading standard is undoubtedly a departure from the "no-set-of-facts" standard that reigned for the half-century following the court's decision in Conley v. Gibson, this standard nonetheless operates within a notice pleading regime. A complaint need not contain "specific facts," but in all cases must provide the defendant "fair notice" of the alleged conduct that renders him liable to the plaintiff. For instance, an antitrust defendant is not provided sufficient notice of his role in an alleged conspiratorial agreement spanning a seven-year period in which no "who, where, or when" allegations are advanced. Likewise, attempting to implicate individual defendants in an alleged antitrust conspiracy by referring generally to "defendants" will not do if the complaint provides "no clue" as to the terms of the agreement, or what role each defendant played. Therefore, while specific facts, like the "who, where, or when" of a claim are not required, to the extent the absence of such allegations fails to provide the defendant fair notice of the claims the plaintiff asserts, a plaintiff does not fulfill his *Fed. R. Civ. P. 8* obligation to provide a short and plain statement of the claim showing that the pleader is entitled to relief.

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

HN5[] **Complaints, Requirements for Complaint**

Discussing the conclusory/non-conclusory divide, Twombly and Iqbal define as conclusory "bare assertions" of liability, and "threadbare" legal statements as being denied a presumption of truth, but not allegations that contain factual support.

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

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

HN6[] **Regulated Practices, Private Actions**

The plausibility pleading standard does not require a court to construct a mandatory checklist of the "who, what, where, when, and how" of an antitrust agreement for each defendant. Common sense prevails, and a complaint survives if it contains "enough factual matter (taken as true) to suggest that an agreement was made" among the defendants.

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

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

HN7[] **Regulated Practices, Private Actions**

Watson Carpet has no application until the existence of an express conspiratorial agreement is determined. But because a complaint containing an express conspiratorial agreement does not announce itself, a court must examine the complaint as a whole and determine whether such an agreement has been established by direct allegations, or if only circumstantial evidence has been offered in which case the allegations must plausibly suggest, and not merely be consistent with, a conspiratorial agreement.

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

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

HN8[] **Regulated Practices, Private Actions**

To the extent Watson Carpet articulates a different standard than cases like Twombly and In re Travel Agent, this standard only differs as to the consequences that flow from the route a plaintiff chooses to follow when pleading an antitrust conspiracy while, of course, leaving the plausibility pleading standard unchanged. Watson Carpet departs from Twombly and certain of its progeny because the existence of a well-pled conspiratorial agreement necessarily removes the need to determine whether sufficient circumstantial evidence tending to exclude the possibility of independent conduct had been presented. The Watson Carpet plaintiff pursued the path of direct allegations to establish its entitlement to relief instead of supplying solely inferential allegations, a well-established pleading dichotomy. This distinction mirrors the "crucial question" for making out an antitrust claim, whether defendant's conduct toward plaintiff stemmed from independent decision or from an agreement, tacit or express.

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

HN9[] **Regulated Practices, Private Actions**

An express conspiratorial agreement cannot be established through circumstantial evidence, or those allegations that can only be connected to a conclusion of fact by inference.

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

HN10[] **Concerted Action, Civil Conspiracy**

A fundamental tenant of conspiracy law holds one participating conspirator jointly liable for all his co-conspirators' prior acts.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN11[] **Business Torts, Fraud & Misrepresentation**

In the Sixth Circuit, a plaintiff alleging fraudulent concealment must plead: 1) defendants concealed the conduct that constitutes the cause of action; 2) defendants' concealment prevented plaintiffs from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action.

Torts > ... > Statute of Limitations > Tolling > Equitable Estoppel

HN12[] **Tolling, Equitable Estoppel**

When facts exist that should excite the suspicions of a reasonably diligent person, a plaintiff that fails to make proper inquiries to discover his cause of action will not see the limitations period tolled. By contrast, when no information, actual or constructive, exists hinting at the fact of plaintiff's injury, the "reasonable diligence" requirement seems limited to denying tolling for careless plaintiffs. At bottom, the "reasonable diligence" component of the fraudulent concealment doctrine requires the plaintiff to show that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense.

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

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

HN13[] **Complaints, Requirements for Complaint**

A plaintiff must provide specific allegations of the conspiracy's concealment and eventual discovery so that a court may clearly see whether, by ordinary diligence, the discovery might not have been before made and relief sought sooner.

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Judges: JACK ZOUHARY, U. S. DISTRICT JUDGE.

Opinion by: JACK ZOUHARY

Opinion

[*790] MEMORANDUM OPINION AND ORDER

Introduction

Before the Court are a series of Motions for Reconsideration (Doc. Nos. 202-203, 214) of this Court's July 19, 2011 Order (Doc. No. 191) ("Order") denying in part a series of Motions to Dismiss the Direct and Indirect Purchaser Plaintiffs' (collectively "Plaintiffs") Consolidated Amended Complaints (collectively "Complaints"). In the alternative, Defendants seek certification for an immediate appeal of the Order. In addition, one Motion requests a stay of this case until the U.S. Department **[**6]** of Justice ("DOJ") concludes its parallel criminal grand jury investigation (Doc. No. 202).

For the reasons set forth below, the Motions for Reconsideration and Certification for Immediate Appeal are denied. The Motion for Stay is also denied. To the extent the Motions for Reconsideration raise arguments not addressed in a similar order denying Defendant Leggett & Platt's Motion for Reconsideration and Certification for Immediate Appeal (Doc. No. 200), additional clarifying remarks are offered.

Motions for Reconsideration

Defendants' Motions raise two categories of issues. [1] First, Defendants seek reversal of certain of the Order's rulings, including: the application of the Sixth Circuit's decision in *Watson Carpet & Floor Covering, Inc v. Mohawk Indus., Inc. (Watson Carpet), 648 F.3d 452, 2011 U.S. App. LEXIS 12606, 2011 WL 2462833 (6th Cir. 2011)* to the Complaints; and the finding that the Complaints sufficiently allege Defendant FXI Innovations' participation in the conspiracy.

Defendants also re-raise two arguments that, if accepted, would narrow the scope of the pleadings. First, Defendants argue the Complaints fail to properly allege fraudulent concealment with respect to the conspiracy. Second, Defendants claim the Indirect Purchaser Plaintiffs lack standing to assert state antitrust or consumer protection claims in jurisdictions not represented among the named Indirect Purchaser Plaintiffs. This Court declined to address the first issue, fraudulent concealment, in its Order. By contrast, at the July 1, 2011 hearing, this Court postponed standing analysis to a later time (TR 127:12-19). This Order supplies answers to both challenges.

Finally, Defendants seek a Stay of this litigation pending "resolution" of related government investigations or, in the alternative, staged discovery as to all Defendants (Doc. No. 202-1 at 10-11).

[1] As indicated in this Court's Order granting the Woodbridge Defendants' Motion for Joinder, a motion addressing common issues will be treated as if all Defendants joined in the motion's filing (Doc. No. 222). Therefore, this Memorandum **[**7]** Opinion refers to "Defendants" generally when discussing common issues, distinguishing among individual Defendants only when necessary.

Overview of *Twombly* and *Iqbal*

Before proceeding, however, a word must be said about the keystone supporting much of the claimed inadequacies in the Complaints: Defendants contention that "at least **[**8]** 90 of the 160-paragraph CAC are unquestionably conclusory" and that, aside from Complaint paragraphs describing the parties, only 20 paragraphs contain "bits and pieces of factual support," but not enough to support the claims asserted (Doc. No. 90 at 22). Defendants' dissection of the Complaint purports to be grounded in the plausibility pleading standard articulated in *Bell Atl.* ***[*791]*** *Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. However, despite Defendants' characterization of the standard, this Court notes different trends in the manner in which Defendants apply that standard.

HN1[] This Court evaluates the Complaints in light of the plausibility pleading standard articulated in *Twombly* and reaffirmed in *Iqbal*. According to this standard, a plaintiff must provide "allegations plausibly suggesting (not merely consistent with)" the defendant's liability. *Twombly, 550 U.S. at 557*. However, this standard neither imposes a probability requirement nor requires ultra specific factual allegations. *Id. at 555-56*. Rather, the factual allegations "must be enough to raise a right to relief above the speculative level," *id. at 555*, or "raise a reasonable expectation **[**9]** that discovery will reveal evidence" of the defendant's liability. *Id. at 556*.

HN2[] Courts use a two-step process when evaluating the facial plausibility of a complaint. First, a court must dispose of those allegations not entitled to a presumption of truth, namely, "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." *Iqbal, 129 S. Ct. at 1949*. A plaintiff may not proceed to discovery on a complaint containing only conclusions about the defendant's liability.

Even under this standard, however, legal conclusions still play a role, albeit a limited one. *Id. at 1950*. Specifically, "legal conclusions can provide the framework of a complaint" but "must be supported by factual allegations," *id. at 1950*, and cannot themselves be dressed up as factual allegations. *Twombly, 550 U.S. at 555*, *quoting* *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*. Determining whether a legal conclusion "masquerades" as a factual allegation requires a court to consider whether there exists elsewhere in the complaint factual allegations supporting the allegation. *See* *id. at 564* (concluding that on a "fair reading" of the complaint as a whole, a few statements speaking **[**10]** to "agreement" were mere legal conclusions resting on factual allegations of parallel conduct that did not plausibly suggest the existence of an antitrust conspiracy).

HN3[] Second, a court must examine those allegations, not swept aside as factually-unsupported legal conclusions, to gauge whether the remaining allegations, accepted as true, "plausibly give rise to an entitlement to relief." *Iqbal, 129 S. Ct. at 1950*. A plausible claim is not merely "possible," *Twombly, 550 U.S. at 557*, or "conceivable," *id. at 570*, but rather permits a court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949*. A Section 1 claim supported only by allegations of parallel behavior does not permit such an inference to be drawn, for "alleging parallel decisions to resist competition" is not suggestive of a conspiracy. *Twombly, 550 U.S. at 566*.

HN4[] Though the plausibility pleading standard is undoubtedly a departure from the "no-set-of-facts" standard that reigned for the half-century following the Court's decision in *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, *see* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 **[**11]** Duke L. J. 1 (2010), this standard nonetheless operates within a notice pleading regime. A complaint need not contain "specific facts," but in all cases must provide the defendant "fair notice" of the alleged conduct **[*792]** that renders him liable to the plaintiff. *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. For instance, an antitrust defendant is not provided sufficient notice of his role in an alleged conspiratorial agreement spanning a seven-year period in which no "who, where, or when" allegations are advanced. *See* *Twombly, 550 U.S. at 565 n.10*. Likewise, attempting to implicate individual defendants in an alleged antitrust conspiracy by referring generally to "defendants" will not do if the complaint provides "no clue" as to the terms of the agreement, or what role each defendant played. *In re Travel Agent Comm'n Antitrust Litig, 583 F.3d 896, 905 (6th Cir. 2009)* (*quoting* *Twombly, 550 U.S. at 565 n.10*). Therefore, while specific facts, like the "who, where, or when" of a claim are not required, to the extent the absence of such allegations fails to provide the defendant fair notice of the claims the plaintiff asserts, a plaintiff does not fulfill his *Federal Civil Rule 8* obligation to **[**12]** provide "a short and plain statement of the claim showing that the pleader is entitled to relief."

As they must, Defendants correctly describe the first prong of the plausibility pleading standard, the rejection of conclusory allegations (Doc. No. 90 at 14-20). However, in applying this standard to the Complaint, Defendants transform this standard in two important respects not supported by *Twombly* or its progeny.

Defendants' treatment of certain Complaint paragraphs is indicative of this approach. For instance, Defendants dismiss as conclusory an allegation that:

> In seeking conditional leniency with the DOJ and in connection with a pending Canadian government investigation of antitrust violations by manufacturers of flexible polyurethane foam, several current and former Vitafoam employees agreed to be interviewed regarding the flexible polyurethane foam price fixing conspiracy. These interviews revealed the mechanisms, participants, duration, and impact of the conspiracy. These employees described a cartel among Defendants, who are responsible for production of the majority of flexible polyurethane foam, and other co-conspirators.

(Doc. No. 46 at ¶ 62; Doc. No. 52 at ¶ 74). However, no **[**13]** motion or supporting briefing material filed by any Defendant denies Vitafoam applied to, and was accepted by, the DOJ Corporate Leniency Program. Nor does any Defendant deny that Vitafoam employees were interviewed by DOJ personnel in connection with the Corporate Leniency Program application process, which required Vitafoam executives to admit their participation in an antitrust conspiracy. In short, no one denies these interviews actually occurred — yet Defendants still assert the paragraph is "conclusory."

Likewise, Defendants dismiss as conclusory the allegation that:

> The sworn affidavit from Pierre-Yves Guay also separately states that it is the result of an investigation of 'previous and ongoing conduct contrary to' the Competition Act of Canada by entities including Carpenter, Valle Foam, Domfoam, A to Z Foam, Vita Foam Group, Foamex, Flexible Foam, Future Foam, Mohawk, Scottdel, Broadway Foam, Woodbridge, Leggett & Platt, and Hickory Springs. The violations of law alleged in the affidavit concerned conduct both 'in Canada and in the United States.'

(Doc. No. 46 at ¶ 84; Doc. No. 52 at ¶ 96). Again, no Defendant denies Mr. Guay prepared the sworn affidavit referenced in this Complaint **[**14]** paragraph. Indeed, two Defendants confirm its existence by attaching excerpts from a public version of **[*793]** the sworn affidavit to their individual Motions to Dismiss, and both excerpts contain the same enumeration of Defendants listed in the relevant Complaint paragraphs (Doc. No. 91-1; Doc. No. 100-2). Yet again, Defendants insist such a paragraph is conclusory.

The problem thus appears to be a shifting meaning of "conclusory." Is it the Defendants' contention that the fundamental content of Mr. Guay's personal statements in the affidavit are conclusory or that Plaintiffs' pleading of the existence and knowledge of the affidavit is conclusory? A fine distinction, to be sure, but this Court is guided by step two of the process above — Plaintiffs' pleading of the admitted existence of the affidavit, with its known content both implicates specific Defendants by name and provides fair notice of the alleged conduct. The two-step process does not push this Court to tread where Defendants seek to lead — namely to look "inside" the affidavit to determine whether an individual's sworn statements themselves may be conclusory. Such a determination is made at a later time by a factfinder to determine **[**15]** the relative truth, credibility, and weight of such sworn statements.

The Consolidated Complaint

A thorough examination of the Complaint paragraphs Defendants label as conclusory and non-conclusory, respectively, reveals a similar clear trend in Defendants' dissection of the Complaint. First, with only four exceptions

[2] *each* and *every* Complaint paragraph that in some form references a "conspiracy," "conspiratorial conduct," "unlawful acts," "agreements," or like terms is automatically dismissed as conclusory. Defendants pay no regard to factual allegations supporting such descriptions that exist elsewhere in the Complaint, or, as is the case in two Complaint paragraphs excerpted above, in the *very same* Complaint paragraph. The allegations referring to the fact of the Vitafoam executive interviews fails because it references a "price-fixing conspiracy" as the interviews' subject. Similarly, the Complaint paragraphs describing Mr. Guay's sworn affidavit, the existence of which Defendants themselves confirm by submitting portions of the affidavit to this Court as part of certain Motions to Dismiss, allegedly fail because such paragraphs reference "violations of law."

Defendants' gloss on the plausibility pleading standard thus dooms *any* Complaint paragraph containing a term that, by itself, constitutes a legal conclusion, regardless of any factual support that may exist for that allegation anywhere in the Complaint. However, even in its most expansive reading, *Twombly* does not support such exacting dissection of a complaint. Instead, ***HN5***[] discussing the conclusory/non-conclusory divide, *Twombly* and *Iqbal* define as conclusory "bare assertions" of liability, *Twombly, 550 U.S. at 556*, and "threadbare" legal statements as being denied a presumption of truth, *Iqbal, 129 S. Ct. at 1949*, but *not* allegations that contain factual support. By contrast, Defendants strike allegations containing *any* assertions of their antitrust liability, and thus strike **[**17]** all legal conclusions regardless of whether such allegations serve as a framework for the Complaints as permitted by *Iqbal*, or are supported by factual allegations.

[*794] Second, Defendants restrict the presumption of truth to only those Complaint paragraphs that contain specific facts, like the inclusion of precise dates (*e.g.*, Doc. No. 46 at ¶ 112(f); Doc. No. 52 at ¶ 123(f)) or transcriptions of telephone calls (*e.g.*, Doc. No. 46 at ¶ 109; Doc. No. 52 at ¶ 120). These Complaint paragraphs, of course, *should* be entitled to a presumption of truth, but limiting the presumption of truth to *only* Complaint allegations containing such specific facts imposes the variety of heightened pleading standard rejected by *Twombly*. *See Twombly, 550 U.S. at 570*.

For example, Defendants dismiss as conclusory the allegation that "Vitafoam had a purported company policy of not having conversations with competitors, but this policy was merely window-dressing and was not followed in practice during the Class Period" (Doc. No. 46 at ¶ 69; Doc. No. 52 at ¶ 81). This Complaint paragraph contains no supposedly taboo labels like "unlawful," and therefore was presumably dismissed because, unlike those paragraphs Defendants **[**18]** label as non-conclusory, this allegation does not contain *enough* factual specificity about the claimed "no communication" policy.

Nonetheless, this allegation, and others like it, is entitled to a presumption of truth. Factual allegations are readily distinguishable from solely legal conclusions. A factual allegation's veracity can be demonstrated on its own terms. A legal conclusion, by contrast, would require the analysis of underlying facts, if any, to determine whether the asserted legal determination is appropriate, *i.e.*, whether a defendant negligently manufactured a product. The allegation that a "no communications" policy existed is clearly a factual allegation, which turns on whether company policy proscribed conversations with competitors and, if so, whether such conversations occurred.

After misapplying *Twombly*'s "conclusory" classification, Defendants further err in describing the level of factual specificity necessary to plausibly suggest and agree to restrain trade. Specifically, Defendants argue Plaintiffs must advance specific factual allegations describing the "who, what, when, where, and how" of the alleged conspiracy, or some similar collection of interrogatories. **[**19]** This line of argument extends from *Twombly's* observation that "[a]part from identifying a seven-year span in which the § 1 violations were supposed to have occurred . . . the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." *Twombly, 550 U.S. at 565 n.10*. Defendants argue that for this reason, *i.e.*, the lack of "when, where, or who" allegations, the *Twombly* complaint "was not sufficient to state a claim" (Doc. No. 90 at 22).

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[2] Specifically, Defendants **[**16]** concede the non-conclusory nature of certain Complaint paragraphs even though these paragraphs reference "illegal antitrust activities" (Doc. No. 46 at ¶ 60; Doc. No. 52 at ¶ 72), "participation in a conspiracy" (Doc. No. 46 at ¶ 61; Doc. No. 52 at ¶ 73), and activities undertaken "in furtherance of the conspiracy" (Doc. No. 46 at ¶ 112; Doc. No. 52 at ¶ 123); (Doc. No. 46 at ¶ 112(g); Doc. No. 52 at ¶ 123(g)).

Twombly stands for no such proposition. Rather, this portion of the opinion speaks purely in terms of *notice*:

> If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the *notice* required by Rule 8. Apart from identifying a seven-year span in which the § 1 violations were supposed to have occured (*i.e.*, "[b]eginning at least as early as February 6, 1996, and continuing to the present,") the pleadings mentioned *no* specific time, place, or person involved in the alleged conspiracies. This *lack of notice* contrasts sharply with the model form for pleading negligence, Form 9, which the dissent **[**20]** says exemplifies the kind of "bare allegation" that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified **[*795]** date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant *wishing to prepare an answer* in the simple fact pattern laid out in Form 9 would *know what to answer*; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have *little idea where to begin*.

Twombly, 550 U.S. at 565 n.10 (emphasis added) (citations omitted); *see also* In re Packaged Ice Antitrust Litig. (Packaged Ice I), 723 F. Supp. 2d 987, 1005 (E.D. Mich. 2010) (*Twombly* complaint dismissed, not because of the absence of particularized "when, where, and who" factual allegations, but rather because the complaint, containing only a bare allegation of agreement and descriptions of parallel behavior, did not state a plausible claim for relief; *Hinds County, Miss. v. Wachovia Bank N.A. (Hinds County II), 700 F. Supp. 2d 378, 394 (S.D.N.Y. 2010)* **[**21]** ("A § 1 complaint must adequately allege the plausible involvement of each defendant and put defendants on notice of the claims against them, but it need not be detailed with overt acts by each defendant."); In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 905-06 (6th Cir. 2009) (court did not require particularized "when, where, and who" factual allegations, only "further circumstance[s] [beyond a conclusory agreement/parallel conduct framework] pointing toward a meeting of the minds" and enough factual allegations to provide defendants adequate notice); Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 (6th Cir. 2008) (dismissing a complaint where "[p]laintiffs *only* offer bare allegations without *any* reference to the 'who, what, where, when, how *or* why'" and no allegations of horizontal agreement among conspirators) (emphasis added); In re Southeastern Milk Antitrust Litig., 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) ("[W]hile not answering all specific questions about who, what, when, and where, . . . [the complaints put] defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which **[**22]** their claims exist.").

In short, ***HN6***[] the plausibility pleading standard does not require a court to construct a mandatory checklist of the "who, what, where, when, and how" of an antitrust agreement for each defendant. Common sense prevails, and a complaint survives if it contains "enough factual matter (taken as true) to suggest that an agreement was made" among the defendants. Twombly, 550 U.S. at 556.

Watson Carpet

Defendants also argue *Watson Carpet* has no application here, "where the existence of an express agreement is denied, and the question is whether Plaintiffs have alleged sufficient facts to describe and support their claim of express agreement" (Doc. No. 202-1 at 7). This Court remains satisfied the Complaints provide sufficient direct allegations of a conspiratorial agreement necessary to trigger application of the *Watson Carpet* principle.

Defendants are correct in asserting that ***HN7***[] *Watson Carpet* has no application until the existence of an express conspiratorial agreement is determined. But because a complaint containing an express conspiratorial agreement does not announce itself, a court must examine the complaint as a whole and determine whether such an agreement has been established **[**23]** by direct allegations, or if only circumstantial evidence has been offered in which case the allegations must plausibly suggest, and not merely be consistent with, a conspiratorial **[*796]** agreement. Twombly, 550 U.S. at 557.

Through the use of Complaint subheadings, Plaintiffs provide a clear roadmap of alleged antitrust violations. Specifically, after chronicling Defendant Vitafoam's DOJ Corporate Leniency Program application and the content of interviews with Vitafoam executives detailing the scope and terms of the conspiratorial agreement by which Defendants allegedly fixed prices and allocated customers in the flexible polyurethane foam market, Plaintiffs supply specific facts illustrating individual episodes of conspiracy implementation and enforcement.

First, Plaintiffs define the conspiratorial agreement by expressly referencing information derived from Defendant Vitafoam during its successful application to the DOJ Corporate Leniency Program (Doc. No. 46 at ¶¶ 60-61; Doc. No. 52 at ¶¶ 72-73). As part of the application process, and in connection with a Canadian Bureau of Competition investigation into similar allegedly unlawful conduct, several current and former Vitafoam employees **[**24]** agreed to be interviewed by government officials, disclosing the "mechanism, participants, duration, and impact of the conspiracy" — the same conspiracy in which all Defendants are alleged to have participated (Doc. No. 46 at ¶ 62; Doc. No. 52 at ¶ 74). These descriptions include biannual or triannual discussions of collusive pricing (Doc. No. 46 at ¶ 63; Doc. No. 52 at ¶ 75); the use of raw material cost increases as a pretext for adopting the agreed-upon collusive price increase that would have failed in the absence of conspiracy-wide coordination (Doc. No. 46 at ¶ 64; Doc. No. 52 at ¶ 76); the use of telephone conversations, price increase letter exchanges, and in-person meetings to coordinate the amount and timing of price increases (Doc. No. 46 at ¶ 65; Doc. No. 52 at ¶ 77); and understandings and agreements on price level increases the conspirators would set together before publication of pricing letters with the same, or almost the same, effective dates, and sharing of published letters to "police" the agreement (Doc. No. 46 at ¶ 66; Doc. No. 52 at ¶ 78).

The Complaint then chronicles the interviews of individual Vitafoam executives that corroborate the existence of the alleged **[**25]** conspiratorial agreement. Plaintiffs first use materials from the Vitafoam interviews to describe the conduct of one of that company's former presidents. This officer directed subordinates to send copies of draft Vitafoam pricing letters to competitors in exchange for competitors' draft pricing letters (Doc. No. 46 at ¶ 70; Doc. No. 52 at ¶ 82). At least seven Vitafoam employees carried out the former Vitafoam president's instructions by engaging in such draft pricing letter exchanges, or otherwise having discussions about the amount and timing of price increases with competitors (Doc. No. 46 at ¶ 70; Doc. No. 52 at ¶ 82). These Vitafoam employees had such communications with at least eight employees of five other named Defendants (Doc. No. 46 at ¶ 72; Doc. No. 52 at ¶ 84).

Next, the Complaint introduces a former vice president of Vitafoam who, at an earlier point in his career, was employed by Defendant Woodbridge (Doc. No. 46 at ¶ 73; Doc. No. 52 at ¶ 85). This individual had conspiratorial discussions of the variety described above with employees of at least eight other Defendants (Doc. No. 46 at ¶ 74; Doc. No. 52 at ¶ 86), and joined Mark Kane of Defendant Carpenter in coordinating **[**26]** price levels extended to a common customer (Doc. No. 46 at ¶ 75; Doc. No. 52 at ¶ 87). Robert Valle and Tony Valleoccia of Valle Foam shared communications with another Defendant consistent with the conspiracy (Doc. No. 46 at ¶ 76; Doc. No. 52 at ¶ 88). Vitafoam **[*797]** employees David Gurley and George Newton shared and received draft price increase letters and other pricing information, including competitor pricing lists (Doc. No. 46 at ¶¶ 77-78; Doc. No. 52 at ¶¶ 89-90), and Newton exchanged pricing information with other Defendants (Doc. No. 46 at ¶ 78; Doc. No. 52 at ¶ 90).

Direct allegations confirming the existence of a conspiratorial agreement continue with the admitted conduct of the current Vitafoam vice president of sales, who engaged in conspiratorial conduct with at least nine other Defendants (Doc. No. 46 at ¶¶ 80-82; Doc. No. 52 at ¶¶ 92-94), and provided the Canadian Commissioner of Competition a list of ten Defendant firms and twelve Defendant employees with whom he engaged in "discussions, exchanges of information and agreements regarding the price of foam" (Doc. No. 46 at ¶ 83; Doc. No. 52 at ¶ 95). He also admits that, while he was previously employed with Defendant Woodbridge, **[**27]** he discussed with Bill Lucas, the current Vitafoam president, price increases for certain foam products (Doc. No. 46 at ¶ 85; Doc. No. 52 at ¶ 97), and had similar conversations with an employee of Defendant Foamex (Doc. No. 46 at ¶ 87; Doc. No. 52 at ¶ 99).

The current president of Vitafoam rounds out the group of employees interviewed by DOJ officials in connection with his company's application to the Corporate Leniency Program. He too was previously employed by Defendant Woodbridge in a position where he exercised pricing authority (Doc. No. 46 at ¶ 90; Doc. No. 52 at ¶ 102), and had conspiratorial discussions with at least eleven employees of seven Defendant firms (Doc. No. 46 at ¶ 92; Doc. No. 52 at ¶ 103).

By themselves, allegations describing the broader conspiratorial agreement, as in *Twombly* and *In re Travel Agent*, properly would be labeled conclusory (Doc. No. 46 at ¶¶ 63-66; Doc. No. 52 at ¶¶ 75-78). If supported only by general descriptions of telephone calls, email conversations, and parallel price increases, the Complaints would follow the "conclusory agreement/parallel conduct" archetype and fail at the pleadings stage. However, Plaintiffs have done far more. They have **[**28]** provided direct evidence in the form of the Vitafoam executives' statements, which provides the factual support necessary to grant a presumption of truth to the otherwise conclusory paragraphs that describe the conspiratorial agreement.

The complaint in *Watson Carpet* similarly departed from the "conclusory agreement/parallel conduct" mold. There, like here, the plaintiff provided "detailed allegations of an agreement to restrain trade," *Watson Carpet, 2011 U.S. App. LEXIS 12606, 2011 WL 2462833 at *1*,"clearly" establishing the existence of a conspiracy. *2011 U.S. App. LEXIS 12606, [WL] at *4*. Specifically, the *Watson Carpet* plaintiff alleged:

> In the spring or early summer of 1998, Defendant Rick McCormick met with Defendant Mohawk's Vice President and Senior Manager, Brad Matthaidess, and Mohawk sales representative Fred Woods, and devised a plan to run Plaintiff out of business and eliminate Plaintiff from the Market. As part of the plan to run Plaintiff out of business, Mohawk would refuse to sell carpet to Plaintiff. By shutting off Plaintiff's carpet supply, Plaintiff would be unable to service its homebuilder customer who used Mohawk carpet. Defendant [sic] McCormick, Matthaidess, and Woods specifically discussed their intention to run **[**29]** Plaintiff out of business by shutting off his supply of Mohawk Carpet. Other management employees at Mohawk, such as Larry Brookshire and Dale Byers, also approved, participated in, and made efforts to cover up the plan to run Plaintiff out of business in this manner.

[*798] (Doc. No. 202-1 at 4 n.2). Because "[u]nlike the plaintiffs in *Twombly* and *In re Travel Agent*, Watson Carpet clearly . . . alleged an express agreement to restrain trade," the court foreclosed the defendants' attempts to substitute lawful explanations that defendants' actions were taken pursuant to an express agreement. *Watson Carpet, 2011 U.S. App. LEXIS 12606, 2011 WL 2462833 at *1*. The plaintiff was required to allege "the defendants' agreement *plausibly* explains [conduct allegedly undertaken pursuant to the agreement], not that the agreement is the *probable* or exclusive explanation." *Id.* (emphasis original).

Thus, ***HN8***[] to the extent *Watson Carpet* articulates a different standard than cases like *Twombly* and *In re Travel Agent*, this standard only differs as to the consequences that flow from the route a plaintiff chooses to follow when pleading an antitrust conspiracy while, of course, leaving the plausibility pleading standard unchanged. *Watson Carpet* **[**30]** departs from *Twombly* and certain of its progeny because the existence of a well-pled conspiratorial agreement necessarily removes the need to determine whether "sufficient circumstantial evidence tending to exclude the possibility of independent conduct" had been presented. *In re Travel Agent, 583 F.3d at 907*. The *Watson Carpet* plaintiff pursued the path of direct allegations to establish its entitlement to relief instead of supplying solely inferential allegations, a well-established pleading dichotomy. *See* *Eidson v. State of Tenn. Dep't of Children's Serv., 510 F.3d 631, 634 (6th Cir. 2007)*; *Mezibov v. Allen, 411 F.3d 712, 716 (6th Cir. 2005)*. This distinction mirrors the "crucial question" for making out an antitrust claim, "whether [Defendants'] conduct toward [Plaintiffs] stemmed from independent decision or from an agreement, tacit or express." *Theatre Enter., Inc. v. Paramount Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954)* (emphasis added).

Therefore, in denying the Motions to Dismiss, this Court did not, and could not, infer the existence of an express agreement to restrain trade from purely circumstantial evidence of a conspiratorial agreement. [3] ***HN9***[] An express conspiratorial agreement **[**31]** cannot be established through circumstantial evidence, or those

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[3] This Court's prior Order, when read as a whole, makes clear this Court only looked to *Watson Carpet* to supply the standard by which inferences are to be drawn from circumstantial allegations of conduct taken pursuant to a conspiratorial agreement established by direct allegations. In other words, when a complaint sufficiently alleges an express conspiratorial agreement, a plaintiff need not worry about the varying inferences that may be drawn from the complaint's subsequent allegations so long as one such inference plausibly suggests consistency with the unlawful agreement. *Watson Carpet* only assists when assessing circumstantial allegations of conspiratorial **[**32]** conduct, not the presence or absence of the antecedent agreement.

allegations that can only be connected to a conclusion of fact by inference. Rather, when considering the Motions to Dismiss, this Court drew inferences according to the *Watson Carpet* standard *only* from Complaint allegations that could, by themselves, support alternative lawful and unlawful readings. The detailed admissions of the Vitafoam employees support no such dueling inferences — a confession to participation in an antitrust conspiracy allows for no lawful explanation.

Alone, the Complaint paragraphs describing the alleged implementation and enforcement of the conspiracy would be circumstantial evidence of an agreement to fix prices. But cast in the context of an agreement whose existence has been confirmed by confessions of alleged conspirators, what Defendants urge this Court to accept as the harmless "[g]athering of **[*799]** competitive intelligence" (Doc. No. 202-1 at 5) is also consistent with admitted communications taken to coordinate and enforce collusive pricing levels as Plaintiffs allege. Because the latter, unlawful explanation is a plausible one, Plaintiffs need not foreclose alternative, lawful explanations for such conduct. *Watson Carpet, 2011 U.S. App. LEXIS 12606, 2011 WL 2462833 at *1*.

Hinds County

Defendants also attack the Vitafoam admissions as, among other things, "hearsay" and only "remotely factual" (Doc. No. 202-1 at 8). Defendants seek to dispose of these allegations through application of their flawed version of the plausibility pleading standard and by reference to *Hinds County, Miss. v. Wachovia Bank N.A. (Hinds County I), 620 F. Supp. 2d 499 (S.D.N.Y. 2009)*. The court in *Hinds County I* was confronted **[**33]** with complaint allegations identifying "twelve individuals employed by the Provider Defendants who allegedly engaged in [conspiratorial discussions]," but refused to accept these allegations as true because to do so would "require the Court to assume the existence of the conspiracy." *Id. at 518*. The court was driven to this conclusion in large part by the fear that an antitrust claim could be pled "simply by obtaining the names and positions of a defendant's relevant employees." *Id.*

This approach is suspect for a number of reasons. Because a plaintiff *could*, without further basis, provide a listing of relevant defendant employees to bolster their antitrust claim, this view resolves *any* doubts as to the evidentiary support for such allegations against the plaintiff. Regardless of whether such evident skepticism was warranted in *Hinds County I*, a similar concern is manifestly inappropriate in this case. Plaintiffs specifically allege the evidentiary support for the allegations identifying individual Defendant employees and the manner in which each is alleged to have participated in an antitrust conspiracy: the interviews with Vitafoam executives conducted as part of Vitafoam's successful **[**34]** application to the DOJ Corporate Leniency Program. This is not a case of a plaintiff having mined a defendant's employee directory for names of relevant officials to bolster an otherwise unsupportable Section 1 claim.

Defendants further attempt to draw parallels to other cases in which motions to dismiss were granted because a court determined that certain non-conclusory allegations could not plausibly suggest the existence of a conspiratorial agreeement. Defendants again offer up *Hinds County I*, which also featured a defendant that, like Vitafoam, had participated in the DOJ's Corporate Leniency Program. In that case, however, the complaint contained "no other information about [Bank of America's] participation in the DOJ's leniency program" beyond the mere fact of that defendant's participation. *Id. at 515*. As a result, the court in *Hinds County I* rejected the plaintiff's attempt to establish an industry-wide conspiracy based on one defendant's undescribed participation in the leniency program. *Id. at 514-15*. Here, not only do we have knowledge of a Defendant's participation in the program, but specific statements made by the Defendant's employees as a condition of participating in **[**35]** the program.

References to *In re Iowa Ready-Mix Concrete Antitrust Litig. (Iowa Ready-Mix), 768 F. Supp. 2d 961 (N.D. Iowa 2011)* are also inapposite. There, despite the fact that one defendant entered into plea agreements admitting to conspiratorial conduct with three other companies, the court in *Iowa Ready-Mix* sustained defendants' motion to dismiss the complaint when no "larger picture from which inferences of a wider conspiracy can be drawn from guilty pleas to separate bilateral conspiracies" **[*800]** was presented. *Id. at 975*. There, the complaint baldly alleged that defendants "did those things which they combined and conspired to do, including, among other things, discussing, forming and implementing agreements to raise and maintain at artificially high levels of prices for Ready-Mix Concrete," an allegation that without more was not only conclusory, but tautological as well. *Id. at 974*.

Again, unlike *Hinds County I*, Plaintiffs here advance allegations beyond the mere fact of Vitafoam's participation in the Corporate Leniency Program, summarizing interviews with Vitafoam executives that, when accepted as true, both confirm the existence of a conspiratorial agreement and provide the level **[**36]** of factual specificity absent in *Hinds County I*. As set forth above, these same allegations provide the "larger picture" absent in *Iowa Ready-Mix*.

As this Court has stated twice before, it is not the mere existence of governmental investigations of Defendants' potential participation in a conspiracy to fix prices and allocate customers in the flexible polyurethane foam market that leads this Court to conclude the Complaints pass muster under *Federal Civil Rule 8*. This Court certainly recognizes the pending governmental investigations could, or could not, yield indictments or guilty pleas, and in no way employs a presumption of civil liability when evaluating the Complaints. Instead, this Court employs the *Federal Civil Rule 8* presumption of *truth*, accepting at this stage for purposes of the Motions to Dismiss all non-conclusory, factually supported allegations, including the allegations that the Vitafoam employees, their named conspiratorial correspondents, and all Defendants directly alleged to be members of the conspiracy as confirmed by the Vitafoam admissions, *have* entered an agreement to fix prices and allocate customers. Whether Plaintiffs can *prove* the existence of this agreement **[**37]** at later stages in this litigation is a different conversation for another day.

Defendant FXI

Defendant FXI Innovations ("FXI") argues a June 12, 2009 asset sale eliminated any antitrust liability the predecessor firm may have incurred. Plaintiffs, in reply, challenge the ability of *Bankruptcy Code Section 363(f)* to erase successor liability, or, more specifically, whether the June 2009 Asset Purchase Agreement had the effect of erasing Plaintiffs' antitrust claims. This Court need not reach those arguments.

The Complaints specifically recount the Vitafoam employee's disclosure that each foam product price increase from 1999 until at least early 2010 — when the Vitafoam employees were interviewed — was a product of the price-fixing conspiracy (Doc. No. 46 at ¶ 94; Doc. No. 52 at ¶ 105). Moreover, the Complaints identify Vincent Bonaddio and Don Phillips, senior FXI personnel, as among those employees with whom the current Vitafoam vice president engaged in conspiratorial discussions throughout the Class Period, both before and after the June 2009 asset sale (*e.g.*, Doc. No. 46 at ¶ 83; Doc. No. 52 at ¶ 95). Because the Complaints allege FXI participated in the conspiracy after the asset **[**38]** sale, ***HN10***[] a fundamental tenant of conspiracy law that holds one participating conspirator jointly liable for all his co-conspirators' prior acts renders immaterial any alleviation of antitrust liability resulting from the asset sale. *See* *Coon v. Froehlich, 573 F. Supp. 918, 922 (S.D. Ohio 1983)*. Of course, if Plaintiffs fail to produce evidence of FXI's participation in the conspiracy after the asset sale, this Court will consider the question of the 363(f) sale's significance as part of a potential summary judgment motion.

[*801] Certification of Immediate Appeal

Defendants' Motions for Certification of Immediate Appeal apply only to the extent Defendants seek review of rulings contained in the July 19 Order. Therefore, Defendants' fraudulent concealment and standing arguments are excluded from these Motions. The remaining Motions for Certification of Immediate Appeal are denied for the same reasons described in this Court's Order denying Mohawk and Leggett & Platt's similar motion (Doc. No. 200).

Fraudulent Concealment

Defendants challenge Plaintiffs' claims of fraudulent concealment, claiming the Complaints fail to allege fraudulent concealment with the specificity required by Sixth Circuit precedent **[**39]** (Doc. Nos. 203, 232-1). In response, Plaintiffs direct the Court to a number of paragraphs in the Complaints which they claim sufficiently allege specific acts of concealment (Doc. No. 227).

HN11[] In the Sixth Circuit, a plaintiff alleging fraudulent concealment must plead: "1) defendants concealed the conduct that constitutes the cause of action; 2) defendants' concealment prevented plaintiffs from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action." *Egerer v. Woodland Realty, Inc., 556 F.3d 415, 422 (6th Cir. 2009)* (citing *Pinney Dock & Transport Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988))*.

As a threshold matter, in light of this Court's previous discussion of Defendants' flawed interpretation of the plausibility pleading standard, this Court concludes Plaintiffs pled more than the insufficient recital contained in *Hinds County I* (Doc. No. 90 at 48) (quoting *Hinds County, 620 F. Supp. 2d at 521-22*). Specifically, this Court is satisfied the Complaints sufficiently allege Defendants' concealment of the conspiracy (*see*, *e.g.*, Doc. No. 46 at ¶¶ 64, 114, 118, **[**40]** 135; Doc. No. 52 at ¶¶ 76, 125, 129, 147), and that because of Defendants' deceptive conduct Plaintiffs remained ignorant of the conspiracy throughout the limitations period (*see*, *e.g.*, Doc. No. 46 at ¶¶ 130, 132-33; Doc. No. 52 at ¶¶ 142, 144-45).

Plaintiffs are incorrect, however, in asserting Defendants challenge only the first of the three-prong fraudulent concealment test (Doc. No. 227 at 3). Because this Court did not address fraudulent concealment in the July 19 Order (Doc. No. 191), this Court considers arguments contained in both the briefing material submitted in support of the Motions to Dismiss (Doc. No. 90; Doc. No. 138), as well as the memorandum submitted in support of Defendants' Motion for Reconsideration (Doc. No. 203). In the former briefing materials, Defendants plainly argue Plaintiffs offer only conclusory allegations for each essential portion of the test (Doc. No. 90 at 48; Doc. No. 138 at 19-21). Additional briefing material Defendants submitted after Plaintiffs filed their opposition to the present Motions reaffirms the completeness of Defendants' challenge (Doc. No. 232 at 2).

There remains, then, the question of whether the Complaints satisfy *Pinney's* due **[**41]** diligence requirement. To counter Defendants' arguments that Plaintiffs must plead specific acts of diligence, Plaintiffs argue fraudulent concealment does not require them to "have investigated whether their suppliers were criminals" (Doc. No. 172 at 7), particularly when law enforcement authorities were likewise unaware of Defendants' alleged price-fixing and customer allocation conspiracy until late in the Class Period. The correct test, according to Plaintiffs, sees the concealment requirement satisfied when "the **[*802]** plaintiff shows that he neither knew, nor in the exercise of due diligence, could reasonably have known of the offense" (*id*.).

This Court notes a tension between the first two components of the fraudulent concealment test — the plaintiff's ignorance of the cause of action occasioned by the defendant's concealment —and the apparent requirement that an admittedly ignorant plaintiff must at the same time exercise diligence in discovering a concealed conspiracy. **HN12**[] When facts exist that should excite the suspicions of a reasonably diligent person, a plaintiff that fails to make proper inquiries to discover his cause of action will not see the limitations period tolled. By contrast, **[**42]** when no information, actual or constructive, exists hinting at the fact of plaintiff's injury, the "reasonable diligence" requirement seems limited to denying tolling for careless plaintiffs. *See* *In re Rubber Chemicals Antitrust Litig., 504 F. Supp. 2d 777, 788 (N.D. Cal. 2007)* ("The requirement of diligence is only meaningful . . . when facts exist that would excite the inquiry of a reasonable person.") (quoting *Conmar Corp. v. Mitsui & Co., 858 F.2d 499, 504 (9th Cir. 1988)*.

At bottom, the "reasonable diligence" component of the fraudulent concealment doctrine requires the plaintiff to "show[] that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 195, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (citing *Pinney, 838 F.2d at 1465* and *Conmar, 858 F.2d at 502*). Thus, two paths exist to this showing. Plaintiff, after receiving information that causes him to inquire into defendant's actions, remains ignorant of his injury despite exercising reasonable diligence; or the plaintiff receives no hint of his claim, sees no need to actively inquire as to whether the defendant has wronged him, and timely files a claim after facts emerge disclosing **[**43]** his cause of action.

This is so in the Sixth Circuit despite *Pinney's* reference to the need to plead and prove that a plaintiff exercised reasonable diligence in attempting to learn of his claim. *Pinney, 838 F.2d at 1465*, which Defendants imply requires specific acts of diligence. In *Campbell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982)*, the Sixth Circuit rejected Campbell's attempt to exempt from the "reasonable diligence" requirement cases of active concealment. Campbell alleged he was orally promised by Upjohn officials that by signing a merger agreement he would be provided a "backend payment" that for six years would permit Upjohn to buy Campbell's interest in the successor corporation on terms favorable to Campbell, and that Upjohn would also provide Campbell an incentive employment plan. Immediately after being confronted by Upjohn officials angered by an alleged misrepresentation on Campbell's resume, Campbell, apparently in a distressed state, signed a merger agreement containing neither the backend payment nor the incentive employment plan. For the next six years, from 1969 to 1975, Campbell failed to read the copy of the merger agreement provided him at the 1969 signing. **[**44]** Campbell claimed he only discovered that, contrary to Upjohn's oral assurances, he would not receive the backend payment or incentive employment plan when the former came due in 1975

Because an "avalanche of evidence that would put all but the most indiligent plaintiffs on notice" existed, the court declined to toll the limitations period. *Campbell, 676 F.2d at 1128*. The court then observed:

> A rule of diligence will work no injustice in cases of active concealment. Active concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the circumstances. Actions such as would deceive a reasonably diligent **[*803]** plaintiff will toll the statute; but those plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has run. Indeed, in those cases analyzed above which cite the [Seventh Circuit rule tolling the limitations period in cases of active concealment until actual discovery by the plaintiff], the actions of defendants were such that even reasonably diligent plaintiffs would not have been put on notice. The difference between the two rules may prove **[**45]** to be more illusory than real.

Id. *Campbell* rejected a view that would create two tolling doctrines, including an iteration of the earlier equitable tolling rule that did not require a plaintiff to prove actual diligence when a defendant had concealed all sources of reasonable suspicion, because the court deemed separate rules unnecessary. According to the court, "[the equitable tolling doctrine's exception] is redundant under our test based on *hypothetical diligence*." *Id.* (quoting *State of Ohio v. Peterson, Lowry, Rall, Barber, & Ross, 651 F.2d 687, 695 n.16 (10th Cir. 1981)* (emphasis added). If a hypothetical reasonably diligent plaintiff would not have been put on inquiry notice, the limitations period is tolled. *See id.*

With one exception, the cases Defendants cite in support of a rule requiring a plaintiff to plead and prove acts of diligence contained facts that, like in *Campbell*, should have put the plaintiff on inquiry notice. *See Egerer, 556 F.3d at 423-24* (plaintiff insufficiently diligent for not inquiring about the particulars of a business agreement describing only potential benefit for business referrals and "estimated" title insurance costs); *Pinney, 838 F.2d at 1477-78* **[**46]** (ignored intraoffice memoranda urging certain plaintiff employees to pursue Interstate Commerce Commission complaints and antitrust claims against defendant demonstrates lack of diligence); *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)* (congressional hearings and a Federal Trade Commission suit that occurred more than a decade before plaintiff brought suit should have triggered further investigation by plaintiff); *Gumbus v. United Food & Comm. Workers Intern. Union, 1995 U.S. App. LEXIS 523, 1995 WL 5935 (6th Cir. 1995)* (six-month limitations period not tolled when plaintiffs, members of the defendant union, could have learned of the union's alleged misrepresentations by monitoring progress of a similar suit filed by plaintiffs' coworkers within the limitations period). Other cases contained factual circumstances in which the plaintiff could, and did, exercise reasonable diligence. *See Hinds County II, 700 F. Supp. 2d at 400* (requirement that bidders certify their proposals were neither courtesy bids nor determined in concert with another bidder deemed sufficient to toll the limitations period) [4]; *Michigan ex rel. Kelley v. McDonald Dairy Co., 905 F. Supp. 447, 453 (W.D. Mich. 1995)* **[**47]** (use of sealed bid process followed by detailed review of contracts satisfied diligence requirement).

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[4] The court's decision in *Hinds County II* to toll the limitations period after earlier determining that plaintiffs failed to sufficiently plead fraudulent concealment, *see* *Hinds County I, 620 F. Supp. 2d at 521-22*, demonstrates this case is consistent with the "hypothetical diligence" standard embraced in *Campbell*. Unlike here, where Plaintiffs plausibly allege no reasonable methods for discovering the alleged conspiracy existed before 2010, the plaintiffs in *Hinds County II* employed reasonable certification requirements, albeit unsuccessfully, in an effort to prevent bid collusion.

The exception, of course, is *In re Refrigerant Compressors Antitrust Litig., 795 F. Supp. 2d 647, 2011 U.S. Dist. LEXIS 63297, 2011 WL 2433392 (E.D. Mich. 2011)*. Like here, the *Refrigerant* plaintiffs alleged defendants entered **[*804]** into a price-fixing conspiracy affecting prices of refrigerant compressor products. The court found allegations that plaintiffs "diligently sought to protect themselves from unlawful activity, but it was not until on or about February 18, 2009 that plaintiffs and the Class were able to, or could have been able to, detect the conspiracy" **[**48]** insufficient to satisfy the *Dayco/Pinney* due diligence requirement. *2011 U.S. Dist. LEXIS 63297, [WL] at *16*. While the court's opinion does not recount in detail the nature of the alleged conspiracy, no additional allegations are presented suggesting what steps, if any, plaintiffs could have taken to discover the conspiracy prior to an announcement by one defendant that U.S., Brazilian, and European antitrust authorities were investigating defendant's potential violations of ***antitrust law***.

Rather, the same alleged picture presented here existed in *Refrigerants*: plaintiffs purchasing products at supra-competitive prices resulting from the concealed price-fixing conspiracy. If, in fact, the conspiracy alleged in *Refrigerants*, when accepted as true, contained no aspects that should have triggered the plaintiff's suspicions, it makes little sense to require a plaintiff to inquire of each of his vendors whether a refrigerant compressor's price was determined by market forces or a concealed, multi-year, multi-member antitrust conspiracy. *Pinney* requires *reasonable* diligence, not constant cynicism.

For these reasons, this Court declines to follow *Refrigerants*. Instead, the more well-reasoned approach is contained in *In* ***[**49]*** *re Packaged Ice I*. There, plaintiffs alleged a price-fixing conspiracy similar to that in *Refrigerants* and the instant case. But rather than requiring plaintiffs to plead additional acts of diligence aimed at rooting out the successfully concealed conspiracy, the court in *In re Packaged Ice I* accepted as true the allegation that before the execution of a March 2008 DOJ search warrant, no events did, or should have, excited the plaintiffs' suspicions. *In re Packaged Ice, 723 F. Supp. 2d at 1000*. The court then reserved for the factfinder the question of whether this allegation was true in fact. *Id. at 1019*.

Thus, while a factfinder in this case eventually may be called on to determine whether Defendants did conceal all sources of reasonable suspicion, this Court is satisfied that, when accepted as true, the Complaints establish that no facts existed that did or should have excited Plaintiffs' suspicions about alleged price-fixing and customer allocation conspiracy until the 2010 government raids. Courts, like *Pinney*, impose a "reasonable diligence" requirement to "encourage those victims [of concealed injuries] diligently to investigate and thereby to uncover unlawful activity." *Klehr, 521 U.S. at 195*. **[**50]** ***HN13***[] A plaintiff must provide specific allegations of the conspiracy's concealment and eventual discovery "so that [a] court may clearly see whether, by ordinary diligence, the discovery might not have been before made" and relief sought sooner. *Pinney, 838 F.2d at 1465*. This Court is satisfied Plaintiffs plausibly allege they could not have discovered the alleged conspiracy at an earlier time. And because this decision is not contrary to *Pinney's* requirement that, when possible, plaintiffs make reasonable inquiries after facts arousing a suspicion of unlawful activity, the fraudulent concealment doctrine's incentive structure is retained. Therefore, Plaintiffs sufficiently plead fraudulent concealment.

Indirect Purchaser Claims in Other States

Defendants next argue the Indirect Purchaser Plaintiffs lack standing to pursue claims under the laws of jurisdictions in which a named Indirect Purchaser Plaintiff does not reside, or to which such a Plaintiff is not sufficiently connected. Specifically, **[*805]** Defendants contend the Indirect Purchaser Plaintiffs may only pursue state-law claims in Arizona, California, Florida, Kansas, Massachusetts, Michigan, North Carolina, Tennessee, and Wisconsin.

In **[**51]** reply, the Indirect Purchaser Plaintiffs urge this Court to defer standing considerations until after class certification. Invoking *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*, and *Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*, the Indirect Purchaser Plaintiffs argue class certification is "logically antecedent" to standing considerations because their supposed standing deficiencies would not exist "but for" their attempt to represent a class of "all persons or entities [residing in certain states] . . . who purchased products containing flexible polyurethane foam which were manufactured, produced or supplied by Defendants or their unnamed co-conspirators from January 1, 1999 to the present" (Doc. No. 52 at ¶ 153). According to the Indirect Purchaser Plaintiffs, the named Plaintiffs have not asserted individual injury in the jurisdictions in which they do not reside, or to which they are not connected. Rather, in seeking to represent a class of plaintiffs similarly harmed, the named Indirect Purchaser Plaintiffs argue their injuries are typical of the absent class members they propose to represent. Therefore, because the named Indirect Purchaser Plaintiffs have sufficiently **[**52]** pled individual standing (Doc. No. 52 at ¶¶ 7-20), this Court should defer consideration of the Indirect Purchaser Plaintiffs' ability to assert claims in a jurisdiction in which they do not reside, or to which they are not connected, until class certification.

Courts have reached differing conclusions on the "logically antecedent" exception to standing analysis. Some courts, examining the issue of standing before class certification, stated that *Amchem* and *Ortiz* only address class certification before class member standing in the unique context of a mandatory global class settlement. Those courts also noted *Amchem* and *Ortiz* focused on the standing of absent class members, not the named plaintiffs. *See* *Easter v. Am. West Financial, 381 F.3d 948, 962 (9th Cir. 2004)*. Further, such courts argue the "logically antecedent" exception is but one example of the Supreme Court's preference for addressing non-constitutional grounds for disposition, *i.e.,* class certification, before reaching a simultaneously-presented constitutional question like standing. *See* *In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 922 (N.D. Ill. 2009)*. By contrast, other courts contend when a proposed class contains **[**53]** absent class members who, if certification is granted, would undoubtedly have standing to pursue claims under the laws of states in which a named plaintiff does not reside, class certification is "logically antecedent," and should be addressed first. *See* *Jepson v. Ticor Title Insur. Co., 2007 U.S. Dist. LEXIS 53480, 2007 WL 2060856, *1 (W.D. Wash. 2007)*.

The Sixth Circuit has not directly reached the question of whether class certification *must* be considered before standing for claims arising under the statute of a state in which a named plaintiff is not resident, and district courts have pursued divergent paths to resolving such standing challenges. *Compare* *In re Packaged Ice Antitrust Litig. (Packaged Ice II), 779 F. Supp. 2d 642, 2011 U.S. Dist. LEXIS 26048, 2011 WL 8911699 (E.D. Mich. 2011)* (addressing standing before class certification), *with* *Hovering v. Transnation Title Insur. Co., 545 F. Supp. 2d 662, 667 (E.D. Mich. 2008)* (postponing standing analysis until class certification). However, a related Sixth Circuit decision suggests that after concluding a named plaintiff possesses individual standing to seek redress for the alleged injury he suffered, a court should defer consideration of a putative class's **[*806]** standing to assert state-law based claims until **[**54]** class certification.

In *Fallick v. Nationwide Mut. Insur. Co., 162 F.3d 410 (6th Cir. 1998)*, a Nationwide employee claimed his employer improperly denied him health care benefits through the application of a coverage exclusion in a manner inconsistent with the terms of his health care plan in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § 2601 et seq.* The plaintiff sought to represent a class comprising all participants in, or beneficiaries of, health benefit plans administered or insured by Nationwide who were likewise denied plan benefits in violation of ERISA. The district court did not reach the plaintiff's motion for class certification. Instead, the case was dismissed for lack of standing because the plaintiff sought to represent participants in, or beneficiaries of, plans other than his own. *Fallick, 162 F.3d at 412*.

The Sixth Circuit reversed, finding that after correctly concluding the plaintiff had individual standing to seek relief for himself, "the district court's analysis went astray." *Id. at 421*. Specifically, the circuit court concluded that once the named plaintiff's individual standing was established, his capacity to seek relief **[**55]** for the absent members of the proposed class should have been determined according to the requirements of *Federal Civil Rule 23*, not a motion to dismiss, when the named plaintiff and absent class members's alleged injury had the same source: Nationwide's uniform misapplication of the reasonable and customary coverage exclusion. *Id. at 423*.

This Court would similarly confuse Article III standing and *Federal Civil Rule 23*'s requirements if it would, at this stage, dismiss all state-law claims but those of the jurisdictions in which the named Indirect Purchaser Plaintiffs reside, or to which they are connected. Both the named Indirect Purchaser Plaintiffs and the absent members of the putative class identify the same general cause for their injuries: the alleged price-fixing and customer allocation conspiracy. The named Indirect Purchaser Plaintiffs merely seek relief for themselves under the statutes of the jurisdictions in which they reside, and seek similar relief for absent class members under the antitrust and consumer protection statutes of each such class member's state. Properly understood, neither plaintiff grouping seeks relief for themselves under the laws of a foreign state **[**56]** jurisdiction. The ICAC contains a mixture of state-law claims *only* because the Indirect Purchaser Plaintiffs bring this suit as a proposed class action.

Therefore, since the supposed standing deficiencies Defendants identify arise because the Indirect Purchaser Plaintiffs invoke state antitrust and consumer protection statutes for each state from which putative class members are drawn, this Court will determine whether the Indirect Purchaser Plaintiffs may, as class representatives, advance their state-law claims at class certification. If this Court grants class certification, the resulting class will contain individuals with standing to pursue claims under each of the state law claims. In the alternative, if this Court denies class certification, the Indirect Purchaser Plaintiffs will be limited to pursue claims under the state antitrust and consumer protection statutes of the jurisdiction in which they reside. In either case, the supposed standing deficiencies will be resolved.

Motion for Stay

Finally, Defendants request a Stay of these proceedings pending resolution of the ongoing government investigations of a potential price-fixing and customer allocation conspiracy. Aside from **[**57]** disagreeing with this Court's determination that the **[*807]** Complaints sufficiently plead an antitrust conspiracy, Defendants provide no additional authorities or factors to support their Motion for Stay. The parties have entered into an agreement with DOJ permitting depositions in this case beginning in late October, and document discovery can continue in the meantime. Plaintiffs have satisfied their pleading burden, and discovery will proceed consistent with the DOJ agreement.

IT IS SO ORDERED.

/s/ Jack Zouhary

JACK ZOUHARY

U. S. DISTRICT JUDGE

September 15, 2011

End of Document

Worldhomecenter.com, Inc. v. KWC Am., Inc.

United States District Court for the Southern District of New York

September 15, 2011, Decided; September 15, 2011, Filed

10 Civ. 7781 (NRB)

Reporter

2011 U.S. Dist. LEXIS 104496 *; 2011-2 Trade Cas. (CCH) P77,708; 2011 WL 4352390

WORLDHOMECENTER.COM, INC., Plaintiff, - against - KWC AMERICA, INC., Defendant.

Core Terms

Donnelly Act, products, Internet, vertical, warranty, resale price, advertising, distributors, customers, private right of action, rule of reason, dealers, prices, consumer, retailer, manufacturer, violations, per se rule, communicate, unilateral, alleges, courts, deceptive practices, advertised price, declaratory, disclaimer, reasons, void, injunctive relief, General Business Law

LexisNexis® Headnotes

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

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

HN1[] Motions to Dismiss, Failure to State Claim

When deciding a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)*(6, a court must accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences in a plaintiff's favor. A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Where a plaintiff has not nudged its claims across the line from conceivable to plausible, its complaint must be dismissed. That pleading standard applies in all civil actions.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] Antitrust & Trade Law, Sherman Act

The Donnelly Act declares every contract, agreement, arrangement, or combination whereby competition in the conduct of any business, trade or commerce is or may be restrained to be against public policy, illegal and void. *N.Y. Gen. Bus. Law § 340*. Despite that broad language, the Donnelly Act has long been understood to prohibit only unreasonable restraints on trade. Courts generally construe the Donnelly Act in accordance with its federal analogue, the Sherman Act, *15 U.S.C.S. § 1 et seq.*, upon which it was modeled. Indeed, the New York Court of Appeals has stated that the Donnelly Act--often called a 'Little Sherman Act--should generally be construed in light of federal precedent and given a different interpretation only where state policy, differences in the statutory language or the legislative history justify such a result.

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

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

HN3[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

To plead a violation of the Donnelly Act, a plaintiff must allege that a defendant's conduct is anticompetitive under either the rule of reason or the per se rule. The accepted standard for evaluating most Donnelly Act claims is the rule of reason. That legal standard requires a court to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. When applying the rule of reason, appropriate factors to take into account include specific information about the relevant business, the restraint's history, nature, and effect, and whether the businesses involved have market power. In addition to the rule of reason, there is also a rule of per se illegality for certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable. For example, horizontal agreements among competitors to fix prices or divide markets have been deemed per se unlawful.

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

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

HN4[] **Vertical Restraints, Resale Price Maintenance**

Vertical resale price maintenance (RPM) agreements were generally defined as agreements between a manufacturer and its distributors to set the minimum price at which distributors can sell the manufacturer's goods. Like horizontal RPM agreements, vertical RPM agreements were long treated as per se violations of *§ 1* of the Sherman Act. Some New York courts have also treated vertical RPM agreements as per se Donnelly Act violations. However, in 2007, the Dr. Miles decision was overruled by the Leegin decision, in which the United States Supreme Court abandoned the per se rule for vertical RPM agreements and instead applied the rule of reason to such claims.

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

HN5[] **Vertical Restraints, Price Fixing**

N.Y. Gen. Bus. Law § 369-a is entitled Price Fixing Prohibited and provides, any contract provision that purports to restrain a vendee of a commodity from reselling such a commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.

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

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

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

In the absence of any authority construing *N.Y. Gen. Bus. Law § 369-a* as relevant, much less controlling, with respect to New York ***antitrust law***, a federal district court will declines to adopt such a view. Pleading a violation of *§ 369-a* does not provide a means to establish per se liability under the Donnelly Act. *Section 369-a* does not render vertical resale price maintenance agreements illegal in New York.

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

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

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason is the standard applicable to a vertical resale price maintenance claim under the Donnelly Act.

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

HN8[] Vertical Restraints, Resale Price Maintenance

A policy that restricts only the minimum price for which a dealer could advertise on the Internet and explicitly states that a dealer may sell for any price is not to a vertical resale price maintenance agreement.

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

HN9[] Vertical Restraints, Resale Price Maintenance

Courts have long recognized that an advertising restriction that only sets a floor on the discount prices that can be advertised does not rise to the level of an antitrust violation.

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

HN10[] Vertical Restraints, Resale Price Maintenance

An internet advertising policy cannot be the basis of a vertical resale price maintenance when it does not restrain resale prices, but merely restricts advertising.

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

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

While the Donnelly Act makes unreasonable price restraints unlawful, *N.Y. Gen. Bus. Law § 369-a* has the distinct aim of preventing parties from seeking the assistance of the courts to enforce those restraints.

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

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

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

The rule of reason is the standard applicable to vertical non-price restrictions.

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

HN13[] Regulated Practices, Price Fixing & Restraints of Trade

Like the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the Donnelly Act proscribes only concerted action in the form of a contract, agreement, arrangement, or combination. *N.Y. Gen. Bus. Law § 340*. Indeed, a manufacturer's independent, unilateral actions are outside the scope of the Donnelly Act. A manufacturer's independent acts to set minimum resale prices, without seeking agreement from its retailers, do not amount to a contract.

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

HN14[] Regulated Practices, Monopolies & Monopolization

A trader or manufacturer engaged in an entirely private business has the right freely to exercise his own independent discretion as to parties with whom he will deal and announce in advance the circumstances under which he will refuse to sell.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN15[] Deceptive & Unfair Trade Practices, State Regulation

Under *N.Y. Gen. Bus. Law § 349*, deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in New York State are hereby declared unlawful. Although violations of the statute are prosecuted by the New York Attorney General, *N.Y. Gen. Bus. Law § 349(b)-(g)*, the statute was amended in 1980 to provide a private right of action for citizens who wish to recover damages or to enjoin an unlawful act or practice. *N.Y. Gen. Bus. Law § 349(h)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

HN16[] **Deceptive & Unfair Trade Practices, State Regulation**

To state a claim under *N.Y. Gen. Bus. Law § 349(h)*, a plaintiff must show that a defendant has engaged in consumer-oriented conduct that is materially misleading and that plaintiff suffered injury as a result of the deceptive act or practice. A plaintiff alleging an injury that is indirect or derivative, such that it arises solely as a result of injuries sustained by another party, lacks standing to pursue a *§ 349* claim. However, entities other than consumers, such as business competitors, have been held to have standing to bring a claim so long as harm to the public at large is at issue.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN17[] **Deceptive & Unfair Trade Practices, State Regulation**

N.Y. Gen. Bus. Law § 369-b provides that any attempt by a manufacturer to limit its warranty or guarantee of merchandise solely for the reason that such merchandise is sold by a particular dealer or dealers will be void.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statutory Remedies & Rights

HN18[] **Deceptive & Unfair Trade Practices, State Regulation**

N.Y. Gen. Bus. Law § 369-b does not provide for a private right of action.

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

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN19[] **Regulated Practices, Price Fixing & Restraints of Trade**

Neither *N.Y. Gen. Bus. Law § 369-a* nor *§ 369-b* expressly provides for a private right of action. Absent an express private right of action, New York courts will only conclude that a private right of action may be fairly implied where: (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose; and (3) creation of such a right would be consistent with the legislative scheme.

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

HN20[] **Vertical Restraints, Resale Price Maintenance**

N.Y. Gen. Bus. Law § 369-a applies only to contract provisions which restrain resale prices.

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

Governments > Legislation > Statutory Remedies & Rights

HN21[] **Regulated Practices, Price Fixing & Restraints of Trade**

The legislative scheme embodied in Article 24-A of the General Business Law, where *N.Y. Gen. Bus. Law §§ 369-a* and *369-b* are found, only envisions enforcement by the New York Attorney General, and does not refer to enforcement by private citizens. *N.Y. Gen. Bus. Law §§ 369-e*, *369-ee*, and *369-eee*. The Attorney General is also empowered to take action under *N.Y. Executive Law § 63(12)* against any person who demonstrates persistent fraud or illegality in the carrying on, conducting or transaction of business. Implying a private right of action under *§ 369-a* would be inconsistent with that legislative scheme. Similarly, private enforcement under *§ 369-b* is inconsistent with the legislature's chosen scheme of enforcing Article 24-A through actions by the Attorney General.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Evidence > Burdens of Proof > Allocation

HN22[] **Judgments, Declaratory Judgments**

A plaintiff seeking declaratory relief must suffer an injury in fact. To meet the requirement of injury in fact, a plaintiff must demonstrate an invasion of a legally protected interest which is (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical.

Counsel: [*1] For KWC America, Inc., Defendant: David William Haller, LEAD ATTORNEY, Covington & Burling LLP(NYC), New York, NY; Michael J. Fanelli, Ross A. Demain, PRO HAC VICE, Covington & Burling, L.L.P. (DC), Washington, DC.

Judges: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

Opinion by: NAOMI REICE BUCHWALD

Opinion

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Plaintiff Worldhomecenter.com, Inc. ("Plaintiff") brought this action against defendant KWC America, Inc. ("KWC") alleging violations of New York's ***antitrust law***, *N.Y. Gen. Bus. Law § 340*, and consumer protection law, *N.Y. Gen. Bus. Law § 349*. Plaintiff also seeks declaratory and injunctive relief for alleged violations of *N.Y. Gen. Bus. Law § 369-a* and *§ 369-b*. Defendant now moves to dismiss the action for failure to state a claim, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons discussed below, the motion is granted.

BACKGROUND

Plaintiff is a New York corporation that sells home improvement products through its web sites, *Homecenter.com* and *Supplyhouse.com*, and by telephone. (Compl. ¶¶ 4; 6.) Defendant is a Georgia corporation that manufactures and sells faucets, plumbing accessories, and kitchen accessories to its **[*2]** exclusive distributors for resale to the public. (Compl. ¶¶ 5; 7.) This action was originally filed in the Supreme Court of the State of New York, County of New York, and was removed to this Court based on diversity of citizenship, pursuant to *28 U.S.C. §§ 1332*, *1441(a)*.

Plaintiff purchases KWC's products directly from KWC and other distributors and offers them for resale to customers online. (Compl. ¶ 8.) According to the complaint, due to the low overhead associated with an Internet business, plaintiff is able to offer KWC's products at lower prices than "traditional display room retailers." (*Id.*)

KWC has instituted a policy known as the Internet Advertising Policy ("IAP") which provides, in pertinent part:

> KWC America has unilaterally determined that it will sell its products only to those accounts that . . . [d]o not use the Internet . . . to advertise KWC America products to the general public at a price that is more than twenty percent (20%) for KWC branded products and twenty-five percent (25%) for HANSA branded products below the list price set forth in the effective KWC and HANSA Price Books.

(Haller Decl. Ex. E. [1]) According to the IAP, this provision "appl[ies] to all levels/pages **[*3]** on a website, other than pages associated with an intent to purchase. Actual prices charged customers [sic] may be provided by telephone, e-mail response, and product purchase confirmation webpages or communications." (*Id.*) The IAP also specifies that "[t]his policy applies only to advertised prices and does not apply to actual resale prices." (*Id.*) Furthermore, the IAP states that "KWC America will terminate its business relationship with any account that violates this Policy." (*Id.*)

According to the complaint, KWC has refused to ship and fill orders submitted by plaintiff unless and until plaintiff complies with the IAP. (Compl. ¶ 15.) The complaint also states that plaintiff has "refus[ed] to agree to sell KWC's products at a fixed price" but does not indicate whether plaintiff has refused to comply with the IAP. (Compl. ¶ 16.)

In addition to adopting the IAP, KWC has posted a disclaimer on its website, *KWCAmerica.com*, concerning consumers who purchase products **[*4]** from unauthorized dealers. The disclaimer provides:

> [w]e cannot assist with problems that may occur from purchases from unauthorized channels, this includes online auctions and online purchases from dealers other than those listed in our Where to Buy. We require proof of purchase when processing warranty claims. This means: No Internet Selling, No Mail Order Sales, No Mass Merchants.

(Compl. Ex. B.) The disclaimer also states: "[i]f you purchase KWC/HANSA products on the internet, be advised: WE WILL NOT HONOR ANY WARRANTY CLAIMS ON PRODUCTS PURCHASED FROM UNAUTHORIZED INTERNET SELLERS." (*Id.*) According to the complaint, KWC has indicated that it will not honor warranties on KWC products sold by the plaintiff. (Compl. ¶ 26.)

DISCUSSION

I. Legal Standard

HN1[] When deciding a motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the Court must accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences in plaintiffs' favor. *Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 237 (2d Cir. 2007)*. A complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that **[*5]** is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868* (citing *Bell Atl. Corp. v.*

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[1] A copy of the Internet Advertising Policy is attached to the defendant's motion as Exhibit E and is incorporated by reference. *See Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995)* (per curiam).

Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Where a plaintiff has not "nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Twombly, 550 U.S. at 570*. This pleading standard applies in "all civil actions." *Iqbal, __ U.S. __, 129 S. Ct. at 1953*.

II. Claims Asserted Against KWC

Plaintiff asserts four causes of action against KWC. We address each in turn.

A. Donnelly Act Claim

In its first cause of action, plaintiff alleges that KWC's policies constitute vertical price fixing in violation of New York's antitrust statute, the Donnelly Act. *N.Y. Gen. Bus. Law § 340 et seq.*

1. Legal Standard

HN2[] The Donnelly Act declares "every contract, agreement, arrangement, or combination whereby . . . competition . . . in the conduct of any business, trade or commerce . . . is or may be restrained . . . to be against public policy, illegal and void." *N.Y. Gen. Bus. Law § 340*. Despite this broad language, the Donnelly Act has long been understood to prohibit only 'unreasonable' restraints on trade. *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 333, 520 N.E.2d 535, 525 N.Y.S.2d 816, 819 (1988)* **[*6]** (citing *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. Courts generally construe the Donnelly Act in accordance with its federal analogue, the Sherman Act, *15 U.S.C. § 1 et seq.*, upon which it was modeled. *See People v. Rattenni, 81 N.Y.2d 166, 171, 613 N.E.2d 155, 597 N.Y.S.2d 280, 283 (1993)*. Indeed, the New York Court of Appeals has stated that "the Donnelly Act — often called a 'Little Sherman Act' — should generally be construed in light of federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335, 520 N.E.2d 535, 525 N.Y.S.2d 816, 820 (1988)*.

HN3[] To plead a violation of the Donnelly Act, a plaintiff must allege that the defendant's conduct is anticompetitive under either the rule of reason or the *per se* rule. The accepted standard for evaluating most Donnelly Act claims is the rule of reason. *Rattenni, 81 N.Y.2d at 171, 597 N.Y.S.2d at 283*. This legal standard requires the court to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. **[*7]** When applying the rule of reason, "[a]ppropriate factors to take into account include specific information about the relevant business, [] the restraint's history, nature, and effect, [and] whether the businesses involved have market power." *Id. at 885-86* (internal citations and quotations omitted).

In addition to the rule of reason, there is also a rule of *per se* illegality for "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *Rattenni, 81 N.Y.2d at 171-72, 597 N.Y.S.2d at 283*. For example, horizontal agreements among competitors to fix prices or divide markets have been deemed *per se* unlawful. *Leegin, 551 U.S. at 886*.

2. Applicability of the Per Se Rule

In the present case, plaintiff contends that the *per se* rule applies to its Donnelly Act claim whereas KWC argues that the rule of reason standard applies. Plaintiff's position is that the KWC's IAP is vertical resale price maintenance ("RPM") agreement. ***HN4***[] Vertical RPM agreements are generally defined as agreements between a manufacturer and its distributors to set **[*8]** the minimum price at which distributors can sell the manufacturer's goods. Like horizontal RPM agreements, vertical RPM agreements were long treated as *per se* violations of *§ 1* of the Sherman Act. *See* *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*. Some New York courts have also treated vertical RPM agreements as *per se* Donnelly Act violations. *See, e.g., George C. Miller Brick Co. v. Stark Ceramics, Inc., 2 A.D.3d 1341, 770 N.Y.S.2d 235 (4th Dep't 2003)*. However, in 2007, *Dr. Miles* was overruled by the Supreme Court's decision in *Leegin Creative Leather Products v. PSKS, Inc.*, which abandoned the *per se* rule for vertical RPM agreements and instead applied the rule of reason to such claims. *551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

After *Leegin*, it is uncertain whether New York courts evaluating vertical RPM claims brought under the Donnelly Act will continue to apply the *per se* rule or will follow *Leegin* in adopting the rule of reason. Specifically, the New York Court of Appeals has not addressed whether *Leegin* changes the rule applicable to vertical RPM claims under the Donnelly Act. However, at least two courts in this district have addressed this issue and concluded that **[*9]** the rule of reason now applies to such claims. *See* *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc., No. 10 Civ. 4092 (RJS), 2011 U.S. Dist. LEXIS 136731 (S.D.N.Y. July 5, 2011)*; *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc., No. 10 Civ. 3205 (BSJ), 2011 U.S. Dist. LEXIS 67798, 2011 WL 2565284 (S.D.N.Y. June 22, 2011)*. Notably, both *Franke* and *PLC Lighting* were brought by the present plaintiff against other home accessories manufacturers with similar policies to those at issue here.

Here, plaintiff contends that *Leegin* is inapplicable because New York has a state policy that justifies a departure from federal precedent. Specifically, in support of its argument that the *per se* rule applies to its Donnelly Act claim of vertical RPM, plaintiff argues that: *section 369-a of New York's General Business Law* evidences a state policy in New York against price fixing; [2] this statute and its legislative history justify a divergence in the way state and federal antitrust laws apply to vertical RPM agreements; and therefore courts must treat such agreements as *per se* violations of the Donnelly Act, notwithstanding the decision of the Supreme Court of the United States in *Leegin*.

We recognize this argument has its adherents. *See* Jay L. Himes [3], *New York's Prohibition of Vertical Price-Fixing*, N.Y.L.J. Jan. 29, 2008; Robert L. Hubbard [4], *Protecting Consumers* Post-Leegin, 22 Antitrust 41, 43 (2007). However, plaintiff's position has not been endorsed by any court of which we are aware. *See, e.g.,* *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc., 2011 U.S. Dist. LEXIS 136731, *15 (S.D.N.Y. July 5, 2011)* (***HN6***[] "In the absence of any authority construing *§ 369-a* as relevant, much less controlling, with respect to New York ***antitrust law***, the Court declines to adopt such a view"); *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc., No. 10 Civ. 3205 (BSJ), 2011 U.S. Dist. LEXIS 67798, 2011 WL 2565284, at *4 (S.D.N.Y. June 22, 2011)* (rejecting the theory "that pleading a violation of *§ 369-a* provides a means to establish *per se* liability under the Donnelly Act"); *State v. Tempur-Pedic Int'l, Inc., 30 Misc. 3d 986, 991, 916 N.Y.S.2d 900, 905 (Sup. Ct. N.Y. Cnty. Jan. 14, 2011)* (rejecting **[*11]** the argument that *§ 369-a* of the General Business Law renders vertical RPM agreements illegal in New York).

While we see no reason to depart from the decisions in *PLC Lighting*, *Franke*, and *Tempur-Pedic* that ***HN7***[] the rule of reason is the standard applicable to a vertical RPM claim under the Donnelly Act, we are reluctant to reach the question of what standard a New York court would apply before we are satisfied that the complaint states a plausible claim under either standard. Because we conclude that the complaint does not sufficiently allege a Donnelly Act claim, we do not reach the issue of whether New York law will diverge from federal law post-Leegin. *See* *R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499-500, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* ("[N]o matter

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[2] ***HN5***[] *Section 369-a* is entitled "Price Fixing Prohibited" and provides, **[*10]** "any contract provision that purports to restrain a vendee of a commodity from reselling such a commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law."

[3] The article identifies Jay L. Himes as the chief of the antitrust bureau of the Office of the Attorney General of New York.

[4] The article identifies Robert Hubbard as the director of litigation of the antitrust bureau of the Office of the Attorney General of New York.

how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination" of unclear state law).

3. Adequacy of the Allegations

Plaintiff alleges that **[*12]** the IAP is a vertical RPM agreement because it "restrains price competition by purporting to disallow communication of sales below the fixed price." (Pl.'s Mem. Opp. 10.) KWC offers two reasons why its IAP is not a vertical RPM agreement: first, because it disallows communication only of advertised prices, not of resale prices; and second, because it is a unilateral policy, not an agreement. Indeed, the language of the IAP is unmistakably clear on each of these points:

> This Policy applies only to advertised prices and does not apply to actual resale prices
>
> . . .
>
> This Policy is a unilateral statement of KWC America's preferences concerning the type of account to which KWC America chooses to distribute the products that are subject to the Policy. It is not the intent or purpose of this Policy to restrict, coerce, force or reach agreement with a retailer to charge a particular price for any KWC America product.

(Haller Decl. Ex. E.) Nonetheless, plaintiff contends, first, that there is no distinction between advertised and resale prices on the Internet, and second, that agreements exist between KWC and other distributors whose businesses are threatened by the plaintiff's Internet sales. We **[*13]** reject both of plaintiff's arguments for the reasons set forth herein and discuss them in turn.

a. Distinction Between Advertised and Resale Prices

First, plaintiff contends that a there is no distinction between advertised prices and resale prices on the Internet. Plaintiff's theory turns on a comparison to traditional brick-and-mortar retailers. Whereas a traditional brick-and-mortar retailer advertises to potential customers by "paying to post [] product prices elsewhere" and also communicates resale prices directly to existing customers who are present at the store, an Internet retailer may accomplish both of these goals simultaneously by posting a single price on its website. [5] Plaintiff asserts that this feature of Internet retail collapses the distinction between the price at which a product is advertised and the price at which it is sold.

At least one district court, in a case brought by the present plaintiff and decided prior to the *Leegin* **[*14]** decision, appears to have been persuaded by this reasoning. *See Worldhomecenter.com, Inc. v. L.D. Kichler Co., No. 05 Civ. 3297 (DRH), 2007 U.S. Dist. LEXIS 22496, 2007 WL 963206 (E.D.N.Y. March 28, 2007)* (denying motion to dismiss Sherman Act claim that an internet minimum advertised price policy constitutes vertical price fixing). We, however, are not persuaded.

It may be true that in certain circumstances any means of communicating prices can also be a form of advertising. But the advertised prices on a website are not the only means an Internet retailer has at its disposal to communicate resale prices. Indeed, as Judge Jones recently stated:

> [u]nlike the prior cases cited by Plaintiff where an advertising policy was held to restrain prices, the [] policy here provides internet retailers with more than one way to communicate lower prices to clients, either by allowing customers to call or email for a price quote or by offering a coupon to be applied at checkout.

*WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc., No. 10 Civ. 3205 (BSJ), 2011 U.S. Dist. LEXIS 67798, 2011 WL 2565284, at *5 (S.D.N.Y. June 22, 2011)*.

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[5] In the year 2011, we assume general familiarity with the basic notion that search engines locate and index webpages in order to present users with appropriate results to search queries, including queries for the prices of goods offered for sale.

That reasoning is equally applicable here. Like the policy at issue in Franke, KWC's IAP states that "[a]ctual prices charged **[*15]** customers may be provided by telephone, e-mail response, and product purchase confirmation webpages or communications." (Haller Decl. Ex. E.) By permitting these means of communicating actual resale prices to customers, KWC did not prevent plaintiff from selling its products at whatever price plaintiff wished, but only set a floor on the discount prices that plaintiff could advertise. *See Campbell v. Austin Air Sys., Ltd., 423 F. Supp. 2d 61, 69-70 n.6 (W.D.N.Y. 2005)* (holding ***HN8***[] policy that "restricts only the minimum price for which a dealer could advertise on the Internet" and "explicitly states that a dealer may sell [] for any price" not to be vertical RPM agreement); *Blind Doctor, Inc. v. Hunter Douglas, Inc., No. C-04-2678 (MHP), 2004 U.S. Dist. LEXIS 18480, 2004 WL 1976562, at *2 & n.5 (N.D. Cal. Sept. 7, 2004)* (***HN9***[] "Courts have long recognized that such advertising restrictions do not rise to the level of an antitrust violation").

Therefore, we conclude that ***HN10***[] the IAP cannot be the basis of a vertical RPM claim because it does not restrain resale prices, but merely restricts advertising. Accordingly, the *per se* rule is inapplicable to plaintiff's claim. [6]

b. A Unilateral Policy is Not Evidence of an Agreement or Conspiracy

We next turn to whether the IAP is nonetheless a non-price restraint of competition in violation of the Donnelly Act. ***HN12***[] The rule of reason is the standard applicable to vertical non-price restrictions. *See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*.

HN13[] Like the Sherman Act, the Donnelly Act proscribes only concerted action in the form of a contract, agreement, arrangement, or combination. *N.Y. Gen. Bus. Law § 340*. Indeed, a manufacturer's independent, unilateral actions are outside the scope of the Donnelly Act. *See* ***[*17]*** *State v. Mobil Oil Corp., 38 N.Y.2d 460, 464, 344 N.E.2d 357, 381 N.Y.S.2d 426, 428 (1976)*; *see also Tempur-Pedic Int'l, 30 Misc. 3d at 994* ("A manufacturer's independent acts to set minimum resale prices, without seeking agreement from its retailers, do not amount to a contract.").

Plaintiff alleges that KWC has obtained agreements from its other distributors to adhere to the IAP (Compl. ¶ 33(a)), and that these agreements supply the requisite element of concerted action necessary to plead a Donnelly Act violation. KWC replies that plaintiff has not alleged any specific facts indicating the other distributors it refers to, the dates or places of any alleged agreements, or any actions taken to enforce them. Further, the IAP itself declares that it is a unilateral policy and that it is not intended to be an agreement. (Haller Decl. Ex. E.)

Plaintiff has failed to allege "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 550 U.S. at 556*. Plaintiff appears to argue that we may infer the existence of agreements between KWC and other distributors because, without such agreements, the IAP would not be in KWC's own best interests. Thus, plaintiff asserts that there is a **[*18]** *quid pro quo* in which the IAP protects KWC's other dealers from Internet competition, and in exchange, these dealers agree to continue distributing KWC's products. However, specific factual allegations of such an arrangement are absent from the complaint and therefore plaintiff fails to state a plausible claim under the Donnelly Act.

Plaintiff's argument is also a *non sequitur*. While KWC has not offered a detailed explanation of its reasons for imposing the IAP, and is not obligated to do so, it may have reasonable justifications for its actions. For example, KWC may wish to encourage traditional distributors to present KWC products in display rooms where customers

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[6] We note that, even if plaintiff were correct that the policy **[*16]** at issue constituted a vertical RPM agreement, we see little merit in plaintiff's theory that *N.Y. Gen. Bus. Law § 369-a*, which renders such agreements unenforceable but not illegal, is a reason to treat them as *per se* violations of the Donnelly Act. To the contrary, ***HN11***[] while the Donnelly Act makes unreasonable price restraints unlawful, *section 369-a* has the distinct aim of preventing parties from seeking the assistance of the courts to enforce these restraints. As there is no suggestion that KWC has ever sought to conscript the courts into enforcing the IAP, *§ 369-a* is not relevant here.

can view and touch sample fixtures, see demonstrations, or personally interact with knowledgeable employees. Absent an incentive to do so, these distributors may not think it worth the trouble of providing these benefits to customers, if their customers can then easily locate the same products advertised at lower prices on the Internet. Thus, KWC may have adopted the IAP to provide an incentive for display room distributors to continue devoting energy, expense, and floor space to KWC products. *See* *United States v. Colgate & Co., 250 U.S. 300, 306-07, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)* **[*19]** (recognizing the ***HN14***[] "right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . [and] announce in advance the circumstances under which he will refuse to sell.").

It does not follow from any of the above that an agreement between KWC and these distributors has taken place, or that KWC's actions are contrary to its own interests. The mere observation that the IAP is mutually beneficial to KWC and its non-Internet distributors is not an adequate factual allegation of agreement or conspiracy. Nor does plaintiff allege additional facts from which an agreement could be inferred. Thus, plaintiff has failed to adequately allege a violation of the Donnelly Act. [7] Consequently, the Donnelly Act claim must be dismissed.

Finally, because we conclude that plaintiff's fails to state a claim under the Donnelly Act, we need not reach defendant's suggestion that the Sherman Act preempts the Donnelly Act.

B. Deceptive Practices Claim

In its second cause of action, plaintiff alleges that KWC's warranty disclaimer is a false and deceptive trade practice that violates New York's consumer protection law, *N.Y. Gen. Bus. Law § 349*.

HN15[] Under *section 349*, "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state are hereby declared unlawful." *N.Y. Gen. Bus. Law § 349*. Although violations of this statute are prosecuted by the New York Attorney General, *see* *N.Y. Gen. Bus. Law § 349(b)-(g)*, the statute was amended in 1980 to provide a private right of action for citizens who wish to recover damages or to enjoin an unlawful act or practice. *See* *N.Y. Gen. Bus. Law § 349(h)*.

HN16[] To state a claim under *§ 349(h)*, a plaintiff must show that the defendant has engaged in: (1) consumer-oriented conduct that is (2) materially **[*21]** misleading and that (3) plaintiff suffered injury as a result of the deceptive act or practice. *City of New York v. Smokes-Spirits.com, Inc., 12 N.Y.3d 616, 621, 911 N.E.2d 834, 883 N.Y.S.2d 772, 776 (2009)*. A plaintiff alleging an injury that is indirect or derivative, such that it arises solely as a result of injuries sustained by another party, lacks standing to pursue a *§ 349* claim. *Id. at 622*. (citing *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc., 3 N.Y.3d 200, 207, 818 N.E.2d 1140, 785 N.Y.S.2d 399, 404 (2004))*. However, entities other than consumers, such as business competitors, have been held to have standing to bring a claim "so long as harm to the public at large is at issue." *Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995)*.

Plaintiff alleges that KWC's stated policy of refusing to honor warranties for customers of Internet resellers is a deceptive practice. The allegation is not that plaintiff's customers are deceived if they purchase KWC products unaware that their warranties will not be honored; rather, it is that those customers who read KWC's warranty policy are deceived as to their rights under the law in New York, specifically***HN17***[] *§ 369-b* of the General Business **[*22]** Law, which provides that any attempt by a manufacturer to limit its warranty or guarantee of merchandise "solely for the reason that such merchandise is sold by a particular dealer or dealers" will be void. Plaintiff's theory

[7] Even assuming plaintiff had adequately alleged an agreement, there have been no factual allegations regarding the relevant market, the actual effects of the IAP on this market, or the market power of the parties, all of which would be necessary to support a rule of reason analysis. Thus, even if KWC had structured the IAP as an agreement with distributors, something it explicitly **[*20]** did not do, the factual allegations in the complaint would still be insufficient to state a Donnelly Act violation under the rule of reason standard.

appears to be that if KWC actually refused to honor the warranty of a New York consumer because that consumer purchased KWC products from plaintiff on the Internet, then KWC's refusal would be void under *§ 369-b*, and therefore it is deceptive for KWC's policy to assert that KWC will take actions which are void under the law.

Plaintiff's effort to backdoor a ***HN18***[] *§ 369-b* claim for which there is no private right of action, *see discussion infra*, into a deceptive practices claim, while clever, is unavailing. Plaintiff has not identified any harm to itself or to the public at large which might afford it standing to assert competitive harms, *see Securitron Magnalock, 65 F.3d at 264*, and therefore has failed to satisfy the third element of a deceptive practices claim, sufferance of an injury. Specifically, plaintiff has not even alleged the existence of any consumer whose warranty claim has been denied by KWC as a result of having purchased a KWC product from plaintiff, an **[*23]** occurrence of which it would presumably be aware. Thus, any claim of "loss of profits, loss of established business dealings and prospective business opportunities, and damage to reputation" is purely speculative. (Compl. ¶ 41.) In fact, some consumers may care nothing at all about warranties and simply want to locate KWC products at the lowest possible resale price. Astute consumers might even infer that unauthorized sellers on the Internet have the best deals available since the cost of warranty coverage is not built into their prices, thereby benefitting plaintiff's business.

Nor is it clear that KWC's warranty policy would violate *§ 369-b*. This is because KWC's blanket disclaimer of warranties for all products sold by "unauthorized Internet sellers" may be too general to fit within the statutory language of *§ 369-b*, which voids warranty disclaimers for products "sold by a *particular* dealer or dealers." *N.Y. Gen. Bus. Law § 369-b* (emphasis added).

Therefore, for these several reasons, plaintiff's deceptive practices claim must be dismissed.

C. Declaratory and Injunctive Relief

In its third and fourth causes of action, plaintiff seeks declaratory and injunctive relief. Specifically, **[*24]** plaintiff seeks a declaratory judgment that KWC's IAP is "void and unenforceable" under *section 369-a* of the General Business Law and that KWC's warranty policy "constitutes a violation of" *section 369-b* of the General Business Law. (Compl. ¶ 45-46.) In addition, plaintiff asks the Court to enjoin KWC from taking any actions to enforce either policy.

As a threshold matter, ***HN19***[] neither *section 369-a* nor *section 369-b* expressly provides for a private right of action. *See N.Y. Gen. Bus. Law §§ 369-a*, *369-b*. Absent an express private right of action, New York courts will only conclude that "a private right of action may be fairly implied" where: (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose; and (3) creation of such a right would be consistent with the legislative scheme. *See Sheehy v. Big Flats Community Day, 73 N.Y.2d 629, 633, 541 N.E.2d 18, 543 N.Y.S.2d 18, 20 (1989)*.

Notably, plaintiff has failed to address the factors we must consider in order to find an implied private right of action. Nonetheless, it is apparent that plaintiff is not among the class for whose benefit *§ 369-a* **[*25]** was enacted. ***HN20***[] *Section 369-a* applies only to contract provisions which restrain resale prices, yet plaintiff was not a party to any contract regarding prices, but rather was merely subjected to a unilateral policy restricting advertising. In addition, ***HN21***[] the legislative scheme embodied in Article 24-A of the General Business Law, where *§ 369-a* and *§ 369-b* are found, only envisions enforcement by the New York Attorney General, and does not refer to enforcement by private citizens. *See, e.g.*, *N.Y. Gen. Bus. Law § 369-e*, *§ 369-ee*, *§ 369-eee*. The Attorney General is also empowered to take action under *N.Y. Executive Law § 63(12)* against any person who demonstrates "persistent fraud or illegality in the carrying on, conducting or transaction of business." We conclude that implying a private right of action would be inconsistent with this legislative scheme, and plaintiff may not pursue declaratory or injunctive relief under *§ 369-a*.

Similarly, private enforcement under *§ 369-b* is inconsistent with the legislature's chosen scheme of enforcing Article 24-A through actions by the Attorney General, and thus we conclude that no private right of action can be implied under *§ 369-b*.

In addition, even **[*26]** if a private right of action were found to exist under *§ 369-b*, the plaintiff has not demonstrated any injury caused by KWC's warranty policy. ***HN22***[] A plaintiff seeking declaratory relief must suffer an 'injury in fact.' *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. To meet the requirement of injury in fact, a plaintiff must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* Plaintiff's memorandum of law fails to address this issue in any meaningful way. Nonetheless, the same failure to identify any injury from KWC's warranty policy, which required dismissal of plaintiff's deceptive practices claim under *§ 349(h)*, also demonstrates that plaintiff lacks standing to challenge the validity of the policy directly under *§ 369-b*.

Finally, because we conclude that plaintiff has not alleged facts supporting irreparable harm or a likelihood of success on the merits, it is clear that plaintiff is not entitled to injunctive relief.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss the complaint is granted.

Dated: New York, New York

September 15, 2011

/s/ Naomi Reice Buchwald **[*27]**

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

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PCI Int'l Consultants, Inc. v. Flavor & Food Ingredients, Inc.

United States District Court for the Western District of Louisiana

September 16, 2011, Decided; September 19, 2011, Filed

CIVIL NO. 6:11-0762

Reporter
2011 U.S. Dist. LEXIS 117224 *

PCI INTERNATIONAL CONSULTANTS, INC. versus FLAVOR AND FOOD INGREDIENTS, INC., ET AL.

Subsequent History: Adopted by, Count dismissed at, Claim dismissed by, Without prejudice *PCI Int'l Consultants, Inc. v. Flavor & Food Ingredients, Inc., 2011 U.S. Dist. LEXIS 117116 (W.D. La., Oct. 6, 2011)*

Core Terms

allegations, conspiracy, food, rec, products, wholly owned subsidiary, Sherman Act, recommendation, conspiring, contacts, personal jurisdiction, forum state, subsidiary, antitrust, Flavor, lack of personal jurisdiction, failure to state a claim, restraint of trade, minimum contact, Ingredients, distributor

LexisNexis® Headnotes

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

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

When deciding a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, the court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. To survive a *Fed. R. Civ. P. 12(b)(6)* motion, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. The plaintiff's obligation is to provide the grounds of his entitlement to relief and requires more than mere labels and conclusions. The allegations must be sufficient to raise a right to relief above the speculative level; the pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action. If a plaintiff fails to allege facts sufficient to nudge his claims across the line from conceivable to plausible, his complaint must be dismissed.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN2[] **Sherman Act, Claims**

Section 1 (15 U.S.C.S. § 1) of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. 15 U.S.C.S. § 1 (1997). A claim of unreasonable restraint of trade under § 1, requires proof of three elements: (1) the defendants engaged in a conspiracy; (2) the conspiracy had the effect of restraining trade; and (3) trade was restrained in the relevant market. The plaintiff has the burden of proving each element of a § 1 violation.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

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

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

HN3[] **Sherman Act, Claims**

The United States Supreme Court held that a parent company and its wholly owned subsidiary are legally incapable of conspiring in restraint of trade under § 1 (15 U.S.C.S. § 1) of the Sherman Act. That holding was based on the court's conclusion that a corporate parent and its wholly owned corporate subsidiary are mere instrumentalities of a single manufacturing-merchandizing unit which makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. In essence, they must be viewed as a single enterprise. In so holding, the Court rejected the intra-enterprise conspiracy doctrine, which allowed recovery under the Sherman Act for the coordinated acts of a parent and its subsidiary. The Court expressed, as the basis for its decision, the unity of purpose shared by the parent and its subsidiary as follows: A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal agreement, the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do agree to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

HN4[] **Conspiracy to Monopolize, State Regulation**

La. Rev. Stat. Ann. § 51:122 of the Louisiana ***Antitrust law*** deems every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce illegal. The Louisiana legislature has amended La. Rev. Stat. Ann. § 51:122 to include La. Rev. Stat. Ann. § 51:122(C) which provides that: For purposes of La. Rev. Stat. Ann. § 51:122, a parent corporation, limited liability company, partnership, or partnership-in-commendam is not capable of conspiring with any subsidiary that it controls, and each such controlled subsidiary is not capable of conspiring with any other wholly owned subsidiary controlled by the same common parent. Thus, as is the case under federal law, La. Rev. Stat. Ann. § 51:122(C) clearly precludes any cause of action based on an alleged conspiracy in restraint of trade or commerce between wholly owned subsidiaries of a single parent.

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

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

HN5[] **In Personam Actions, Due Process**

Where a defendant challenges personal jurisdiction, the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists. In addition to the pleadings, the court may consider affidavits and discovery materials. The court must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction. To exercise personal jurisdiction over a nonresident defendant, two requirements must be met. First, the nonresident defendant must be amenable to service of process under the forum state's jurisdictional long-arm statute. Second, the assertion of in personam jurisdiction must be consistent with the *Fourteenth Amendment's Due Process Clause*. Louisiana's long-arm statute was specifically amended to permit service of process to the extent permitted by the due process clause.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

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

HN6[] **In Rem & Personal Jurisdiction, Constitutional Limits**

The *Due Process Clause of the Fourteenth Amendment* guarantees that no federal court may assert in personam jurisdiction of a non-resident defendant unless the defendant has meaningful contacts, ties, or relations with the forum state. Jurisdiction may be general or specific. Where a defendant has continuous and systematic general business contacts with the forum state, the court may exercise general jurisdiction over any action brought against that defendant. Where contacts are less pervasive, the court may still exercise specific jurisdiction in a suit arising out of or related to the defendant's contacts with the forum.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

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

HN7[] **In Rem & Personal Jurisdiction, Constitutional Limits**

A federal court may satisfy the constitutional requirements for specific jurisdiction by a showing that the defendant has minimum contacts with the forum state such that imposing a judgment would not offend traditional notions of fair play and substantial justice. The United States Court of Appeals for the Fifth Circuit has consolidated the personal jurisdiction analysis into a three-step inquiry: (1) whether the defendant has minimum contacts with the forum state; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable. To determine whether a foreign business has minimum contacts with the forum state, federal courts must identify some act whereby the business purposely availed itself of the privilege of conducting activities there, thus invoking the benefits and protections of its laws. The defendant's conduct must show that it reasonably anticipates being haled into court" in the forum state. Only after the plaintiff establishes minimum contacts, does the burden shift to the foreign defendant to show that the assertion of jurisdiction is unfair and unreasonable.

Counsel: [*1] For P C I International Consultants Inc, Plaintiff: Gilbert H Dozier, LEAD ATTORNEY, Dozier Law Firm, Lafayette, LA.

For Flavor & Food Ingredients Inc, doing business as Summit Hill Flavors, Activ International Inc, Defendants: Jay Corenswet, LEAD ATTORNEY, James K Irvin, Philippe Jack Langlois, Milling Benson Woodward (NO), New Orleans, LA.

Judges: C. MICHAEL HILL, UNITED STATES MAGISTRATE JUDGE. JUDGE MELANCON.

Opinion by: C. MICHAEL HILL

Opinion

REPORT AND RECOMMENDATION

Pending before the undersigned for report and recommendation are the Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim for relief which can be granted filed by defendant, ACTIV International, Inc. ("ACTIV") [rec. doc. 9] and the Motion to Dismiss for failure to state a claim for which relief can be granted filed by defendant Flavor and Food Ingredients, Inc. d/b/a Summit Hill Flavors ("Summit Hill"). [rec. doc. 10]. Plaintiff, PCI International Consultants, Inc. ("PCI") has filed no Opposition to either Motion, and the delays for opposition have run. For those reasons set out below, it is recommended that the Motions to Dismiss [rec. docs. 9 and 10] be **GRANTED.**

BACKGROUND

PCI, an international distributor of food **[*2]** products and food ingredient products, is a Louisiana corporation with its principal place of business in Louisiana. [rec. doc. 1, ¶ 6 and 4]. Summit Hill, a manufacturer of food products and food ingredients, is a New Jersey corporation with its principal place of business in New Jersey. [*Id.* at ¶ 8 and 5(a)]. ACTIV(a competitor of PCI), is an international distributor of food products and food ingredient products. ACTIV is a Washington corporation with its principal place of business in Washington. [*Id.* at ¶ 7 and 5(b)]. Plaintiff invokes this court's diversity jurisdiction. [*Id.* at ¶ 1].

PCI alleges that, pursuant to two Exclusive Distributorship Agreements, it contracted with Summit Hill to be the exclusive distributor of Summit Hill food flavoring products in Brazil and the territories of North, Central and South America, Europe and Asia. [*Id.* at 10, 13 and 1]. The Agreements provide that they are to be "construed and enforced in accordance with the Laws of the State of Louisiana venue Lafayette." [rec. doc. 1-2, pg. 8].

The Complaint and record before this court demonstrate that Summit Hill and ACTIV are wholly owned subsidiaries of a single parent company, Vamara Holdings, S.A. **[*3]** [rec. doc. 1, ¶, 7 and 25; rec. doc. 8].

In the instant action, PCI seeks damages from Summit Hill and ACTIV on four theories of recovery, each denominated as a separate "Count". Count I alleges that Summit Hill breached its contract with PCI that made PCI the exclusive distributor of Summit Hill food flavoring products. [*Id.* at ¶ 15-18]. Count II alleges a conspiracy between PCI and ACTIV in violation of federal and Louisiana state antitrust laws. [*Id.* at ¶ 19-20]. Count III alleges a violation of the Louisiana Unfair Trade Practices Act based on the allegations in Counts 1 and II. [*Id.* at ¶ 21-23] Count IV alleges a claim for intentional misrepresentation and detrimental reliance against Summit Hill, that is, that Summit Hill made intentional misrepresentations to PCI and that PCI relied on these misrepresentations to its detriment. [*Id.* at ¶ 24-26].

The record reveals that ACTIV was not a party to the Exclusive Distributorship Agreements at issue in this case. The record further reveals that ACTIV is not licensed to do business in Louisiana, has no office located in Louisiana, has no employees located in Louisiana, has no assets in Louisiana, does not manufacture, purchase or sell **[*4]** products or services in Louisiana, does not solicit customers in Louisiana, does not advertise in Louisiana, and has not contracted or performed any business in Louisiana. [rec. doc. 9-2].

LAW AND ANALYSIS

Motion to Dismiss Count II - Federal and Louisiana State Law Antitrust Claims

Both Summit Hill and ACTIV seek dismissal of Count II of the Complaint, the sole claim asserted under federal law, for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. Count II alleges a conspiracy between PCI and ACTIV to "replace PCI as a distributor of [Summit Hill] products", thereby constituting an unreasonable restraint of trade and competition in violation of the Sherman Act (*15 U.S.C. § 1, et seq.*) and Louisiana antitrust laws. (*La. R.S. 51:122*). The defendants argue that because Summit Hill and ACTIV are wholly owned subsidiaries of a single parent company, Vamara Holdings, S.A., that, as a matter of law, they are legally incapable of conspiring with one another. For the following reasons, the defendants' argument is well taken.

HN1[] When deciding a *Rule 12(b)(6)* motion to dismiss, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable **[*5]** to the plaintiff.' " *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)* (internal quotations omitted) *quoting* *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)*.

To survive a *Rule 12(b)(6)* motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544,127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. [1] The plaintiff's obligation is "to provide the 'grounds' of his 'entitlement to relief' [and] requires more than mere labels and conclusions." *Id. at 1964-1965* *citing* *Papasan, 478 U.S. at 286*. The allegations must be sufficient "to raise a right to relief above the speculative level"; "the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id. at 1965* *citing* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004). If a plaintiff fails to allege facts sufficient to "nudge[] [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Id. at 1974*.

HN2[] Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1 (1997)*.

A claim of unreasonable restraint of trade under *Section 1*, requires proof of three elements: (1) the defendants engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) trade was restrained in the relevant market. *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc., 300 F.3d 620, 627 (5th Cir. 2002)* *citing* *Spectators' Comm. Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001)* and *Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 392 (5th Cir. 1996)*. The plaintiff has the burden of proving each element of a *Section 1* **[*7]** violation. *Id. citing* *Jefferson Parish Hosp. Dist. No. 2, v. Hyde, 466 U.S. 2, 29, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984)*.

PCI cannot satisfy the first element, that is, that the defendants, Summit Hill and ACTIV, engaged in a conspiracy. In *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)*, ***HN3***[] the United States Supreme Court held that a parent company and its wholly owned subsidiary are legally incapable of conspiring in restraint of trade under *§ 1* of the Sherman Act. This holding was based on the Court's conclusion that a corporate parent and its wholly owned corporate subsidiary are "mere instrumentalities of a single manufacturing-merchandizing unit [which] makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." *Id. at 2738*. In essence, they must be viewed as a "single enterprise." *Id. at 2741*. In so holding, the Court rejected the "intra-enterprise conspiracy doctrine," which allowed recovery under the Sherman Act for the coordinated acts of a parent and its subsidiary.

The Court expressed, as the basis for its decision, the unity of purpose shared by the parent and its subsidiary as follows:

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[1] The *Twombly* Court explicitly disavowed the oft-quoted **[*6]** generally accepted rule in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80(1957)* that " a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly, 127 S.Ct. at 1968-69* *quoting* *Conley, 355 U.S. at 45-46*.

> A parent and **[*8]** its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny.

Id. at 2741-2742 (internal citations and quotations omitted).

The Fifth Circuit has expanded the reasoning in *Copperweld* to preclude *§ 1* liability based on an alleged conspiracy "between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations." *Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984)*. This holding recognizes that, despite the form or structure **[*9]** of the enterprise, for purposes of the Sherman Act, such entities always have "a unity of purpose or a common design." *Id.* Moreover, relying on *Copperweld*, the Fifth Circuit has expressly held that two wholly owned subsidiaries of a common parent corporation cannot conspire with one another to violate *§ 1* of the Sherman Act because they share a common purpose. *Hood v. Tenneco Texas Life Insurance Co., 739 F.2d 1012, 1015 (5th Cir. 1984)*.

Accordingly, in light of *Copperweld, Century Oil Tool* and *Hood,* PCI cannot state a claim under *§ 1* of the Sherman Act against Summit Hill and ACTIV as they are legally incapable of conspiring with one another against PCI to violate the Act.

Likewise, PCI fails to state a claim for relief against Summit Hill and ACTIV under ***HN4***[] *§ 51:122* of the Louisiana ***Antitrust law*** which deems "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" illegal. The Louisiana legislature has codified the holding of *Copperweld, Century Oil Tool* and *Hood* by amending *§ 122* to include the following subsection:

> C. For purposes of this Title, a parent corporation, limited liability company, partnership, or partnership-in-commendam **[*10]** is not capable of conspiring with any subsidiary that it controls, and each such controlled subsidiary is not capable of conspiring with any other wholly owned subsidiary controlled by the same common parent.

La. R.S. § 51:122 as amended by Acts 2003, No. 888, § 1. [2]

Thus, as is the case under federal law, *sub-section C of section 122* clearly precludes any cause of action based on an alleged conspiracy in restraint of trade or commerce between wholly owned subsidiaries of a single parent. Accordingly, PCI's Louisiana state law antitrust claim against Summit Hill and ACTIV must be dismissed as they are legally incapable of conspiring with each **[*11]** other in violation of *`§ 122*.

ACTIV's Motion to Dismiss for Lack of Personal Jurisdiction

ACTIV also seeks dismissal of all of PCI's claims asserted against it for lack of personal jurisdiction. [3] *Fed. R. Civ. P. 12(b)(2)*.

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[2] Prior to amendment, the Louisiana Supreme Court held that a parent company and its subsidiary were capable of conspiring in restraint of trade under *§ 122* of the Louisiana ***antitrust law***, contrary to the United States Supreme Court's interpretation and in spite of virtually identical state and federal statutes. *See Free v. Abbott Laboratories, Inc., 176 F.3d 298, 299 (5th Cir. 1999) citing Louisiana Power and Light Co. v. United Gas Pipe Line Co., 493 So.2d 1149, 1158-1160 (La.1986)*. However, the 2003 amendment legislatively overruled that holding.

HN5[] Where a defendant challenges personal jurisdiction, the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists. *Luv n' care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006) citing Wyatt v. Kaplan, 686 F.2d 276, 280 (5th Cir. 1982)*. In addition to the pleadings, the court may consider affidavits and discovery materials. *Colwell v. Realty Investments, Inc. v. Triple T Inns of Arizona, Inc., 785 F.2d 1330, 1333 (5th Cir. 1986)*; *Jobe v. ATR Marketing, Inc., 87 F.3d 751, 753 (5th Cir. 1996)*. This court must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction. *Luv n' care, Ltd., 438 F.3d at 469*.

To exercise personal jurisdiction over a nonresident defendant, two requirements must be met. *Dickson Marine Incorporated v. Panalpina, Inc., 179 F.3d 331, 336 (5th Cir. 1999)*. First, the nonresident defendant must be amenable **[*13]** to service of process under the forum State's jurisdictional long-arm statute. *Id.* Second, the assertion of *in personam* jurisdiction must be consistent with the *Fourteenth Amendment's Due Process Clause*. *Id.* Louisiana's long-arm statute was specifically amended to permit service of process to the extent permitted by the *due process clause*. *Id.*; *Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361 (5th Cir. 1990)*. The statutory and constitutional inquiries thus merge. *Dalton, 897 F.2d at 1361*.

HN6[] The *Due Process Clause of the Fourteenth Amendment* guarantees that no federal court may assert *in personam* jurisdiction of a non-resident defendant unless the defendant has meaningful "contacts, ties, or relations" with the forum state. *Luv n' care, Ltd., 438 F.3d at 469 quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945)*. Jurisdiction may be general or specific. *Id.* Where a defendant has "continuous and systematic general business contacts" with the forum state, the court may exercise "general" jurisdiction over any action brought against that defendant. *Id. quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)*. **[*14]** Where contacts are less pervasive, the court may still exercise "specific" jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Id. quoting Helicopteros Nacionales, 466 U.S. at 414*.

HN7[] A federal court may satisfy the constitutional requirements for specific jurisdiction by a showing that the defendant has "minimum contacts" with the forum state such that imposing a judgment would not "offend traditional notions of fair play and substantial justice." *Id. quoting Int'l Shoe, 326 U.S. at 316*. The Fifth Circuit has consolidated the personal jurisdiction analysis into a three-step inquiry: (1) whether the defendant has minimum contacts with the forum state; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable. *Id. citing Nuovo Pignone v. STORMAN ASIA M/V, 310 F.3d 374, 378 (5th Cir.2002) citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)*.

To determine whether a foreign business has "minimum contacts" with the forum state, federal courts must identify some act whereby the **[*15]** business "purposely avail[ed] itself of the privilege of conducting activities [there], thus invoking the benefits and protections of its laws." *Id. at 469-470 citing Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)*. The defendant's conduct must show that it "reasonably anticipates being haled into court" in the forum state. *Id. at 470 citing World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)*.

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[3] As set forth above, PCI has failed to state a claim under the Sherman Act, the sole federal claim asserted herein. Therefore, this action is properly before this court solely on the basis of diversity jurisdiction, the only jurisdictional basis asserted by the plaintiff. Accordingly, dismissal for lack of personal jurisdiction is appropriate.

However, even if this were not the case, ACTIV alternatively seeks dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. As set forth above, Count II is subject to dismissal for failure to state a claim upon which relief may be granted. Moreover, as argued by ACTIV, plaintiff's remaining state law claims are subject to dismissal for failure to state claims for relief. ACTIV was not a party to the agreements which are the subject of the PCI's breach of contract claim asserted in Count I. With respect to Count III, plaintiff has failed to set forth an unfair trade practice claim against ACTIV based on the alleged **[*12]** breach of agreements to which it was not a signatory or the antitrust claims asserted in Count II. Moreover, with respect to Count IV, plaintiff fails to state any acts of misrepresentation by ACTIV upon which PCI may have relied to its detriment.

Only after the plaintiff establishes minimum contacts, does the burden shift to the foreign defendant to show that the assertion of jurisdiction is unfair and unreasonable. *Nuovo Pignone, 310 F.3d at 382* *citing* *Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 215 (5th Cir.1999)*; *see also* *Luv n' Care, Ltd., 438 F.3d at 473*.

In this case, there are no allegations, nor has there been any showing by PCI, that ACTIV has engaged in "continuous and systematic general business contacts" with the State of Louisiana for the exercise of "general" personal jurisdiction over ACTIV. *Luv n' care, Ltd., 438 F.3d at 469*.

Moreover, there are no allegations, nor has there been any showing by PCI, that ACTIV has the requisite "minimum contacts" with **[*16]** the State of Louisiana for the exercise of "specific" personal jurisdiction over ACTIV. *Id.* Indeed, there are no allegations, and there has been no showing by PCI, of any act whereby ACTIV "purposely avail[ed] itself of the privilege of conducting activities [in Louisiana], thus invoking the benefits and protections of [Louisiana's] laws." *Id. at 469-470*. The allegations, pleadings and evidence presented by ACTIV to this court demonstrates the opposite — that ACTIV has no contacts whatsoever with this State. ACTIV could not therefore "reasonably anticipate[] being haled into court" in Louisiana. *Id. at 470* *citing* *World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)*. To do so would "offend traditional notions of fair play and substantial justice." *Id.* *quoting* *Int'l Shoe, 326 U.S. at 316*.

In sum, in the absence of any allegations or evidence demonstrating the requisite contacts between ACTIV and the State of Louisiana, PCI has failed to satisfy its burden of proving that personal jurisdiction over ACTIV exists in this case.

For these reasons, ACTIV's Motion to Dismiss for lack of personal jurisdiction should be granted.

CONCLUSION

Based on the foregoing, **[*17]** it is recommended that the Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim filed by defendant, ACTIV International, Inc. [rec. doc. 9] and the Motion to Dismiss for failure to state a claim filed by defendant Flavor and Food Ingredients, Inc. d/b/a Summit Hill Flavors [rec. doc. 10] be **GRANTED.** Accordingly, it is recommended that plaintiff's federal and state antitrust claims asserted in Count II of the Complaint be **dismissed with prejudice,** and that all of plaintiff's remaining claims against ACTIV be **dismissed without prejudice.**

Under the provisions of *28 U.S.C. § 636(b)(1)(C)* and *Fed. R. Civ. P. 72(b)*, parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

Failure to file written objections to the proposed factual finding and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by *Fed. R. Civ. P. 6(b)*, [*18] shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See *Douglas v. United Services Automobile Association, 79 F.3d 1415 (5th Cir. 1996)*.

Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

Signed this 16th day of September, 2011, at Lafayette, Louisiana.

/s/ C Michael Hill

C. MICHAEL HILL

UNITED STATES MAGISTRATE JUDGE

End of Document

Metris U.S.A., Inc. v. Faro Techs., Inc.

United States District Court for the District of Massachusetts

September 19, 2011, Decided; September 19, 2011, Filed

CIVIL ACTION NO. 08-CV-11187-PBS

Reporter

882 F. Supp. 2d 160 *; 2011 U.S. Dist. LEXIS 105865 **; 2011 WL 4346852

METRIS U.S.A., INC., METRIS N.V., METRIS IPR N.V., and 3D SCANNERS LTD., Plaintiffs, v. FARO TECHNOLOGIES, INC., Defendant.

Subsequent History: Motion denied by *Metris U.S.A., Inc. v. Faro Techs., Inc., 2012 U.S. Dist. LEXIS 27599 (D. Mass., Mar. 2, 2012)*

Prior History: *Metris U.S.A., Inc. v. Faro Techs. Ltd., 768 F. Supp. 2d 338, 2011 U.S. Dist. LEXIS 47673 (D. Mass., 2011)*

Core Terms

arm, calculator, patent, scanner, inequitable conduct, infringement, trigger, three-dimensional, invention, antitrust, signal, laser, processor, output, refers, segment, host, deceive, fact-finder, inventor, housing, doctrine of equivalents, patent office, multiply-jointed, electrical, misconduct, technology, recording, software, parties

LexisNexis® Headnotes

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN1[] **Inequitable Conduct, Elements**

To prevail on a claim of inequitable conduct, an accused infringer must prove that the patentee acted with the specific intent to deceive the Patent and Trademark Office (PTO). Where an inventor is accused of withholding known information, the accused infringer must demonstrate that the inventor knew of the reference, knew that it was material, and made a deliberate decision to withhold it. Courts should not infer specific intent based solely on the fact that a reference is deemed highly material: Proving that the applicant knew of a reference, should have known of its materiality, and decided not to submit it to the PTO does not prove specific intent to deceive.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN2[] **Inequitable Conduct, Burdens of Proof**

The materiality required to establish inequitable conduct is but-for materiality. When an applicant fails to disclose prior art to the Patent and Trademark Office (PTO), that prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art. If a claim is properly invalidated in district court based on the deliberately withheld reference, then that reference is necessarily material. However, an accused infringer might be able to demonstrate materiality even where it cannot establish invalidity. Because invalidity challenges involve patent claims that have received the imprimatur of the patent office, an accused infringer must establish that the claims at issue are invalid under a clear and convincing evidence standard. In contrast, the inequitable conduct doctrine implicates the patent prosecution process itself. Therefore, when analyzing materiality, courts must examine the prior art under the same standards that a patent officer would have relied upon in deciding whether to allow the claim; a withheld reference is material if it would make a claim unpatentable by a preponderance of the evidence when the claim language is given its broadest reasonable interpretation.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN3[] **Inequitable Conduct, Elements**

There is an exception to the rule requiring but-for materiality where the accused infringer can show that the inventor engaged in affirmative egregious misconduct. Neither mere nondisclosure of prior art references to the Patent and Trademark Office nor failure to mention prior art references in an affidavit constitutes affirmative egregious misconduct.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN4[] **Inequitable Conduct, Burdens of Proof**

To meet the clear and convincing evidence standard for establishing inequitable conduct, the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence.

Patent Law > Originality > Joint & Sole Inventorship

HN5[] **Originality, Joint & Sole Inventorship**

In arriving at conception the inventor may consider and adopt ideas and materials derived from many sources such as a suggestion from an employee, or hired consultant, so long as he maintains intellectual domination of the work of making the invention down to the successful testing, selecting or rejecting as he goes, even if such suggestion or material proves to be the key that unlocks his problem. Manual Patent Examining P. § 21.37.01.

Patent Law > Originality > Joint & Sole Inventorship

HN6[] **Originality, Joint & Sole Inventorship**

A joint inventor must contribute in some significant manner to the conception or reduction to practice and make a contribution to the claimed invention that is not insignificant in quality, when that contribution is measured against the dimension of the full invention.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN7[] **Inequitable Conduct, Elements**

The focus of the inequitable conduct inquiry is the inventor's conduct before the patent examiner; often this misconduct will persist during litigation before a court, but it is the affirmative conduct before the patent examiner that serves as the basis for the affirmative egregious misconduct exception to the "but for" materiality requirement. Because inequitable conduct renders an entire patent (or even a patent family) unenforceable, as a general rule, the doctrine should only be applied in instances where the patentee's misconduct resulted in the unfair benefit of receiving an unwarranted claim.

Patent Law > ... > Specifications > Description Requirement > General Overview

HN8[] **Specifications, Description Requirement**

A patent application is entitled to the benefit of the filing date of an earlier filed application only if the disclosure of the earlier application provides support for the claims of the later application, as required by *35 U.S.C.S. § 112*. To satisfy the written description requirement the disclosure of the prior application must convey with reasonable clarity to those skilled in the art that, as of the filing date sought, the inventor was in possession of the invention. A disclosure in a parent application that merely renders the later-claimed invention obvious is not sufficient to meet the written description requirement; the disclosure must describe the claimed invention with all its limitations.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

HN9[] **Regulated Practices, Intellectual Property**

Generally patent protection provides an exception to the strictures of ***antitrust law***. However, a patentee who brings an infringement suit may be subject to antitrust liability for the anticompetitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

HN10[] **Bad Faith, Fraud & Nonuse, Fraud**

Proof that a patentee obtained a patent by knowingly and willfully misrepresenting facts to the Patent Office is sufficient to strip a patentee of its protections from antitrust laws.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Evidence > Burdens of Proof > Clear & Convincing Proof

HN11[] **Bad Faith, Fraud & Nonuse, Fraud**

The heightened standard of materiality in a Walker Process case requires that the patent would have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission. Walker Process fraud is a variant of common law fraud and that the elements of common law fraud include: (1) a representation of a material fact, (2) the falsity of that representation, and (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent. The intent to deceive must be established by clear and convincing evidence.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

HN12[] **Regulated Practices, Intellectual Property**

The sham litigation theory allows accused infringers to bring antitrust claims where it can be shown that (1) the patent infringement lawsuit is objectively meritless such that no reasonable litigant could expect success on the merits and (2) the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN13[] **Regulated Practices, Intellectual Property**

State law unfair competition claims are preempted to the extent that they are founded solely on misconduct before the Patent and Trademark Office.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

HN14[] **Bad Faith, Fraud & Nonuse, Bad Faith**

Bad faith enforcement of a patent, if alleged as a basis for state tort liability, may bring the state tort claim outside the ambit of federal preemption. The test for bad faith in this context is substantially the same as the test for determining whether bad faith enforcement supports a sham litigation theory of antitrust liability. The bad faith standard has objective and subjective components. The objective component requires a showing that the infringement allegations are objectively baseless. The subjective component relates to a showing that the patentee in enforcing the patent demonstrated subjective bad faith.

Patent Law > Infringement Actions > Summary Judgment > General Overview

HN15[] **Infringement Actions, Summary Judgment**

In order to allow summary judgment of non-infringement, the court must conclude that when all of the reasonable inferences are drawn in a patentee's favor, no reasonable fact-finder could find that the accused product either literally or through equivalents infringes the asserted claims of the patents.

Patent Law > ... > Doctrine of Equivalents > Elements > Equivalence

HN16[] **Elements, Equivalence**

Under the doctrine of equivalents, an accused device or process infringes a patent if it contains elements equivalent to each claimed element of the patented invention. Infringement may be found under the doctrine of equivalents if every limitation of the asserted claim, or its equivalent, is found in the accused subject matter, where an equivalent differs from the claimed limitation only insubstantially. In addressing this question a fact-finder is not bound by any particular linguistic formulation of what makes any single element equivalent to another, but special vigilance must be paid to ensure against allowing the concept of equivalence to eliminate completely any such elements.

Patent Law > Infringement Actions > Doctrine of Equivalents > Equivalence Limits

Patent Law > Infringement Actions > Doctrine of Equivalents > Fact & Law Issues

HN17[] **Doctrine of Equivalents, Equivalence Limits**

The all-elements rule or the all-limitations rule is the judicial counterweight to the doctrine of equivalents. The all-elements rule forecloses resort to the doctrine of equivalents when on the facts or theories presented in a case, a limitation would be read completely out of the claim - i.e., the limitation would be effectively removed or vitiated. Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole. Whereas generally the question of equivalence is a question of fact, the application of the all-elements rule is a question of law for the court.

Patent Law > ... > Doctrine of Equivalents > Elements > Equivalence

HN18[] **Elements, Equivalence**

The doctrine of equivalents does not require a one-to-one correspondence between components of the accused device and the claimed invention. An accused device may infringe under the doctrine of equivalents even though a combination of its components performs a function performed by a single element in the patented invention as long as it contains every limitation of its equivalent. Similarly, equivalency can also exist when separate claim limitations are combined into a single component of the accused device.

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN19[] **Claim Interpretation, Aids & Extrinsic Evidence**

Claim terms cannot be narrowed by reference to the written description or prosecution history unless the language of the claims invites reference to those sources.

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For Faro Technologies Incorporated, Counter Claimant: William J. Cass, LEAD ATTORNEY, Cantor Colburn, LLP, Hartford, CT; Jo-Anne M. Kokoski, Cantor Colburn LLP, Hartford, CT.

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For Faro Technologies Incorporated, Counter Claimant: Andrew C Ryan, LEAD ATTORNEY, Jo-Anne M. Kokoski, Cantor Colburn LLP, Hartford, CT; Thomas J. Mango, LEAD ATTORNEY, Cantor Colburn LLP, Bloomfield, CT; William J. Cass, LEAD ATTORNEY, Cantor Colburn, LLP, Hartford, CT.

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Judges: PATTI B. SARIS, United States District Judge.

Opinion by: PATTI B. SARIS

Opinion

[*166] **AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Saris, U.S.D.J.

Introduction

The patents in-suit concern technology used to scan and create highly accurate digital models of three-dimensional physical objects. Metris U.S.A., INC., Metris N.V., Metris IPR N.V., and 3D Scanners Ltd.[1] ("Metris") hold U.S. Patents No. 6,611,617 (the "'617 patent") and 7,313,264 (the "'264 patent"). These patents protect inventions related to the use of an optical laser scanner attached to a six-jointed articulated arm that a user can manipulate around objects in order to image them from various perspectives. The development of the inventions is described in detail in my memorandum and order dated May 4, 2011, with which this Court assumes familiarity. See generally, *Metris v. Faro Techs., 768 F. Supp. 2d 338 (D. Mass. 2011)*.

On May 4, 2011, after a five-day evidentiary **[**4]** hearing, this Court found that the '617 patent was unenforceable due to inequitable conduct before the patent office. As to the '264 patent, the Court found that Faro had "failed to meet its steep burden in establishing by clear and convincing evidence" that the named inventor of the '264 patent, Stephen Crampton, intended to deceive the patent office by failing to disclose information that was material to that patent.

[1] Metris is now called Nikon Metrology N.V. The Court will continue to refer to the plaintiffs collectively as "Metris."

Since the issuance of that opinion, the Federal Circuit has caused a sea-change in the law of inequitable conduct. See *Therasense, Inc. v. Becton, Dickinson & Co., Nos. 2008-1511, 2008-1512, 2008-1513, 2008-1514, 2008-1595, 649 F.3d 1276, 2011 U.S. App. LEXIS 10590, 2011 WL 2028255 (Fed. Cir. May 25, 2011)*. Here the Court reexamines its prior holdings in light of the change in law and new arguments related to the '264 patent. Because the Court finds that the challenge to both patents can no longer succeed under the more stringent standard for proving inequitable conduct, the Court vacates its prior finding that the '617 patent is invalid and addresses Faro's motions for summary judgment of noninfringement and Metris's motions for summary judgment on Faro's antitrust and state unfair competition claims.

I. Inequitable [**5] Conduct

A. Therasense v. Becton Dickinson and Co.

In Therasense, the Federal Circuit signaled the dramatic constriction of the inequitable conduct doctrine, which it described as a "plagu[e] not only on the courts but also the entire patent system." *2011 U.S. App. LEXIS 10590, [WL] at *9*. The court "tight[ened] the standards for finding both intent and materiality in order to redirect a doctrine that has been overused to the detriment of the public." Id.

With regard to intent, Therasense held that ***HN1***[] "to prevail on a claim of inequitable conduct the accused infringer must prove that the patentee acted with the specific intent to deceive the PTO." Id. Specifically relevant to this case, where an inventor is accused of withholding known information, the accused infringer must demonstrate that the inventor "knew of the reference, knew that it was material, and made a deliberate decision to withhold it." Id. The court also warned that lower courts should not infer specific intent based solely on the fact that a reference is deemed highly material: "Proving that the applicant knew of a reference, should have known of its materiality, and decided not **[*167]** to submit it to the PTO does not prove specific intent to deceive." *2011 U.S. App. LEXIS 10590, [WL] at *10* **[**6]** (emphasis added).

The court also raised the bar for showing that a reference is material. Under the new legal standard, ***HN2***[] "the materiality required to establish inequitable conduct is but-for materiality. When an applicant fails to disclose prior art to the PTO, that prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art." *2011 U.S. App. LEXIS 10590, [WL] at *11*.

The court recognized how the changed standard created overlap between the question of inequitable conduct and invalidity: "[I]f a claim is properly invalidated in district court based on the deliberately withheld reference, then that reference is necessarily material. . . ." Id. However, an accused infringer might be able to demonstrate materiality even where it cannot establish invalidity. Because invalidity challenges involve patent claims that have received the imprimatur of the patent office, an accused infringer must establish that the claims at issue are invalid under a clear and convincing evidence standard. *Microsoft Corp. v. i4i Ltd. P'ship, 131 S.Ct. 2238, 2242, 180 L. Ed. 2d 131 (2011)*; but see *id. at 2251* ("[N]ew evidence supporting an invalidity defense may 'carry more weight' in an infringement action **[**7]** than evidence previously considered by the PTO."). In contrast, the inequitable conduct doctrine implicates the patent prosecution process itself. Therefore, when analyzing materiality, courts must examine the prior art under the same standards that a patent officer would have relied upon in deciding whether to allow the claim; a withheld reference is material if it would make a claim unpatentable by a preponderance of the evidence when the claim language is given its broadest reasonable interpretation. See *Therasense, 2011 U.S. App. LEXIS 10590, 2011 WL 2028255, at *11* (citing MPEP §§ 706 & 2111).

The court also allowed ***HN3***[] an exception to the rule requiring but-for materiality where the accused infringer can show that the inventor engaged in "affirmative egregious misconduct." The court reiterated, however, that "neither mere nondisclosure of prior art references to the PTO nor failure to mention prior art references in an affidavit constitutes affirmative egregious misconduct." *2011 U.S. App. LEXIS 10590, [WL] at *12*.

B. '617 patent

1. Sync and Trigger

With regard to the '617 patent, I found that the inventor Stephen Crampton intended to deceive the patent office by withholding information about Faro arms and their triggering abilities from the **[**8]** patent examiner. Therasense does not affect that conclusion. See 2011 U.S. App. LEXIS 10590, [WL] at *10 (HN4[] "[T]o meet the clear and convincing evidence standard, the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence." (internal quotation marks and citation omitted)).

My findings of materiality, however, have been cast to dust. With regard to non-disclosed materials bearing on inventorship, I observed that "the inventorship issue here is not-clear cut. [There are] reasons why a patent examiner might not have concluded that Faro should have been among the named inventors of the '617 patent, namely the fact that, in theory, the sync and trigger technology could operate on arms that did not use the Caliper 3D software or the specific hardware in place on the Faro arm." Metris, 768 F. Supp. 2d at 359.

Upon consideration of the evidence in light of the new standard for finding inequitable conduct, I conclude that Faro has **[*168]** not established that the undisclosed information would have altered the patent examiner's finding of inventorship. It is true that at the time of the '617 patent application Faro had produced the only triggerable arm and software that allowed the **[**9]** arm and its position calculator to record position data contemporaneously with the sending of a synchronization signal. See Metris, 768 F. Supp. 2d at 356-60. However, MPEP regulations, which a patent examiner would rely upon in issuing a patent, explain:

> HN5[] "'In arriving at ... conception [the inventor] may consider and adopt ideas and materials derived from many sources ... [such as] a suggestion from an employee, or hired consultant ... so long as he maintains intellectual domination of the work of making the invention down to the successful testing, selecting or rejecting as he goes...even if such suggestion [or material] proves to be the key that unlocks his problem.'"

MPEP § 21.37.01 (quoting Morse v. Porter, 155 USPQ 280, 283 (Bd. Pat. Inter. 1965)). Based on the evidence presented at trial, I conclude that Crampton maintained intellectual domination of the project throughout his communications with Faro. In fact, the evidence showed that in July 1996, Crampton sent a fax to Faro explicating that in order "to get the most accuracy from the Faro arm we need to trigger it exactly when our sensor records a stripe." (Def's Ex. 21.) He then went on to ask specific questions about how **[**10]** to execute the trigger function on a Faro arm. (Id.) This document is perhaps more relevant to the core of the sync and trigger invention than any other evidence in the record and demonstrates that even after the initial creation of the Data Creator, Crampton maintained control over the pursuit of a solution to the timing problems created by the integration of a laser scanner and a manually operated movable arm.

The question of joint-inventorship is closer. Under the pre-Therasense standard, I found Faro's prolonged and substantial relationship to Crampton, which Crampton never disclosed to the patent office, to be information that a reasonable patent officer would consider important in making a determination about who should be named as inventors. But, under the post-Therasense standard, Faro has not met its burden of proving that the patent would not have been issued to Crampton alone if information about Faro's collaboration had been disclosed. See Metris, 768 F. Supp. 2d at 358. Importantly, even if Faro could show that it "perform[ed]. . . part of the task which produces the invention," through the triggerable arm and the Caliper 3D software, it never produced evidence that it, **[**11]** or any of its employees, "ever ha[d] 'a firm and definite idea' of the claimed combination as a whole." Ethicon, Inc. v. U.S. Surgical Corp., 135 F.3d 1456, 1460 (Fed. Cir. 1998); see also Nartron Corp. v. Schukra U.S.A. Inc., 558 F.3d 1352, 1356 (Fed. Cir. 2009). In this case, the claim at issue included not only the ability to trigger the arm at a specific point in time in response to a transmission from outside of the arm hardware, but also the mechanism for synchronizing this transmission with the capturing of image data. Faro clearly had ideas about how to trigger its arms and also supplied the software to flag the most recently recorded position data, but there is little in the record to suggest that any Faro employee collaborated on or even considered the use of a single synchronization signal to cause the simultaneous recording of position and image data, the heart of the sync and trigger claim. See *Pannu v. Iolab Corp., 155 F.3d 1344, 1351 (Fed. Cir. 1998)* (***HN6***[] joint inventor must "contribute in some significant manner to the conception or reduction **[*169]** to practice. . . [and] make a contribution to the claimed invention that is not insignificant in quality, when that contribution **[**12]** is measured against the dimension of the full invention.").

Faro has also failed to establish that a patent examiner would have found the claimed inventions obvious if Faro's arm and software had been disclosed during the prosecution. To be sure, a patent examiner may have determined that "even if the existence of the software and the arm hardware would not have dictated the use of a single synchronization signal to solve the problem synch and trigger aimed to resolve, it would seem that such a solution would be 'obvious to try.'" *Metris, 768 F. Supp. 2d at 361*. However, my findings on materiality were not grounded on a complete enough record to determine that a patent examiner would likely not have issued this patent as a result of obviousness. See id. ("The parties in this case have not fully briefed or argued the Graham factors, and, thus, a full-blown obviousness inquiry is not attainable, but neither is it required."). There is simply not enough of a record to support the more searching analysis called for by Therasense.

Faro argues, however, that it need not show "but for" materiality, because Crampton committed affirmative egregious misconduct in lying in this litigation about **[**13]** his relationship with Faro. I found and continue to believe that Crampton's sworn testimony on this matter was purposefully evasive. In particular, I described his testimony that the Faro arm in his possession in 1994-1995 did not have a port for mounting a laser scanner to be "so beyond the scope of credibility" that it provided evidence of intent to deceive the PTO. *Metris, 768 F. Supp. 2d at 363*. Nonetheless, his testimony does not constitute affirmative egregious misconduct as described by the Federal Circuit. ***HN7***[] The focus of the inequitable conduct inquiry is the inventor's conduct before the patent examiner; often this misconduct will persist during litigation before a court, but it is the affirmative conduct before the patent examiner that serves as the basis for the exception to the "but for" materiality requirement. See *Therasense, 2011 U.S. App. LEXIS 10590, 2011 WL 2028255, at *12* (in explaining why affirmative egregious misconduct presents an exception to but for materiality stating, "a patentee is unlikely to go to great lengths to deceive the PTO with a falsehood unless it believes that the falsehood will affect issuance of the patent."). As the Federal Circuit explained, "[b]ecause inequitable conduct **[**14]** renders an entire patent (or even a patent family) unenforceable, as a general rule, this doctrine should only be applied in instances where the patentee's misconduct resulted in the unfair benefit of receiving an unwarranted claim." *2011 U.S. App. LEXIS 10590, [WL] at *12*.[2] It would unduly stretch the inequitable conduct doctrine to hold the '617 patent unenforceable under the doctrine of inequitable conduct based on Crampton's misconduct in the litigation after the patent issued.

[*170] 2. Dual Mode

In my first **[**15]** order, I never addressed inequitable conduct in the prosecution of the dual mode invention of the '617 patent because I found that patent unenforceable due to inequitable conduct in the prosecution of the sync and trigger claim. *Metris, 768 F. Supp. 2d at 363*. When I issued that order, I believed that the evidence supporting inequitable conduct with regard to the dual mode invention was not nearly as strong as the evidence related to the sync and trigger invention. I believe the same today.

The best evidence of the existence of dual mode in the prior art is that before Crampton applied for the British patent in 1995, another scanner company, called EOIS, created a laser scanner head that maintained "touch probe" capability. (Trial Tr. Day 4, 30:11-13.) Further, Faro's Caliper 3D software with which Crampton became familiar in

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[2] Therasense analogizes to the unclean hands doctrine in explicating the affirmative egregious misconduct exception. *2011 U.S. App. LEXIS 10590, [WL] at *12* (exception "incorporates elements" of the unclean hands doctrine"). But a critical difference remains between unclean hands and inequitable conduct, even when inequitable conduct is based on affirmative egregious misconduct: The unclean hands doctrine allows courts to dismiss suits brought by bad faith plaintiffs, whereas the inequitable conduct doctrine results in the unenforceability of the entire patent. *2011 U.S. App. LEXIS 10590, [WL] at *4*. This remedy, which the Federal Circuit has described as the "atomic bomb" of patent law, *2011 U.S. App. LEXIS 10590, [WL] at *8*, is appropriate only in cases where the patent itself is called into doubt.

his efforts to integrate a Faro arm with a 3D Scanners' laser scanner, included an _H command, which allowed a user to switch between laser scanner and touch probe data gathering techniques. (Id. at 28-30.)

Putting aside the question of whether these references were material, Faro cannot demonstrate that Crampton specifically intended to conceal them from the patent **[**16]** office. Crampton's prolonged relationship with Faro included numerous communications regarding features related to the sync and trigger claim, but the same is not true of dual mode. Even if it can be assumed that Crampton was aware of the _H command, this demonstrates only that he knew some arms could switch between modes. There is no direct evidence that he knew of the EOIS scanner's touch probe capabilities or those of any other scanner, and I find circumstantial evidence insufficient. Therefore, on this issue, Faro has not met its burden of establishing specific intent.

C. '264 patent

At the initial trial, there was very little argument on inequitable conduct related to the '264 patent, which among other things, claims the use of a digital processor in the housing of the laser line scanner for processing the electrical image data and generating data of reduced quantity. *Metris, 768 F. Supp. 2d at 341*. On the basis of the sparsity of the record, I found that Faro had failed to meet its steep burden in establishing intent. Since trial, I have allowed the parties to file further briefing (but no new evidence) on this issue. After considering these arguments, I once again find that Faro **[**17]** has failed to establish that Crampton intended to deceive the PTO with regard to this claim, particularly in light of Therasense's tightened standards.

The initial order focused on a patent held by Kreon, a French laser line scanner company. See U.S. Patent No. 5,424,835 ("'835 patent"). In May 1995, Kreon sued Crampton and 3D Scanners for infringement of the French version of the '835 patent. According to testimony at trial, I found that the '835 patent taught the use of a technique for finding the center of a laser line that is reflected off of an object, known as the center of gravity technique. See *Metris, 768 F. Supp. 2d at 349*. Although this technique may be material to the '264 patent, I found that Faro had failed to establish that Crampton knew of this feature of the patent and intentionally decided not to disclose it to the PTO. Id.

In the supplemental filings, Faro pointed to the following portions of the record as further illustrations of Crampton and 3D Scanners' familiarity with Kreon. In January or February of 1994, Naval Kapoor of Kreon brought Crampton and 3D **[*171]** Scanners a Kreon I Scanner for Crampton to examine. (Trial Tr. Day 3, 43:710.) Crampton was impressed with the **[**18]** technology, noting that the Kreon I sensor was "well engineered – possible too sturdy even." (Def. Ex. 32.) Crampton and 3D Scanners then began working on technology for the Kreon I scanner to operate with 3D Scanners software. (Id. at 46:14-16.) Around this period, Crampton took a Kreon scanner apart to "its barest bits." (Id. at 46:18-22.) Beyond the Kreon I scanner, Crampton was reportedly also aware of the Kreon II scanner by the time he filed the British patent application in 1995. (Id. at 44-46.) Furthermore, Faro also pointed to further evidence that Crampton was aware of processor in the head in the prior art. Apparently, 3D Scanners possessed Kreon marketing materials that disclosed the sub-pixel calculation of the center of gravity. (Def's Ex. 38.)

Further, by December 1995, 3D Scanners was aware that Faro was attempting to integrate its arm with a Kreon scanner. (Def's Ex. 198.) Stuart Hamilton of 3D Scanners wrote, "I have not seen Kreon's results, my knowledge of their products makes me skeptical about what they may have achieved. To my knowledge they have merely attached an existing scanner to an arm." (Id.)

None of this evidence alters my conclusion that Faro failed to **[**19]** establish intent to deceive the patent office in not disclosing references that he knew were material to the processor in the head claim. First, it is not clear that the Kreon I scanner included the same technology described in the '835 patent. But even if the Kreon scanner that Crampton took apart to its barest bits did include something like a processor in the head, there is no evidence that Crampton was aware of it or deliberately failed to disclose it, as is required under Therasense. Morever, as I explained in my initial order, there is no evidence that Crampton was made aware of this aspect of Kreon's technology through the French litigation or through any other means, including the marketing materials.

More likely, Crampton was focused on finding a way to improve the integration of scanner and arm technology. In fact, much of the thrust of Faro's argument at trial with regard to Crampton's familiarity with Kreon revolved around his understanding of the mechanism for "registering" the Kreon scanner onto a Faro arm. (See Trial Tr. Day 4, 30-34 (concerning the Kreon brochure used as an exhibit in the French Kreon litigation).) Registration is a process for calibrating a laser scanner **[**20]** and movable arm so that the arm can calculate the position of the end-point of the scanner. As explained in my first order, the registration of a laser scanner to a multiplyjointed arm is not material to the '617 sync and trigger invention. *Metris, 768 F. Supp. 2d at 354*. It is certainly not material to the processor in the head claim, which does not even concern the integration of a scanner and arm.

The finding that Faro has failed to establish specific intent to deceive the PTO with respect to dual mode is further supported by the complexity of the processor in the head technology. It is not clear that even if Crampton had read the entire '835 patent (or its French precursor) or had fully examined every aspect of a Kreon scanner, he would have known that technology allowing for the determination of the center of gravity of the line was material to the claims of the '264 patent. With regard to the sync and trigger claim, circumstantial evidence of Crampton's knowledge of Faro's importance to the invention was present in his frequent communications with Faro about the precise issue **[*172]** that Faro alleges was material to the '617 patent. Here, although there may be evidence that Crampton was **[**21]** familiar with Kreon and the Kreon scanner, inequitable conduct, particularly after Therasense, calls for a higher showing of specific intent.

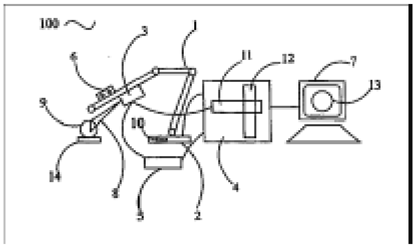
Faro also makes scattered references to the fact that Crampton added the phrase "a multiply-jointed arm having a plurality of arm segments and data communication link to transmit data" to certain claims in the '264 patent after the original patent application was filed and after Faro purportedly had published a patent application that used the phrase "arm segments." Of the asserted claims, the term "plurality of arm segments" now appears in claims 1-6, 11-13, 16, and 26-34 of the '264 patent. According to Faro, the added language is "new matter" not included in the parent '617 patent or in the 1995 British patent application. Faro further argues that "arm segment" refers to Faro's innovative improvements to the accuracy of its arms by using "modular bearing cartridges" in each of the arm joints. (See Def's Ex. 64 ("Kurfess Rep."), at ¶ 87.)

At trial, Faro pressed this argument in a perfunctory manner. In fact, the Faro patent application that allegedly included the "arm segment" language serving as the basis for Crampton's amendment was not even **[**22]** introduced at trial.

But even if this argument had been more forcefully pursued, it would have been unavailing. Although Faro does not specify the legal import of its factual arguments, a finding that the '264 patent included impermissible new matter could theoretically produce at least two outcomes. First, I could find that Crampton's failure to disclose this fact to the patent office constituted inequitable conduct. Cf. *Rainbow Rewards, USA, Inc. v. Source, Inc., 07-00239, 2007 U.S. Dist. LEXIS 94095, 2007 WL 4365669 (D. Colo. Dec. 10, 2007)* (discussing claims of inequitable conduct alleging that patentee had styled certain patent applications as continuation applications even though they contained new matter). Alternatively, a finding of new matter would support a holding that the '264 patent cannot benefit from the priority date of the parent applications. See *Tronzo v. Biomet, Inc., 156 F.3d 1154, 1158 (Fed. Cir. 1998)*.

But before arriving at either of these outcomes, I must find that the additions to the '264 patent are indeed new matter. The restriction on new matter originates in the "written description" requirement. "It is elementary patent law that ***HN8***[] a patent application is entitled to the benefit of the **[**23]** filing date of an earlier filed application only if the disclosure of the earlier application provides support for the claims of the later application, as required by *35 U.S.C. § 112*." *Poweroasis, Inc. v. T-Mobile USA, Inc., 522 F.3d 1299, 1306 (Fed. Cir. 2008)* (quoting *In re Chu, 66 F.3d 292, 297 (Fed. Cir. 1995))* (internal quotation marks omitted). "To satisfy the written description requirement the disclosure of the prior application must convey with reasonable clarity to those skilled in the art that, as of the filing date sought, the inventor was in possession of the invention." Id. (internal quotation marks, citations, and alterations omitted). "A disclosure in a parent application that merely renders the later-claimed invention obvious is not sufficient to meet the written description requirement; the disclosure must describe the claimed invention with all its limitations." *Tronzo, 156 F.3d at 1158*.

Here, a plain language reading of the '617 patent and its specification reveals that the patent discloses the use of a "plurality of arm segments." The term "segment" has a broad everyday definition as "one **[**24]** of the parts into which something is divided; a division, portion, or section." **[*173]** Random House Webster's College Dictionary 1214 (1991). The '617 patent specification uses very similar language when describing that "[m]ultiply jointed arms commonly comprise multiple linkages and are available for scanning complex objects." '617 patent, col. 2, ll. 32-35. Moreover, the figures in the '617 and '264 patents illustrate segmented arms. Figure 1 is a prime example:



'617 patent, fig. 1. By lay eye, the arm depicted here fairly clearly includes segments.

In response, Faro argues that this illustration depicts a "stick figure," and suggests through its expert that the term "arm segment" should be defined with reference to Faro innovations, which have involved placing complicated bearings on each of the arm joints. (See Kurfess Rep., at ¶ 87.) It may be true that Faro's linkages were more sophisticated than the simple joints present in early arms and the '617 specification, but this does not mean that one with ordinary skill in the art would find that the term "arm segment" so evokes this new technology that the term is not disclosed by a patent that refers to simple arm linkages. Faro did not introduce **[**25]** any evidence to suggest the contrary.

II. Antitrust and Unfair Competition Claims

Faro has asserted federal antitrust and state unfair competition counter-claims, and Metris has moved for summary judgment on these claims.

A. Antitrust Claims

HN9[] Generally patent protection provides an exception to the strictures of ***antitrust law***. See *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945)* (A patent "is an exception to the general rule against monopolies and to the right to access to a free and open market"). However, the Federal Circuit has instructed, "A patentee who brings an infringement suit may be subject to antitrust liability for the anticompetitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud. . . or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)*(citations and internal quotation marks omitted).

The first prong of this test refers to the analysis **[**26]** set out by the Supreme Court in *Walker Proc. Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. The second refers to the "sham litigation" theory of antitrust liability. Count VII of Faro's Answer asserts a counter claim of Walker Process fraud as a basis for antitrust liability. (Doc. 130.) Count VIII is based on a sham litigation theory. (Id. (citing *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984)*.)

1. Walker Process

In Walker Process, the Supreme Court held that *HN10*[] proof that a patentee obtained a patent by "knowingly and willfully misrepresenting facts to the Patent Office" is sufficient to strip a patentee of its protections from antitrust laws. *Walker Process, 382 U.S. at 177*.

[*174] Since Walker Process, courts have had occasion to address the relationship between its holdings and the inequitable conduct doctrine. The Walker Process court cited many of the same early unclean hands cases that Therasense has described as the foundation of inequitable conduct law. See id. (citing *Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 54 S. Ct. 146, 78 L. Ed. 293, 1934 Dec. Comm'r Pat. 639 (1933)*, *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944)*, *Precision Instrument Mfg. Co. v. Auto. Maint. Mach., 324 U.S. 806, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945))*. **[**27]** However, as described above, between the development of the unclean hands doctrine and Therasense, the inequitable conduct doctrine progressively expanded to incorporate less serious forms of wrongdoing. On this basis, in the past, a finding of inequitable conduct did not necessarily dictate a finding of Walker Process liability. See *Argus Chem. Corp. v. Fibre Glass-Evercoat Co., Inc., 812 F.2d 1381, 1384 (Fed. Cir. 1987)*. Conversely, because Walker Process liability was founded upon the same type of wrongdoing before the PTO as inequitable conduct, but required a higher showing of both materiality and intent, a finding of inequitable conduct was a prerequisite for a showing of Walker Process fraud. See *Dippin' Dots, Inc., 476 F.3d 1337, 1346 (Fed. Cir. 2007)* ("To demonstrate Walker Process fraud, a claimant must make higher showings of both materiality and intent than are required to show inequitable conduct."); *FMC Corp. v. Manitowoc Co., Inc., 835 F.2d 1411, 1417 (Fed. Cir. 1987)* ("[F]ailure to establish inequitable conduct precludes a determination that the [party making antitrust claims] had borne its greater burden of establishing the fraud required to support its Walker Process **[**28]** claim.").

Since Therasense, no court has had an opportunity to fully examine the relationship between Walker Process liability and inequitable conduct. But see *TransWeb LLC v. 3M Innovative Props. Co., 10-4413, 2011 U.S. Dist. LEXIS 59095, 2011 WL 2181189, at *12 (D.N.J. June 1, 2011)* ("Therasense. . .provided no indication that the elements of Walker Process fraud changed."). But it appears that Walker Process fraud is now largely coextensive with the new inequitable conduct doctrine. With regard to materiality, the Federal Circuit has explained that *HN11*[] "[t]he heightened standard of materiality in a Walker Process case requires that the patent would have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission." *Dippin' Dots, Inc., 476 F.3d at 1346-47*.

As articulated by the Federal Circuit, the intent prong of the Walker Process fraud test is not as precisely congruent with Therasense. The Federal Circuit has explained that Walker Process fraud "is a variant of common law fraud and that the elements of common law fraud include: (1) a representation of a material fact, (2) the falsity of that representation, and (3) the intent to deceive or, at least, a state of mind **[**29]** so reckless as to the consequences that it is held to be the equivalent of intent (scienter)." *Hydril Co. LP v. Grant Prideco LP, 474 F.3d 1344, 1349 (Fed. Cir. 2007)*. Therasense does not fully explore whether a state of mind may be so reckless as to be the equivalent of specific intent. Nonetheless, there is no reason to distinguish between the standards on this account. The leap between recklessness and intent is a common one, even in criminal law. See, e.g., *Willis v. United States, 87 F.3d 1004, 1007-08 (8th Cir. 1996)*. Furthermore, under both doctrines the intent to deceive must be established by "clear and convincing" evidence. See *Unitherm Food Sys. Inc. v, Swift Eckrich, Inc., 375 F.3d 1341, 1360 (Fed. Cir. 2004)*, rev'd on **[*175]** other grounds *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*.

The question here, then, is whether my finding of no inequitable conduct resolves the Walker Process issue. Federal Circuit case law could be read to suggest that a finding of no inequitable conduct necessarily precludes a finding that the patents at issue were obtained through fraud before the patent office. See *FMC Corp., 835 F.2d at 1418* ("[T]hose seeking unenforceability [are] seen as raising a shield and those seeking **[**30]** antitrust damages as unsheathing a sword. FMC broke its Walker Process sword when it failed to establish inequitable conduct."). Metris has assumed this proposition to be the case, and Faro has not urged a different analysis.

There may, however, be reason to doubt this principle now. If a judge's determination of no inequitable conduct precluded a jury from later finding Walker Process fraud as a matter of law, then a viable argument could be made that the doctrines would collide with the protections afforded Walker Process claimants by the Seventh Amendment. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959); Shum v. Intel Corp., 499 F.3d 1272, 1279 (Fed. Cir. 2007); Cabinet Vision v. Cabnetware, 129 F.3d 595, 600 (Fed. Cir. 1997) (finding that a "Walker Process counterclaim and an affirmative defense of inequitable conduct share common factual elements" and thereby concluding that a district court had erred in overriding a jury's fact-finding on a Walker Process claim under the auspices of addressing an inequitable conduct claim). It appears, then, that the foundation of the proposition that a finding of no inequitable conduct forecloses Walker Process fraud claims was **[**31]** the difference between the Walker Process fraud and inequitable conduct standards. Because it was more difficult to establish Walker Process fraud, a finding of no inequitable conduct, even if by a judge, would almost certainly mean that no jury could find that the facts at issue were sufficient to meet the higher standard of Walker Process fraud. See SanDisk Corp. v. STMicroelectronics, Inc., No. C. 04-4379, 2009 U.S. Dist. LEXIS 45931, 2009 WL 1404689, *2 (N.D. Cal. May 19, 2009) ("[J]ust as a finding of inequitable conduct may moot SanDisk's patent infringement claim, a finding that SanDisk did not engage in inequitable conduct may moot ST's Walker Process claim, as '[a] finding of Walker Process fraud requires higher threshold showings of both intent and materiality than does a finding of inequitable conduct.'" (quoting Nobelpharma AB, 141 F.3d at 1071)). Therasense may, therefore, provide reason to reexamine the general rule that a finding of no inequitable conduct precludes Walker Process liability.

In any event, even if this legal principle has been unsettled by the fact that test for inequitable conduct has been brought into line with the test for Walker Process fraud, Faro's claim fails. There is insufficient **[**32]** evidence in the record, even taking into account all of the evidence presented at the inequitable conduct trial, for a reasonable fact-finder to conclude that a patent officer would not have issued the '617 patent to Crampton if she had access to information about Faro. Therefore, I allow Metris' motion for summary judgment on Faro's Walker Process fraud claim.

2. Sham Litigation

HN12[] The "sham litigation" theory allows accused infringers to bring antitrust claims where it can be shown that "(1) the lawsuit [is] objectively meritless such that 'no reasonable litigant could expect success on the merits' and (2) . . . that 'the baseless lawsuit conceals an attempt to interfere **[*176]** directly with the business relationships of a competitor." C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1368 (Fed. Cir. 1998).

Given the other issues at stake in the litigation, Faro cannot demonstrate that the suit is objectively meritless. Although a fact-finder may ultimately determine that there was no infringement on the '264 patent or that this patent is invalid, Metris' claims have at least enough merit to withstand summary judgment. With regard to the '617 patent, for the reasons discussed below, the issue of infringement **[**33]** is not so open-andshut that Metris' assertion of this patent is baseless. Because Faro cannot meet the second prong of the "sham litigation" test, the Court need not reach the question of whether Metris is attempting to use the litigation itself to interfere with Faro's business. See Nobelpharma, 141 F.3d at 1072 ("[I]f a suit is not objectively baseless an antitrust defendant's subjective motivation is immaterial.").

B) c. 93A claims

Faro's state unfair competition claims also fail. As a preliminary matter, the law is clear that ***HN13***[] state law claims are preempted to the extent that they are founded solely on misconduct before the PTO. See Abbott Lab. v. Brennan, 952 F.2d 1346, 1355 (Fed. Cir. 1998). The facts that serve as the basis for the inequitable conduct claim can, therefore, not serve as the sole basis for a c. 93A claim.

Faro argues that this claim escapes preemption, however, because it is founded upon 3D Scanners and Crampton's continued unfair competition since the issuance of the patent. It points in particular to the March 2003 email and to a communication from February 18, 2004, in which Crampton stated that he intended to "put [Kreon] out of business. . . [and] get [its] customer **[**34]** list. . . ." (Def's Ex. 69,) as evidence that Crampton's enforcement of the patent was in bad faith.

It is true that ***HN14***[] bad faith enforcement of the patent, if alleged as a basis for state tort liability, may bring the state tort claim outside the ambit of federal preemption. See *Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1353 (Fed.Cir.1999)* ("[F]ederal patent law bars the imposition of liability [under federal or state law] for publicizing a patent in the marketplace unless the plaintiff can show that the patent holder acted in bad faith."). However, the test for bad faith in this context is substantially the same as the test for determining whether bad faith enforcement supports a sham litigation theory of antitrust liability. See *800 Adept, Inc. v. Murex Sec., Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008)* ("This bad faith standard has objective and subjective components. The objective component requires a showing that the infringement allegations are objectively baseless. The subjective component relates to a showing that the patentee in enforcing the patent demonstrated subjective bad faith."). Even if these emails suggest subjective bad faith, they do not change the analysis **[**35]** that Faro cannot demonstrate that the enforcement of the patent is objectively baseless.

Nor can Faro point to any other evidence of unfair competition beyond enforcement of the patent. All Faro can show through the emails is that Crampton had bad intent. Therefore, at its heart, Faro's state unfair competition counterclaim is based upon Crampton's conduct before the PTO, and the resulting enforcement of a patent obtained through fraud; this alleged misconduct gives rise to federal claims only.

[*177] III. Non-Infringement

HN15[] In order to allow summary judgment of non-infringement, the Court must conclude that when all of the reasonable inferences are drawn in Metris' favor, no reasonable fact-finder could find that the accused product either literally or through equivalents infringes the asserted claims of Metris' patents. *Abbott Laboratories v. Sandoz, Inc., 566 F.3d 1282, 1288 (Fed. Cir. 2009)*.

A. '617 patent

The crux of Faro's argument of non-infringement of the '617 patent concerns the purported absence of a "position calculator" in the accused Faro product. As explained in this Court's May 4 order, "For the purposes of creating a three-dimensional image of an object, the data an optical or laser **[**36]** scanner captures is meaningless if the user cannot determine where the scanner was located relative to that object when it captured the image. This means that while a scanning device collects data on the object itself, it must also collect data on the position and orientation of the scanner." *Metris, 768 F. Supp. 2d at 340*. In Faro's prior products, including both the Bronze and Silver Faro arms, a serial box, otherwise known as a position calculator, served as an intermediary between the host computer and the manually operated multi-jointed arm. See U.S. Patent No. 5,402,582 (the "'582 patent"), fig. 1. In broad strokes, the purpose of the position calculator in these products was the "preprocessing [of] position data prior to transfer. . .said position data to a host computer." '582 patent, col. 15, ll. 19-21.

In the accused Faro arm, there is no separate position calculator serving as an intermediary between the arm and the host computer, where position and orientation data are combined with data collected by the laser scanner to generate three dimensional data relating to the scanned object. (See Kurfess Rep., at ¶ 94.) Instead, each of the arm's joints contains an encoder that **[**37]** measures data related to the angle of that particular joint and relays this data to the host computer in response to a signal sent from the base of the arm. (See id., at 95.)

Claim 1 of the '617 patent claims:

> [A] Scanning apparatus for scanning an object to generate three-dimensional data, comprising:
> a scanner mounted on a multiply-jointed arm for movement by an operator to scan the object to capture data from a plurality of points on the surface of the object, the scanner comprising:
>> a light source operable to emit light onto the object surface; and

> a light detector operable to detect light reflected from the object surface by recording reflected light at recording times defined by a synchronization signal;
>
> a position calculator for calculating the position of the multiply-jointed arm, and outputting position data defining the position in response to a trigger pulse;
>
> a trigger pulse generator for receiving the synchronization signal for the light detector defining the recording times thereof, and, in response thereto, generating and outputting trigger pulses to the position calculator to cause the position calculator to output position data for each of at least some of the recordings by **[**38]** the light detector; and
>
> a three dimensional data generator for receiving recorded data output by the light detector and associated position data output from the position calculator, and for processing the data to generate **[*178]** three-dimensional data relating to the object.

'617 patent, col. 29, ll. 34-60 (emphasis added). Of critical importance here is the language emphasized regarding the "position calculator." At claim construction, this Court addressed the proper construction of many of the terms relevant to this particular dispute. However, the proper scope of some of these terms was ultimately agreed upon by the parties. (See Joint Statement of Agreed Upon Claim Terms, Nov. 11, 2009, Doc. 81.) Specifically the parties agreed that a position calculator should be understood as "A device with a program for calculating the position of the multiply-jointed arm, and outputting position data defining the position in response to a trigger pulse." (Id.) Although the claim 1 language regarding the position calculator is not used in every one of the asserted claims, all of the claims at issue use the term "position calculator," and thus incorporate the agreed upon definition of position calculator. **[**39]** See '617 patent, col. 30, l. 7 (claim 2); col. 31, l. 7 (claim 4). The parties further agreed that the term "position data" refers to "data defining positions relating to a multiply-jointed arm." (Id.)

There is no dispute that the accused products do not include a separate device that acts as an intermediary between the arm's joints and the host computer, but Metris asserts that a reasonable fact-finder could find that the network of encoders, or Digital Signal Processors (DSPs), associated with each arm joint constitute a position calculator under the claim language of the '617 patent as agreed upon by the parties. Such a finding would require a fact-finder to arrive at a number of conclusions: 1) that a position calculator can be constituted by a network of devices existing within the arm; 2) that the DSPs are a device with a program for calculating the position of the arm; 3) that the DSPs receive trigger pulses; and 4) that in response to these trigger pulses the DSPs output position data. The Court finds that even if Metris can raise genuine issues of material fact with regard to some of these conclusions, no reasonable factfinder could find that the DSPs are a "device with a program **[**40]** for calculating the position of the arm."

1. Literal Infringement.

Although the precise mechanism of the DSPs in the accused product is opaque, according to Dr. Hager, Metris's expert, the DSPs are signaled by software to "calculate (among other calculations) the rotation count [of a particular joint], which is a measure of the joint's rotation angle." (Pl.'s Ex. A. ("Hager Rep."), at ¶ 63.)) In general, this "calculation" occurs when a light source is projected through disks attached to a body that rotates around an axis. The disks are made up of some transparent and some opaque bands, and the rotation of the body can be determined by measuring the light as it projects through the disks. (Id.)

Faro briefly challenges that the DSPs are "a device with a program" but does not provide any evidence to refute Dr. Hager's account. (Reply Br., Doc. 233, at 9.) Furthermore, the fact that Faro describes the devices as "digital signal processors," belies this fleeting suggestion. Without anything more, the Court is unwilling to conclude that a reasonable fact-finder could not find that the DSPs include a "program."

But Metris must do more than establish that the position calculator is a device with **[**41]** a program. It must also prove that the DSPs are, under the definition agreed to by the parties, "for calculating the position of the multiply-jointed arm." Based on the undisputed language, I find that the **[*179]** DSPs do not literally infringe this language.

The claim term "position of the arm" plainly refers to the end-point of the arm, where the scanner is attached. As discussed above, this is the only position on the arm that matters for the purpose of the invention. Cf. *Minn. Min. & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559, 1567 (Fed. Cir. 1992)* (interpreting otherwise arguably indefinite term such that it was consistent with the purpose of the invention). Further, this construction is supported by the juxtaposition of the language "position of the arm" with "position data." In contrast to the pluralized term "position data," which the parties have construed broadly, the term "position of the arm" refers to a single piece of information; again, given the way that image and position data are paired, the single most important piece of information regarding the arm is the position of the end-point of the arm. If the purpose of the position calculator were merely the **[**42]** calculation of various pieces of data related to the position of the arm, the claim language would have used the term "position data" in the first clause of the definition of position calculator just as it did in the second clause when describing what the position calculator outputs.

But the DSPs do not calculate the position of the arm. The DSPs transmit raw rotation counts that must be combined with other information, including the temperature of the arm, in order to determine the angle of the rotation of the joints. Although Faro disputes that this raw-count data can constitute "position data" under the second clause of the definition of position calculator, the Court need not reach this question because, even if the raw-count data is understood as angular data "related to the position of the arm," it does not amount to "the position of the arm," as the first clause of the definition requires. Therefore, the DSPs cannot serve as the position calculator in determining whether the accused product literally infringes the '617 patent.

Metris cannot avoid this conclusion by arguing that the position calculator is within the host computer, which in the accused product also serves as the **[**43]** three-dimensional data generator. (See Hager Rep., at 78 ("The COG data. . . is combined in a buffer with the position data returned by the mid-DSPs. . .and is sent to the host computer for further processing. . . ."). First, though there is no language in the claims that requires that the position calculator be a separate device from the multiply-jointed arm, there is language that suggests that the position calculator must be a separate device from the three-dimensional data generator. Most importantly, the definition of position calculator states that the position calculator "output[s]" position data in response to a trigger pulse and the claim language specifies that the three-dimensional data generator "receiv[es] recorded data output by the light detector and associated position data output from the position calculator."

Second, the definition of position calculator requires that the position calculator output position data in response to a trigger pulse. Because there is no dispute that the host computer in the accused device does not receive a trigger pulse, the accused device cannot literally infringe the '617 patent. (See Hager Rep., at ¶¶ 60-61.)

2. Doctrine of Equivalents

HN16[] Under **[**44]** the doctrine of equivalents, an accused device or process infringes a patent if it contains "elements. . . equivalent to each claimed element of the patented invention." *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem., 520 U.S. 17, 40, 117 S. Ct. 1040, 137 L. Ed. 2d 146* ***[*180]*** *(1997)*. "Infringement may be found under the doctrine of equivalents if every limitation of the asserted claim, or its 'equivalent,' is found in the accused subject matter, where an 'equivalent' differs from the claimed limitation only insubstantially." *Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp., 149 F.3d 1309, 1315 (Fed. Cir. 1998)*. In addressing this question a fact-finder is not bound by any particular linguistic formulation of what makes any single element equivalent to another, but "special vigilance [must be paid to ensure] against allowing the concept of equivalence to eliminate completely any such elements. . . ." *Warner-Jenkinson, 520 U.S. at 40*.

This final principle, known as ***HN17***[] the all-elements rule or the all-limitations rule, is the judicial counterweight to the doctrine of equivalents. See *Ethicon, 149 F.3d at 1317* (observing that the rule is better understood as applying to claim "limitation" as opposed to "elements" because it is the **[**45]** "limitation of a claim that counts in determining both validity and infringement." (internal quotation marks and citation omitted)). "[T]he 'all elements' rule forecloses resort to the doctrine of equivalents [when] on the facts or theories presented in a case, a limitation would be read completely out of the claim - i.e., the limitation would be effectively removed or 'vitiated.'" Dupey Spine, Inc. v. Medtronic Sofamor Danek, Inc., 469 F.3d 1005, 1017 (Fed. Cir. 2006). Although there is considerable difficulty in applying the doctrine, the Supreme Court has provided the following guidance: "Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole." Warner-Jenkinson, 520 U.S. at 29. Whereas generally the question of equivalence is a question of fact, the application of the all-elements rule is a question of law for the court. See Cordis Corp. v. Boston Scientific Corp., 561 F.3d 1319, 1330 (Fed. Cir. 2009).

The Court concludes that application of the doctrine of equivalents as a basis for finding that the accused **[**46]** device infringes the '617 patent would vitiate the limitation in the definition of position calculator that the calculation of position occur in the position calculator, separate from the three-dimensional data generator. As a corollary of this holding, I also find that no reasonable fact-finder could conclude that the difference between performing the position calculation in the position calculator versus performing it in the host computer, which also holds the three-dimensional image processor, is insubstantial. See Nystrom v. Trex. Co., Inc., 580 F.3d 1281, 1286-87 (Fed. Cir. 2009) (Rader, J. concurring) (noting that the "vitiation doctrine is really subsumed within the test for equivalents itself" in that "a finding of insubstantial difference. . .obviates any further vitiation analysis," whereas, "a finding of substantial difference renders vitiation unnecessary," and further observing that despite this overlap, the doctrines differ in that vitiation addressed by a judge whereas equivalence is addressed by a jury).

In Dolly, Inc. v. Spalding & Evenflo Co., Inc., 16 F.3d 394 (Fed. Cir. 1994), the Federal Circuit explained that **HN18**[] "the doctrine of equivalents does not require a one-to-one **[**47]** correspondence between components of the accused device and the claimed invention." Id. at 398 (citing Intel Corp. v. Int'l Trade Comm'n, 946 F.2d 821, 832 (Fed. Cir. 1991)). "An accused device may infringe under the doctrine of equivalents even though a combination of its components performs a function performed **[*181]** by a single element in the patented invention. . . [as long as it] contain[s] every limitation of its equivalent." Id. Similarly, "[e]quivalency can also exist when separate claim limitations are combined into a single component of the accused device." Id.

At first blush, the accused product may appear to fall in the first category. Although the position calculator (or the DSPs) does not calculate the position of the arm, a reasonable fact-finder could conclude that this function is performed within the host computer, which also serves as the three-dimensional image processor.[3] Because the DSPs output position data in response to a trigger pulse coordinated with image collection, the three-dimensional image processor is still able to combine position information with correlating image data. The only difference is that in the accused device the conversion of position data into **[**48]** the position of the arm occurs within the three-dimensional image processor, as opposed to the position calculator.

But, because of the explicit claim language, the doctrine of equivalents is inapplicable. The definition of the term "position calculator," by specifying that the position calculator outputs position data to the three-dimensional image calculator,[4] requires that the calculating of the position of the arm be performed in a separate component from the three-dimensional image processor. In short, the definition of position calculator includes not only a functional but also a structural limitation. See Dolly, 16 F.3d at 398 (finding that the fact that the accused product performed a

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[3] It is not entirely clear whether the calculation of the position and orientation of the arm in the accused device is a discrete computational step, separate from the combination of position data and image data. Even assuming that the host computer actually "calculates" the position of the arm, however, Metris' infringement claim still fails.

[4] This requirement is expressed in the definition of "position calculator," which describes that the component is for "calculating the position of the multiply-jointed arm, and outputting position data defining the position in response to a trigger pulse" and the claim language specifying that the three-dimensional image generator is for "receiving. . . position data output from the position calculator." See, e.g., '617 patent, col. 29, ll. 58-59.

function relying on components that the patent expressly stated could not perform the function prevented a finding of infringement by equivalents). As such, **[**49]** Metris's reading would vitiate this claim limitation.

Metris at times also argues that the accused product may infringe by equivalents because, even if its position calculator does not calculate the position of the arm, it records data that can very easily be transformed into the position of the arm. This argument also fails to take into account the express limitations inherent in the definition of position calculator. The dictionary definition of the verb calculate is "to determine or ascertain by mathematical methods." Random House Webster's College Dictionary 193 (1992). Neither this definition, nor the common understanding of the term, requires that the calculation be difficult. In fact, the mathematical computation required to transform **[**50]** angular data into position data is exactly the kind of problem that would normally be performed on a "calculator." Finding that the raw-count data is so easily transformable into the position of the arm that the accused product infringes by equivalents reads out the limitation that the position calculator must be the component that performs this calculation.

Moreover, the position calculator in the '617 patent performs a critical function in **[*182]** that it serves as an intermediary between the arm and the three-dimensional image processor and is for calculating the position of the arm. As Dr. Hager opines, this "calculation" may be easily performed based solely on angular measurements, but the calculation must also be performed in real-time as the arm is manipulated around an object. The position calculator, thus, performs an important function, and any device that does not rely on the position calculator to perform this function is substantially different from the protected invention.

B. '264 patent

Faro's argument that the accused product does not infringe the '264 patent revolves around the purported absence of a data processor within the housing of the scanner. Claim 1 of the '264 patent **[**51]** reads as follows:

> A scanning apparatus, comprising:
> a multiply-jointed arm having a plurality of arm segments and a data communication link to transmit data; and
>
> a scanner mounted on an arm segment of the multiply-jointed arm for movement therewith to capture data from a plurality of points on a surface of an object, <u>the scanner having a housing</u> enclosing:
>
>> (a) a light source operable to emit light onto the object surface;
>> (b) a light detector operable to detect light reflected from the object surface and to generate electrical image data signals in dependence upon the detected light; and
>> (c) a data processor operable to process the electrical image data signals to generate processed data of reduced quantity, the data processor being connected to the data communication link to transmit the processed data therealong.

Of importance to this dispute is the data processor within the scanner housing. The parties have agreed that "data processor operable to process the electrical image data signals to generate processed data of reduced quantity" should be construed as "a device with a program which performs computations to modify manipulate, or transform electrical image data signals to generate **[**52]** processed data of reduced quantity."

Metris argues that a DSP within the scanner housing of the accused product falls within this element of the claim. This DSP uses special software algorithms to compute each frame of image data in order to determine the precise location of the measured object with sub-pixel accuracy. (MacFarlane Dep., at ¶ 29.) It performs this function through a method known as the center of gravity technique. This technique measures the "weighted average" of the laser stripe that is projected onto an object and reflected back to a scanner. (Kurfess Rep., 106.) The scanner head on the accused Faro device initially captures more pixels of data than the apparatus needs to determine the location of the object's surface. The DSP, through use of the center of gravity technique, is able to winnow this data down to what is necessary to determine the location of the object. It then transmits this data to the host computer where it is combined with data related to the position of the arm in order to produce a three-dimensional image of the scanned object. By reducing the data that the scanner head transmits, Faro is able to speed up the operations of the apparatus. (<u>See</u> MacFarlane **[**53]** Dep., 101:14-18.)

Faro does not dispute that the DSP is within the scanner housing or that it reduces the quantity of the data that the scanner initially captures. Instead, Faro **[*183]** argues that because the data synthesized by the DSP is not three-dimensional image data, but rather, is one-dimensional pixel data, it is not "electrical image data" within the language of the claim. In the accused product, the synthesis of three-dimensional data occurs when the center of gravity is combined with arm position data within the three-dimensional data processor on the host computer. Because this function occurs outside of the scanner housing, Faro argues that the accused product does not have a data processor within the scanner housing, as the patent requires.

But the plain language of the claim does not specify that "electrical image data signals" refers only to three-dimensional image data. In fact, on one reading, claim one appears to presume that the three-dimensional data manipulation will occur outside of the scanner housing. Both parties agree that in order to render three-dimensional data, the apparatus must combine laser image data with information regarding the position of the arm. In claim **[**54]** one of the '264 patent, however, there is no limitation that arm position data must be run into the scanner head. Instead, the "therealong" language indicates that image data will be passed via the data communication link outside of the scanner head and into the arm. Under this account, electrical image data cannot possibly refer only to three-dimensional image data, because the device will not generate three-dimensional image data until the initial data captured by the laser line scanner is combined with data regarding the position of the arm.

Faro's argument that the data manipulated by the DSP within the scanner housing is not "electrical image data" is based mainly on the '264 patent specification's reference to the possibility of moving the host computer into the scanner housing: "As computing power becomes faster and more compact, it will be possible to encapsulate the computer. . . in the probe. . . as well as having the display. . .mounted on the probe. The probe might have memory. . . which could be both dynamic memory and magnetic memory, such as a CD-ROM or digital video disk." '264 patent, col. 20, ll. 32-37. The quoted language indeed seems to envision the possibility of **[**55]** performing the full three-dimensional image synthesis in the scanner head. However, the specification does not overwhelm the language of the claim, which, interpreted according to its ordinary meaning, refers to "electrical data image signals" processed by the processor in the head, a term which could include one- or two-dimensional data initially captured by the scanner head. See *Johnson Worldwide Assocs., Inc. v. Zebco Corp., 175 F.3d 985, 989-90 (Fed. Cir. 1999)* (***HN19***[] "[C]laim terms cannot be narrowed by reference to the written description or prosecution history unless the language of the claims invites reference to those sources.").

ORDER

The Court vacates its May 4, 2011 decision holding the '617 patent unenforceable for inequitable conduct (Doc. 309). It **ALLOWS** Metris' motion for summary judgment with regard to Faro's unfair competition and antitrust claims on the '264 patent and '617 patent (Doc. 246), and it **DENIES** Faro's motion for summary judgment of non-infringement on the '264 patent but **ALLOWS** the motion for summary judgment of non-infringement with regard to the '617 patent (Doc. 145).

/s/ PATTI B. SARIS

PATTI B. SARIS

United States District Judge

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EMC Nat'l Life Co. v. Employee Benefits Sys.

United States District Court for the Southern District of Iowa, Central Division

September 26, 2011, Decided; September 26, 2011, Filed

No. 4:10-cv-00143 - JEG

Reporter
827 F. Supp. 2d 979 *; 2011 U.S. Dist. LEXIS 140552 **

EMC NATIONAL LIFE COMPANY, Plaintiff, vs. EMPLOYEE BENEFITS SYSTEMS, INC., and WILLIAM B. LOWETH, Defendants;EMPLOYEE BENEFITS SYSTEMS, INC., Counterclaim Plaintiff vs. EMC NATIONAL LIFE COMPANY, Counterclaim Defendant.

Prior History: *Emc Nat'l Life Co. v. Employee Ben. Sys., 2011 U.S. Dist. LEXIS 169683 (S.D. Iowa, Mar. 15, 2011)*

Core Terms

damages, treble damages, funds, actual damage, Deferred, parties, counterclaim, calculated, diverted, retirement account, contributions, restitution, mitigate, recouped, trebling

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

The interpretation of a statute is a question of law for the court.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

HN2[] **Racketeer Influenced & Corrupt Organizations, Remedies**

18 U.S.C.S. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act provides that any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962* may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains.

Governments > Legislation > Interpretation

HN3[] **Legislation, Interpretation**

As with any question of statutory interpretation, the court's analysis begins with the plain language of the statute.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

HN4[] **Racketeer Influenced & Corrupt Organizations, Remedies**

In the first clause of *18 U.S.C.S. § 1964(c)*, Congress extends to individuals injured due to a violation of the criminal Racketeer Influenced and Corrupt Organizations Act (RICO) statute the ability to allege civil RICO violations in federal court. However, because "damages" is modified by "he sustains," Congress' authorization for treble damages is dependent on the establishment of a defendant's RICO liability first, and the trebling is based on the damages caused by the injury proven for liability. In other words, the statute authorizes courts to treble actual damages, which are defined as an amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

HN5[] **Racketeer Influenced & Corrupt Organizations, Remedies**

Determining actual damages for an injury caused by a Racketeer Influenced and Corrupt Organizations Act (RICO) violation does take into consideration restitution and mitigation. Civil RICO is a statutory tort remedy-simply one with particularly drastic remedies. It follows then, that limitations on damages suggested by tort law would also apply to civil RICO.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

HN6[] **Racketeer Influenced & Corrupt Organizations, Remedies**

Recouped losses should be considered in Racketeer Influenced and Corrupt Organizations Act cases.

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For EMC National Life Company, Counter Defendant: Todd A Strother, LEAD ATTORNEY, Bradley M Beaman, Denny M Dennis, BRADSHAW FOWLER PROCTOR & FAIRGRAVE, DES MOINES, IA.

Judges: JAMES E. GRITZNER, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES E. GRITZNER

Opinion

[*980] ORDER

This matter comes before the Court on a Motion for Determination of a Law Point (ECF No. 60) filed **[**2]** by Defendant/Counterclaim Plaintiff Employee Benefits Systems, Inc. (EBS). Plaintiff/Counterclaim Defendant EMC National Life Company (EMCNL)[1] does not resist the determination of the law point at issue in EBS's motion but argues for a contrary result. The Court held a hearing on the motion on August 2, 2011. Todd Strother represented EMCNL, and Arnold Anderson Vickery represented EBS. For the reasons stated below, the Court does not find the matter fully submitted and ready for ruling. However, to illustrate the remaining issue, the Court finds it appropriate to provide **[*981]** some discussion both of the factual background and the legal issues.

I. FACTUAL AND PROCEDURAL BACKGROUND

EBS works with insurance agents, providers, and underwriters to package various types of coverage to sell to union workers. Defendant William B. Loweth (Loweth) managed EBS full time and was paid a salary, bonus, and benefits. Beginning in 1999, Loweth entered into a series of agreements with EMCNL, purporting to outline and **[**3]** govern the relationship between EMCNL, EBS, and Loweth. EBS adopted resolutions to enter into an agent contract with EMCNL and that Loweth, as President of EBS, was authorized to enter into contracts with EMCNL.

Loweth entered into an "Agent's Deferred Income Agreement" (the Deferred Income Agreement) that identified as EMCNL and EBS/Loweth as the contracting parties and identified Loweth as the beneficiary of the agreement and as an employee of EBS/Loweth. Under the Deferred Income Agreement, EMCNL made contributions to Loweth's retirement account. Between 2001 and 2007, under the Deferred Income Agreement, EMCNL yearly transferred money into an account for the personal benefit of Loweth, totaling $760,814.40. Loweth also entered into a "Supplemental Bonus Plan Agreement" (the Bonus Agreements) with EMCNL. Under the Bonus Agreements, in 2006 and 2007, EMCNL paid Loweth $52,241.20 in bonuses based on his sales.

In 2009, after meeting with EBS about the bonuses and retirement account funds, Loweth paid EMCNL $144,000.00 in cash and assigned EMCNL all of the monies in his retirement account. Pursuant to Loweth's assignment, EMCNL issued a check to EBS for $572,019.17.

EBS and EMCNL both **[**4]** filed lawsuits in different U.S. District Courts. EBS's lawsuit included a claim against EMCNL and Loweth for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-1968*. After the lawsuits were consolidated before this Court, EMCNL moved to dismiss EBS's RICO claim.

On March 15, 2011, in response to EMCNL's motions to dismiss, the Court entered an order that addressed the issue of damages in its RICO standing discussion as follows:

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[1] EMCNL is a successor entity to National Traveler's Life Insurance Company, which entered into some of the agreements at issue in this case. "EMCNL" refers to both entities without distinction.

> EMCNL next asserts that any damages to EBS have been remedied or mitigated, thus obviating any injury to EBS's business or property. EBS counters that it has only been partially reimbursed for the allegedly improper diversion of funds.
>
> The counterclaim states that EMCNL diverted $614,681.13 into a deferred compensation fund and additionally made $146,133.67 worth of matching contributions to that fund. The counterclaim also states that Loweth has paid EBS $144,000.00 and assigned EBS the monies held in the deferred compensation account, from which EMCNL has paid EBS $572,000.00. EMCNL asserts that the matching contributions should not be part of the damages calculation; consequently, the cash reimbursement amounts that **[**5]** EBS has received (collectively, $716,000.00) are greater than the total amount of the claimed injury ($614,681.13, or $666,922.42 when including bonuses paid to Loweth), and therefore no injury remains. EBS contends that the matching contributions were part of the diverted funds and hence it has only received partial restitution.
>
> Because the counterclaim asserts that the payments were wrongfully diverted from EBS to Loweth's deferred compensation account, EBS suffered a loss. See Gallagher [v. Magner], 619 F.3d [823,] 841-42 **[*982]** [8th Cir. 2010]. However, it is difficult to determine from the counterclaim the amount of the actual loss to EBS since part of the diverted funds were matching contributions to a personal retirement account, and EBS has received some reimbursement from Loweth and EMCNL.
>
> . . .
>
> [A]ccepting as true EBS's factual allegations that EMCNL knew that funds paid into Loweth's retirement account were really EBS funds, the diverted funds totaled $760,814.40 and EBS has only received $716,000.00 of those funds. See [*Brown v. Medtronic, Inc., 628 F.3d 451, 461 (8th Cir. 2010)]*. Thus, EBS has asserted facts showing that it has plausibly suffered a concrete financial loss sufficient **[**6]** to confer statutory RICO standing on EBS at this point in the litigation. See *Bowman, 985 F.2d at 384*.

March 15, 2011, Order, 9-10, ECF No. 46. Central to the current matter, therefore, is the Court's prior determination *only* that EBS has stated a claim for relief that survives a motion to dismiss. The question remains unresolved whether EBS will be able to ultimately prove any amount of damages. The parties have not stipulated that there are damages in some amount. Thus, the Court is being asked to make a determination that may never be required.

In the instant motion for determination of a law point, EBS requests that before the parties commit significant resources and time to discovery, the Court rule on the following issue: "In calculating damages under RICO, would [EMCNL] get a credit for the monies that EBS recouped from [Loweth] and EMCNL *before* or *after* trebling?" EBS's Mot. for Determination of a Law Point ¶¶ 1, 3, ECF No. 60.

II. DISCUSSION

The Court is asked to decide whether, in this case, civil RICO treble damages would be calculated on the total amount of funds allegedly diverted by Loweth and EMCNL from EBS or on the amount of funds allegedly owed to EBS after accounting **[**7]** for the monies Loweth and EMCNL paid before the filing of this lawsuit. ***HN1***[] The interpretation of a statute is a question of law for the Court. See *Kaufmann v. Siemens Med. Solutions USA, Inc., 638 F.3d 840, 846 (8th Cir. 2011)*. This is an issue of first impression in this Circuit. Even more importantly, as it addresses the Court's jurisdiction, it would seem to raise issues of ripeness and the specter of an advisory opinion that the Court would be required to reject. *U.S. Const. art. III, § 2, cl. 1*; and see, e.g., *Pub. Water Supply Dist. No. 8 of Clay Cnty. v. City of Kearney, Mo., 401 F.3d 930, 932 (8th Cir. 2005)*.

HN2[] Title *18 United States Code Section 1964(c)* of the RICO Act provides that "[a]ny person injured in his business or property by reason of a violation of *section 1962* may sue therefore in any appropriate United States district court and shall recover threefold the *damages he sustains* . . . ." (emphasis added).

The question before the Court turns on the meaning and breadth of "the damages he sustains" in *§ 1964(c)*. ***HN3***[] "As with any question of statutory interpretation, [the Court's] analysis begins with the plain language of the statute." United States v. Jeanpierre, 636 F.3d 416, 425 (8th Cir. 2011) **[**8]** (quoting Jimenez v. Quarterman, 555 U.S. 113, 118, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009)). RICO does not define damages; however, damages is a commonly understood term of art meaning the monetary relief awarded in the judicial system. See Black's Law Dictionary 445 (9th ed. 2009) (defining damages as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury"); Webster's Third New International **[*983]** Dictionary 571 (Unabridged 2002) (defining damages as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right"); cf. Morissette v. United States, 342 U.S. 246, 263, 72 S. Ct. 240, 96 L. Ed. 288 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."); Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., Inc., 842 F.2d 977, 985 (8th Cir. 1988) (en banc) (noting that outside the insurance context "damages" can include **[**9]** both legal and equitable monetary relief). ***HN4***[] In the first clause of § 1964(c), Congress extends to individuals injured due to a violation of the criminal RICO statute the ability to *allege* civil RICO violations in federal court. However, because "damages" is modified by "he sustains," Congress' authorization for treble damages is dependent on the establishment of a defendant's RICO liability first, and the trebling is based on the damages caused by the injury proven for liability. In other words, the statute authorizes courts to treble actual damages,[2] which are defined as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses."[3] Black's Law Dictionary 445 (9th ed. 2009).

HN5[] Determining actual damages for an injury caused by a RICO violation does take into consideration restitution and mitigation. See Bieter v. Blomquist, 987 F.2d 1319, 1329 (8th Cir. 1993) ("Other courts have recognized **[**10]** that civil RICO is 'a statutory tort remedy-simply one with particularly drastic remedies.' It follows then, that limitations on damages suggested by tort law would also apply to civil RICO." (citing Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988), overruled on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996))). In Bieter, the court acknowledged that the plaintiff was injured and concluded that defendant's argument that the plaintiff had no cognizable injury under RICO should be made to a jury under the rubric that the plaintiff failed to mitigate its damages. Id. The court held that a jury would be expected to consider the plaintiff's failure to mitigate. Id. Likewise, here the Court has concluded that EBS has asserted facts sufficient to maintain its RICO claim to this point in the litigation. However, like in Bieter, at this point in the litigation the Court is unable to determine any amount of actual damages.

EBS argues, however, that the weight of authority coupled with the rationale and policy behind RICO militate in favor of a holding that restitution and mitigation are not factored into the amount used to calculate treble damages.

EBS relies mainly **[**11]** on Commonwealth of Pennsylvania v. Cianfrani, 600 F. Supp. 1364, 1365 (E.D. Pa. 1985), in which a member of the state senate placed two people on the commonwealth's payroll, although they never did any work for the commonwealth. After the senator pled guilty to charges of mail fraud and RICO violations, **[*984]** the commonwealth received an assignment of the senator's retirement funds and recouped the total amount of payments made to the "ghost" employees. Id. at 1366. The commonwealth then filed a civil RICO action, seeking only RICO treble damages. Id. at 1365. The senator contended that the commonwealth was not entitled to RICO treble damages because it "had set off the amount by which it was damaged before it instituted this suit." Id. at 1367. The Cianfrani court rejected the senator's argument, stating the senator's "interpretation would enable any person guilty of violating § 1962 to avoid imposition of treble damages by the simple device of making restitution before the injured person brings suit." Id. "To adopt such a restrictive reading of § 1964(c) would contravene Congress' mandate that the RICO statute be construed liberally to effectuate its remedial purposes." Id. The court found **[**12]** analogous precedent in ***antitrust law*** that would not allow courts to "deduct from the amount of an unlawful overcharge any part of the injury which the victim had recouped." Id. Thus, Cianfrani stands

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[2] See the Court's March 15, 2011, Order, ECF 46, at 8-9.

[3] Black's Law Dictionary 449 (9th ed. 2009) defines treble damages as "[d]amages that, by statute, are three times the amount of *actual damages* that the fact-finder determines is owed" (emphasis added).

for the proposition that a person adjudged guilty of a RICO violation should not be able to avoid civil RICO treble damages even if the victim has recouped its losses. *Cianfrani* is distinguishable, however, in that the parties in this case seek to know if RICO treble damages are available when there has been no finding or admission of guilt.[4] Moreover, the holding in Cianfrani is contrary to the direction in *Bieter* that ***HN6***[] recouped losses should be considered in RICO cases.

EBS also relies on *Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir, 1957)*, in which the court held that an antitrust conspirator who had been found guilty could not deduct $20,000.00 in restitution paid by a co-conspirator from the jury's $150,000.00 actual damages award for purposes of calculating **[**13]** treble damages. The Flintkote court's conclusion was based on "firmly rooted principles of joint liability and the manifest objectives of antitrust laws in general and the treble damage provision in particular." *Id. at 397*. *Flintkote* addresses a distinct situation from that at issue here because in this case there is as of yet no liability, no fixed jury award for actual damages, and no joint and several liability for joint tortfeasors. The Court must again revisit the statutory authorization that applies treble damages at the point liability and some amount of damages have been determined to be "by him sustained." *15 U.S.C. § 15*.

Inherent in the cases on which EBS relies that considered joint tortfeasor settlements or setoffs is the existence of some amount of actual damages. In *Morley v. Cohen, 888 F.2d 1006, 1012-13 (4th Cir. 1989)*, the court determined that treble damages should be calculated on the amount the jury found in damages. *Id. at 1013* (citing *In re Nat'l Mortg. Equity Corp. Mortg. Pool, 636 F. Supp. 1138, 1151-52 (C.D. Cal. 1986)* (holding that settlement payments are credited against actual damages after trebling); *Cianfrani, 600 F. Supp. at 1368*). Likewise, in *Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1310 (7th Cir. 1987)*, **[**14]** wherein a defendant tried to return propane cylinders after trial as a set-off, the court held that such a set-off should only be deducted from the jury's actual damages award after trebling.

III. CONCLUSION

The Court certainly recognizes the practical utility of the determination the parties seek at this stage in the litigation. **[*985]** That practical benefit seems to collide, however, with the Court's jurisdictional limitations. The Court has attempted to work through the issue but finds the process risks moving from a judicial role to an advocacy role, which the Court must avoid. The Court will not proceed to make the determination sought by the parties absent clear and convincing authority establishing that the Court has jurisdiction to answer the treble damages question *before* a RICO liability finding has been conceded or found by the Court. Accordingly, the Court directs the parties to file supplemental briefs solely on the issue of whether the current motion is ripe for consideration or would necessarily involve an advisory opinion of the Court. Simultaneous briefs shall be filed on October 24, 2011.

IT IS SO ORDERED.

Dated this 26th day of September, 2011.

/s/ James E. Gritzner

JAMES E. GRITZNER **[**15]** , JUDGE

UNITED STATES DISTRICT COURT

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[4] In addition, when confronted by EBS, Loweth assigned the money to EBS and EMCNL paid EBS, whereas in Cianfrani it appears that the commonwealth had no cooperation from the perpetrator in recouping its losses. *Id. at 1366-67*.

In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

September 26, 2011, Decided; September 26, 2011, Filed

MDL No. 2002; 08-md-02002

Reporter

821 F. Supp. 2d 709 *; 2011 U.S. Dist. LEXIS 109641 **; 2011-2 Trade Cas. (CCH) P77,659; 2011 WL 4467685

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

Subsequent History: Motion denied by, Without prejudice *In re Processed Egg Prods. Antitrust Litig., 2011 U.S. Dist. LEXIS 119314 (E.D. Pa., Oct. 14, 2011)*

Prior History: *Processed Egg Prods. Antitrust Litig. v. United Egg Producers, 2011 U.S. Dist. LEXIS 133549 (J.P.M.L., May 19, 2011)*

Core Terms

egg, conspiracy, allegations, Certification, export, Entities, producers, guidelines, attended, prices, participated, meetings, Plaintiffs', joined, hens, motion to dismiss, animal, hatch, antitrust, alleged conspiracy, chick, flock, reduction, marketing, Defendants', overarching, domestic, factual allegations, disposal, trade group

LexisNexis® Headnotes

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

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

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

A *Fed. R. Civ. P. 12(b)(6)* motion tests the sufficiency of a complaint. *Fed. R. Civ. P. 8* requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Nonetheless, a plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Specifically, factual allegations must be enough to raise a right to relief above the speculative level. The question is not whether the claimant will ultimately prevail but whether the complaint is sufficient to cross the federal court's threshold.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss, a civil complaint must allege factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. In essence, this is equivalent to the math teacher's admonition to "show your work" to explain the proffered answer. The complaint need allege only enough facts to state a claim of relief that is plausible on its face so as to test whether plaintiffs have nudged their claims across the line from conceivable to plausible. In other words, there needs to be enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality. Certainly, such an assessment of the sufficiency of a complaint is a context-dependent exercise because some claims require more factual explication than others to state a plausible claim for relief.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

The applicable pleading standard to survive a motion to dismiss requires adherence to certain well-recognized parameters. For one, the court must consider only those facts alleged in the complaint and accept all of the allegations as true. Concomitantly, the court must also accept as true all reasonable inferences that may be drawn from the allegations and view those facts and inferences in the light most favorable to the non-moving party. Nonetheless, the court need not accept as true unsupported conclusions and unwarranted inferences or the plaintiff's bald assertions or legal conclusions. Finally, in considering a pleading's sufficiency, a court must consider only the complaint, exhibits attached to the complaint, and matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents.

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

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

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

HN4[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under *§ 1* of the Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. In order to sufficiently plead a Sherman Act *§ 1* claim in the Third Circuit, two essential requirements must be satisfied. First, the plaintiff must show that the defendant was a party to a contract, combination or conspiracy, and second, that the conspiracy to which the defendant was party imposed an unreasonable restraint on trade. Ultimately, under the conventional Third Circuit case law, a plaintiff seeking to establish a *§ 1* claim must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.

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

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

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

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Considerable focus at the pleadings stage in antitrust suits is directed to the crucial question of whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express, because *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination or conspiracy. The essence of a *§ 1* claim is the existence of an agreement. In Sherman Act litigation, an agreement is sometimes also referred to as a conspiracy or concerted action. To fend off a motion to dismiss, plaintiffs must plead enough factual matter (taken as true) to suggest than an agreement was made. If a plaintiff expects to rely exclusively on direct evidence of conspiracy, its complaint must plead enough fact to raise a reasonable expectation that discovery will reveal this direct evidence of illegality. If the plaintiff alternatively expects to rest on the circumstantial evidence of parallel behavior, the complaint's statement of facts must place the alleged behavior in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

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

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

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

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

Allegations of merely parallel conduct and a bare assertion of conspiracy are insufficient under the requisite pleading standard for a Sherman Act *§ 1*, *15 U.S.C.S. § 1*, complaint because without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Twombly makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if common economic experience, or the facts alleged in the complaint itself, show that independent self-interest is an obvious alternative explanation for defendants' common behavior. However, when a pleading alleges circumstantial facts, the pleading standard does not require consideration of whether the circumstantial evidence is sufficient to compel an inference of conspiracy; instead, the test for whether to dismiss a case at the pleading stage turns on the complaint's plausibility.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

The concept of agreement, implicit or explicit, is central to the inquiry of whether a complaint is sufficient with respect to an individual defendant in an antitrust conspiracy case. In order to address the meat of a motion to dismiss, the key question is whether the complaint sufficiently alleges that the moving defendant joined the alleged agreement, conspiracy, or concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

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

Torts > ... > Multiple Defendants > Concerted Action > General Overview

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

To evaluate the articulated allegations as to an individual defendant in the context of a multi-defendant, multi-faceted conspiracy, the conspiracy must not be compartmentalized. The character and effect of the conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. This maxim has been applied in a variety of contexts, including in consideration of motions to dismiss.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN9[] **Antitrust & Trade Law, Sherman Act**

Antitrust conspiracy allegations need not be detailed on a defendant-by-defendant basis. Individual defendants must have reasonable, not exhaustive, notice of the allegations, and such notice is achieved when the plaintiff states a plausible claim for relief against those defendants.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN10[] **Antitrust & Trade Law, Sherman Act**

To provide reasonable notice to a specific defendant of the antitrust conspiracy claims against it, a complaint must plausibly suggest that the individual defendant actually joined and participated in the conspiracy. The plaintiff must allege that each individual defendant joined the conspiracy and played some role in it. At the same time, plaintiff need not plead each defendant's involvement in the alleged conspiracy in elaborate detail. Likewise, ***antitrust law*** has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN11[] **Antitrust & Trade Law, Sherman Act**

A plaintiff's pleading burden is to offer allegations that plausibly suggest that the defendant agreed to the conspiracy, which, in the antitrust context, is a conscious commitment to a common scheme designed to achieve an unlawful objective. The plaintiff must show that the defendant was a party to a contract, combination or conspiracy; in other words, a unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme. In short, the issue is whether the pleading delineates to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN12[] **Antitrust & Trade Law, Sherman Act**

The court properly looks for more than mere repetitive generic reference to defendants tacked on to a conclusory verb form to connect an individual defendant to an actual agreement in an antitrust conspiracy. Simply using the global term "defendants" to apply to numerous parties without any specific allegations that would tie each particular defendant to the conspiracy is not sufficient. Conclusory, collective language is too convenient, too undisciplined, and too unfocused in light of exposures to litigation expense and disruption (even without ultimate liability) that are so great in antitrust (and other) cases. Such exposure ought to be limited to those who have been made at least reasonably aware of what they have done or failed to do, lest the litigants be left to wander aimlessly through the wilds and wilderness of discovery to no ultimate destination.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN13[] **Antitrust & Trade Law, Sherman Act**

It may be that if demand is inelastic at the current market price, collusion to raise the price will be particularly attractive. And it also may well be that allegations that a market is characterized by economic factors that courts and antitrust experts and economists have found are conducive to collusive behavior, support an inference of plausibility. Nonetheless, under the applicable legal standards, plaintiffs are not absolved from specifically pleading allegations that plausibly suggest each defendant's agreement to or participation in the alleged conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN14[] **Sherman Act, Claims**

Participation in a trade group association or attending trade group meetings, even those meetings where key facets of an antitrust conspiracy allegedly were adopted or advanced, are not enough on their own to give rise to the inference of agreement to the conspiracy. Moreover, a mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because the defendants' presence at such trade meetings is more likely explained by their lawful, free-market behavior.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN15[] Sherman Act, Claims

Given that mere membership in a trade group or attendance at a meeting cannot alone sufficiently plead agreement to a conspiracy, active participation, rather than merely passive presence, becomes key in inferring agreement to the conspiracy and potential liability.

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

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Regulated Practices, Price Fixing & Restraints of Trade

Attendance at industry trade shows and events is presumed legitimate and is not a basis from which to infer a conspiracy, without more. Moreover, even where some competitors have admitted to meeting to fix prices at or near trade shows and conferences, it is not reasonable to infer that another competitor in attendance at the same meeting had done likewise.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN17[] Antitrust & Trade Law, Sherman Act

Whether defendants' actions were benign unilateral business decisions made by the individual defendants or whether they represent concerted effort in violation of the Sherman Act are issues of fact which the court cannot decide on the pleadings and which require discovery prior to resolution.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Inferences

HN18[] Antitrust & Trade Law, Sherman Act

While mere membership, even when coupled with knowledge of wrongful conduct of an association, is insufficient to establish knowing participation in a conspiracy in violation of the Sherman Act, once attendance is coupled with a consistent later act, an inference of knowing participation is permissible.

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

HN19[] Motions to Dismiss, Failure to State Claim

When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

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

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

HN20[] **Motions to Dismiss, Failure to State Claim**

While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.

Antitrust & Trade Law > Sherman Act > Claims

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

HN21[] **Sherman Act, Claims**

Plaintiffs are not obliged to have the same quality or quantity of allegations as to one defendant as unto another. Participation by each conspirator in every detail in the execution of an antitrust conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result.

Antitrust & Trade Law > Sherman Act > Claims

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

HN22[] **Sherman Act, Claims**

So long as plaintiffs plead the requisite contours of a claim against an antitrust defendant, that they require only a few paragraphs or sentences to do so is of no consequence.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

A claim of conspiracy predicated on parallel conduct should be dismissed if the facts alleged in the complaint itself show that independent self-interest is an obvious alternative explanation for defendants' common behavior.

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

HN24[] **Motions to Dismiss, Failure to State Claim**

A district court must consider a complaint in its entirety without isolating each allegation for individualized review.

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

HN25[] **Motions to Dismiss, Failure to State Claim**

Generally, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. In evaluating the adequacy of a pleading, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents.

Evidence > Judicial Notice > General Overview

HN26[] Evidence, Judicial Notice

Without an invocation of *Fed. R. Evid. 201* and a basis for applying it, judicial notice remains discretionary with the trial judge.

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

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN27[] Motions to Dismiss, Failure to State Claim

In circumstances when courts do look beyond a pleading to entire documents that are merely cited in the complaint through isolated statements excerpted from such documents, only those documents that are central to the claim at issue, such as contracts for breach of contract claims or public offering documents containing alleged fraudulent statements in securities misrepresentation suits, are appropriate for that purpose.

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

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN28[] Motions to Dismiss, Failure to State Claim

On a motion to dismiss, the court may take judicial notice of another court's opinion; not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN29[] Sherman Act, Claims

When defendant corporate entities are not plausibly alleged to be directly liable; that is, are not plausibly alleged to have themselves entered into unlawful agreements, there must be some other basis imputing Sherman Act *§ 1*, *15 U.S.C.S. § 1*, liability to those entities. This is because as a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship. Indeed, absent some basis for imputing liability, subsidiary entities cannot automatically sustain liability under *§ 1* for any agreements to which the parent is a party.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN30[] Antitrust & Trade Law, Sherman Act

Parents and subsidiaries cannot conspire for purposes of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. An "agreement" is cognizable under *§ 1* only if it joins together independent centers of decisionmaking.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

Torts > Vicarious Liability > Corporations > General Overview

HN31[] Existence, Distinct & Separate Legal Entity

The mere fact that two corporations have common shareholders, officers or directors, or that their names are similar, does not impose liability on one for the torts of the other or its agents.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN32[] Amendment of Pleadings, Leave of Court

Leave to amend must generally be granted unless equitable considerations render it otherwise unjust.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN33[] Antitrust & Trade Law, Sherman Act

A claim for a Sherman Act *§ 1*, *15 U.S.C.S. § 1*, violation cannot merely rest upon allegations of common resources and membership between incorporated trade groups, much the same as such allegations cannot sustain a *§ 1* claim against corporate entities that have common management. There is nothing inherently illegal or actionable for separately incorporated trade groups to share a mailing address, a president, common leadership, or staff. Likewise, no nefarious conclusions can be drawn necessarily from the fact that meetings are held at the same time in the same town.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Unincorporated Associations

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

HN34[] Antitrust & Trade Law, Sherman Act

A trade association can only be held liable for concerted action under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, if it acted as an entity. Concerted action does not exist every time a trade association member speaks or acts. Therefore, the court will not impute the activities of an organization's members to the organization itself absent allegations that the entity participated in the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Elements

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

Business & Corporate Law > Unincorporated Associations

HN35[] **Antitrust & Trade Law, Sherman Act**

A court cannot automatically impute the conduct of a trade organization's leadership or staff to the trade organization. Certainly, a trade organization can be liable for antitrust violations of its agents premised on a theory of apparent authority. A principal will be liable for an antitrust violation if an agent acting with apparent authority violates the antitrust laws by conspiring with another person. As a corollary, however, plaintiffs must allege facts sufficient to demonstrate the agents were acting with the apparent authority of the trade organization. Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Counsel: [1]** For IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION, IN RE: IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.

For SANDRA A. JESKIE, Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, United States District Judge.

Opinion by: GENE E.K. PRATTER

Opinion

[*712] **MEMORANDUM**

GENE E.K. PRATTER, J.

I. Introduction

This multidistrict litigation concerns an alleged conspiracy by egg producers and trade groups to restrict the domestic supply of eggs in violation of *Section 1 of the Sherman Act*. A half dozen motions to dismiss await resolution. [1] The movants seek to dismiss the claimed antitrust violation asserted against them individually in the

[1] The motions are: Motion to Dismiss Direct Purchaser Second Consolidated Amended Complaint as to Defendant Michael Foods, Inc. (Doc. No. 236) (hereinafter, "Michael Foods Mot."); Defendant Daybreak Foods, Inc.'s Motion to Dismiss Direct Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 233) (hereinafter, "Daybreak Mot."); Motion to Dismiss the Direct Purchasers' Second Consolidated Amended Class Action Complaint on Behalf of Defendant Rose Acre

direct purchaser plaintiffs' Second Consolidated Amended Class Action Complaint (hereinafter, the "SAC") for not meeting the grade. They argue that the SAC is like a curate's egg: although the pleading arguably may have alleged sufficient facts in support of the antitrust conspiracy claim as to some defendants, the **[*713]** pleading is deficient with respect to each of the movants by failing to allege facts that they specifically were parties to the conspiracy. Cracking each motion *ad seriatim*, the Court grants the motions of Hillandale **[**2]** Gettysburg L.P., Hillandale Farms Inc., and Hillandale Farms East, Inc. (collectively, the "Hillandale Entities"), and United Egg Association, and denies the remainder of the motions addressed in this Memorandum. [2]

II. Background

The Plaintiffs are direct purchasers of domestic eggs, [3] who brought suit in a number of jurisdictions, charging that defendant egg producers and trade groups engaged in a conspiracy to manipulate the supply of, and thereby fix prices for, domestically-sold eggs. The Judicial Panel on Multidistrict Litigation centralized the actions for coordinated pretrial proceedings before this Court. At the present stage, the SAC is the operative pleading for the direct purchaser plaintiffs, replacing or superceding all of the previously-filed individual and consolidated complaints. The various named Defendants responded to the SAC by answers or motions to dismiss, or, in some specific respects, both. The six motions at bar have been fully briefed **[**4]** and illuminated by oral argument [4] and the parties' submissions of supplemental authorities they wished to bring to the Court's attention. The Court commends all of the attorneys for their stimulating advocacy.

III. Factual Allegations

Given the complexity of, and level of nuanced detail provided in, the SAC concerning the Defendants' alleged conduct, the industry structure and practices, and market implications, the Court limits the discussion to the SAC's core allegations. [5]

Farms, Inc. (Doc. No. 234) (hereinafter, "Rose Acre Mot."); Defendant Ohio Fresh Eggs, LLC's Renewed Motion to Dismiss the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint (Doc. No. 238) (hereinafter, "Ohio Fresh Mot."); Motion to Dismiss the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint on Behalf of Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. (Doc. No. 240) (hereinafter, "Hillandale Entities Mot."); **[**3]** and United Egg Association's Motion to Dismiss the Claims Against it in Direct Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 232) (hereinafter, "UEA Mot.").

Plaintiffs' responded in opposition to these motions in a memorandum (Doc. No. 316) (hereinafter, "Pls.' Resp."). Defendants also filed reply briefs (hereinafter, "Reply").

[2] Other pending motions in this litigation will be addressed separately in other memoranda.

[3] The direct purchaser plaintiffs are comprised of two subclasses—one subclass consists of entities that directly purchased shell eggs from Defendants and the other subclass consists of entities that directly purchased egg products from Defendants. The SAC defines "shell eggs" as "both 'table eggs' (generally purchased by retail entities for re-sale [sic] to the consuming public) and 'breaking eggs' (generally purchased by food service entities for further processing)." SAC ¶ 2. "Egg products" are defined as "breaking eggs that have been removed from their shells and processed into dried, frozen or liquid forms." *Id.* Although Defendants filed a separate joint motion seeking to dismiss Plaintiffs' claim pertaining to "egg products" (Doc. Nos. 235 and 237), because that motion is still pending, for present purposes the SAC's definition for "eggs" will apply. The dispute over the definition is not germane to the resolution of the motions addressed in this Memorandum.

[4] The transcripts **[**5]** of the oral argument on the motions to dismiss the SAC are contained in the record at Docket Nos. 490 and 424 (hereinafter, respectively, "Day 1 Tr." and "Day 2 Tr.").

[5] The SAC is certainly not vulnerable to any criticism for being too lean or brief. Indeed, in some respects a thorough consideration of these motions demanded something of a hunt through a pleading that could be described as repetitious or organizationally puzzling. However, the Court is not unaware of the good faith concern among the pleadings' drafters that brevity may expose the proponent to heightened risks of dismissal. In any case, the generous inclusion of verbiage added to the Court's concern for careful examination.

Plaintiffs articulate their legal theory as follows:

> Plaintiffs allege herein a conspiracy among Defendants and certain unnamed co-conspirators where they agreed to fix, raise, maintain and/or stabilize the prices at which shell eggs and **[**6]** egg products (collectively, "eggs") were sold in the United States, including by controlling the aggregate supply of domestic **[*714]** eggs. Each Defendant knew that it could not do this by itself and that supply needed to be "restrained" by collective action. Thus, Defendants entered into an overarching agreement to manage the aggregate supply of eggs in the United States. During the Class Period [from January 1, 2000 to present], Defendants implemented this supply management conspiracy by agreeing to take several coordinated actions.

SAC ¶¶ 1, 481. [6]

Specifically, Plaintiffs list eight alleged "collective actions" undertaken by Defendants to advance the purported "overarching conspiracy" to manipulate the supply of eggs thereby affecting the price of eggs. *See id.* ¶¶ 11-18. Those eight actions allegedly enhanced the conspiracy by, in and of themselves, altering the supply and, hence, the price, of eggs.

Plaintiffs claim that the first collective action took place in 1999 and 2000 when Defendants established a "supply adjustment program." Through this program participants agreed to engage **[**8]** in an immediate five-percent flock molt, a five-percent reduction of flock inventory in the ensuing six to twelve months, and the development of a hatch reduction program. *Id.* at ¶¶ 11, 187-89.

The second collective action allegedly involved the Defendants agreeing to a five-percent emergency flock reduction in 2001. *Id.* at ¶¶ 12, 195.

The third action occurred in 2002 when Defendants developed and undertook an early molt and hen disposal plan. *Id.* at ¶¶ 13, 198-200.

The fourth collective action involved Defendants agreeing to adopt guidelines on cage space densities for hens. These guidelines were part of an "animal husbandry" or "animal welfare" program that became known as the "United Egg Producers Certification Program" (hereinafter, the "UEP Certification Program" or the "Program"). *Id.* ¶ 14. By complying with the guidelines, producers could sell "UEP-certified eggs" and affix a logo on packages to reflect that the eggs were certified under the Program. *Id.* ¶¶ 82, 310. The Program figures prominently in the Plaintiffs' claims and is discussed in greater detail below.

The fifth alleged collective action involves the execution of an early molt and flock disposal plan in mid-2004. *Id.* **[**9]** ¶ 15.

For the sixth collective action, Plaintiffs claim that Defendants held an "Egg Industry Economic Summit" to coordinate an immediate supply reduction scheme via a written commitment to reduce supply. *See id.* ¶¶ 16, 288-93. The SAC appears to quote without citation the purported language on this "commitment sheet": "Option **[*715]** #1 To dispose of hens that are currently scheduled for disposal between January 1 and April 30, 2005 four (4)

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[6] A propos of the immediate preceeding footnote, subsequent paragraphs in the 520-paragraph SAC reiterate this theory. *See, e.g., id.* ¶ 10 ("During the Class Period, Defendants agreed to take many joint collective actions as part of the industry's overarching conspiracy that was designed to fix, raise, maintain, and/or stabilize the prices of shell eggs and egg products, including but not limited to significant efforts to manage and/or reduce supply."); *id.* ¶ 182 ("Defendants undertook a coordinated effort to restrict egg supply through various means that has artificially fixed, maintained and/or stabilized egg prices to supracompetitive levels **[**7]** throughout 2000 to the present."); *id.* ¶ 517 (" . . . Defendants and their co-conspirators engaged in a continuing contract, combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of *Section 1 of the Sherman Act*, which had the purpose and effect of fixing, raising, maintaining and/or stabilizing the prices of eggs at artificially high, non-competitive levels in the United States."). Plaintiffs also state in their brief opposing the motions: "the Complaint alleges one comprehensive conspiracy to reduce the supply of eggs implemented through a variety of separate but related components." Pls.' Resp. at 34.

weeks earlier than previously scheduled;" or "Option #2 To reduce their December 1, 2004 flock size by 5% between the dates of January 1 through April 30, 2005." *Id.* ¶ 290; *see also id.* ¶ 293.

As part of the seventh collective action, according to Plaintiffs, Defendants required through the UEP Certification Program "that a company must commit to implementing the welfare guidelines on 100% of all production facilities." *Id.* ¶ 17. Specifically, the requirement was "that 100% of a producer's egg houses . . . be maintained in accordance with the [UEP Certification Program] guidelines in order for a company to sell 'UEP Certified' eggs." *Id.* ¶ 222.

Finally, the alleged eighth action was an export program. Plaintiffs claim that Defendants allegedly agreed to **[**10]** export eggs at a loss in order to lower supply in the United States, and they agreed to reimburse each other to cover those losses. *Id.* ¶¶ 18, 329, 333-34.

As described by Plaintiffs, the Defendants' trade groups, United Egg Producers ("UEP"), United Egg Association ("UEA"), and United States Egg Marketers ("USEM"), who are also named Defendants, were central to this conspiracy. Defendant egg producers' memberships and participation in those trade groups allegedly facilitated the Defendants' "collective actions" that advanced the conspiracy.

Under the Plaintiffs' theory, through their "collective actions" Defendants sought to raise the price of eggs by capitalizing on certain market conditions particular to the domestic egg market. In particular, Plaintiffs charge that Defendants' objective was to take advantage of consumers' relatively inelastic demand for eggs, as well as the fact that eggs are commodities and have no market substitutes. *Id.* at ¶¶ 6, 152-56, 158. Defendants' actions were supposedly prompted by a desire to stabilize the egg market's volatile prices and supply. Prior to Defendants' coordinated actions, supply allegedly was cyclical, depending on the increase or decrease **[**11]** of prices in the egg market. *Id.* at ¶ 7. Recognizing the market volatility and its impact on the industry and producers, Defendants allegedly pursued the coordinated actions to increase egg prices.

According to Plaintiffs, the Defendants' conduct purportedly achieved the desired outcome by decreasing egg production, thereby decreasing the supply of eggs and leading to increased egg prices. Plaintiffs point to various increases in egg prices from 2003 to 2009 and attribute those increases to reduced supply, claiming such a result is the ill-gotten product of the Defendants' conspiratorial conduct. *See, e.g., id.* ¶¶ 162-63, 166-70, 367, 369, 375, 377. Defendants, who were both shell egg and egg products producers, supposedly benefited from the overall reduced supply of eggs. *Id.* ¶ 408. Those Defendants who were egg products producers allegedly benefited by being able to market their egg products at an artificially increased price, even though they purchased shell eggs at inflated prices. *Id.* ¶ 409.

The Defendants, of course, have an entirely different take on the events recounted in the SAC, so much so that many of the Defendants challenge the sufficiency of the allegations in the SAC **[**12]** even while tacitly acquiescing in the continuation of the core of Plaintiffs' claim at least beyond the Rule 12(b)(6) stage.

IV. Legal Standards

A. Motion to Dismiss Standard

As is well acknowledged, ***HN1***[] a Rule 12(b)(6) motion tests the sufficiency of a complaint. **[*716]** *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. *Rule 8 of the Federal Rules of Civil Procedure* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (alteration in original) (quoting *Conley, 355 U.S. at 47*). Nonetheless, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citation omitted). Specifically, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* The question is not whether the claimant will ultimately prevail but whether the complaint is "sufficient to cross the federal court's threshold." *Skinner v. Switzer, 131 S. Ct. 1289, 1296, 179 L. Ed. 2d 233 (2011)* (citation omitted).

HN2[] To survive a motion **[**13]** to dismiss, a civil complaint must allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*; *see also* *Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1323, 179 L. Ed. 2d 398 (2011)*. In essence, this is equivalent to the math teacher's admonition to "show your work" to explain the proffered answer. The complaint need allege "only enough facts to state a claim of relief that is plausible on its face" so as to test whether "plaintiffs . . . have . . . nudged their claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*. In other words, there needs to be "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 319 (3d Cir. 2010)* (alteration in original) (quoting *Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010))*. Certainly, such an assessment of the sufficiency of a complaint is "a context-dependent exercise" because "[s]ome claims require more factual explication than others to state a plausible claim for relief." *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)* **[**14]** (citations omitted).

HN3[] The applicable pleading standard also requires adherence to certain well-recognized parameters. For one, the Court "must consider only those facts alleged in the complaint and accept all of the allegations as true." *ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994)* (citing *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984))*; *see also* *Twombly, 550 U.S. at 589* (stating that courts must assume that "all the allegations in the complaint are true (even if doubtful in fact)"). Concomitantly, the Court must also accept as true all reasonable inferences that may be drawn from the allegations, and view those facts and inferences in the light most favorable to the non-moving party. *Revell v. Port Auth. of N.Y. & N.J., 598 F.3d 128, 134 (3d Cir. 2010)*, *cert. denied*, *131 S. Ct. 995, 178 L. Ed. 2d 825 (2011)*; *Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)*.

Nonetheless, the Court need not accept as true "unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000)* (quoting *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998))*, or the plaintiff's "bald assertions" or "legal conclusions," **[**15]** *Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)*. Finally, in considering a pleading's sufficiency, "a court must consider only the complaint, exhibits attached to the complaint, matters **[*717]** of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010)* (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993))*, *cert. denied*, *131 S. Ct. 1607, 179 L. Ed. 2d 501 (2011)*.

While the foregoing discussion is familiar enough legal terrain—especially for the accomplished advocates involved in this litigation—given what follows in this opinion, it bears recounting the standards against which the pending motions and the SAC must be judged.

B. Application of Pleading Standard to Sherman Act § 1 Claims

HN4[] Under *§ 1* of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The Third Circuit Court of Appeals has held that in order to sufficiently plead a Sherman Act *Section 1* claim "two **[**16]** essential requirements" must be satisfied. *Ins. Brokerage, 618 F.3d at 315*. "First, the plaintiff must show that the defendant was a party to a 'contract, combination . . . or conspiracy,'" and second, "that the conspiracy to which the defendant was party imposed an unreasonable restraint on trade." *Id.* (citations omitted).

Ultimately, under the conventional Third Circuit case law, a plaintiff seeking to establish a *Section 1* claim must prove: "(1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)* (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1229 (3d Cir. 1993)* and *Big Apple BMW, Inc. v. BMW* *of North Am. Inc., 974 F.2d 1358, 1364 (3d Cir. 1992))*; *see also* *Ins. Brokerage, 618 F.3d at 315 n.9* (recognizing that in addition to the "two essential requirements" plaintiffs must also prove two other elements relating to antitrust injury).

HN5[] Considerable focus at the pleadings stage in antitrust suits—and **[**17]** particularly the present suit, given the motions at bar—is directed to the "crucial question" of whether "the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express" because *Section 1* "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination or conspiracy." *Twombly, 550 U.S. at 553* (alterations in original) (internal quotation marks omitted); *see also* *Ins. Brokerage, 618 F.3d at 315* (stating that the "existence of an agreement is the hallmark of a *Section 1* claim"); *Gordon, 423 F.3d at 207* ("The essence of a *Section 1* claim is the existence of an agreement." (citing *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 639 (3d Cir. 1996))*. In Sherman Act litigation, an agreement is "sometimes also referred to as a 'conspiracy' or 'concerted action.'" *W. Penn Allegheny, 627 F.3d at 99* (citing *Twombly, 550 U.S. at 553*; *Gordon, 423 F.3d at 207* & n.16).

To fend off a motion to dismiss, plaintiffs must plead "enough factual matter (taken as true) to suggest than an agreement was made." *Twombly, 550 U.S. at 556*. "[I]f a plaintiff expects to rely exclusively on direct evidence of conspiracy, **[**18]** its complaint must plead 'enough fact to raise a reasonable expectation that discovery will reveal' this direct evidence" of illegality. *Ins. Brokerage, 618 F.3d at 324* (quoting *Twombly, 550 U.S. at 556*). "[I]f the plaintiff alternatively **[*718]** expects to rest on the circumstantial evidence of parallel behavior, the complaint's statement of facts must place the alleged behavior in 'a context that raises a suggestion of a preceeding agreement, not merely parallel conduct that could just as well be independent action.'" *Id.* (quoting *Twombly, 550 U.S. at 557*).

For example, ***HN6***[] allegations of merely parallel conduct and a "bare assertion of conspiracy" would be insufficient under the requisite pleading standard, because "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-57*. [7] "*Twombly* makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if 'common economic experience,' or the facts alleged in the complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common **[**19]** behavior." *Ins. Brokerage, 618 F.3d at 326*. However, when a pleading alleges circumstantial facts, the pleading standard does not require consideration of "whether the circumstantial evidence . . . is sufficient to *compel* an inference of conspiracy; . . . [instead,] the test for whether to dismiss a case at [the pleading] stage turns on the complaint's 'plausibility.'" *Text Messaging, 630 F.3d at 629* (emphasis in original).

HN7[] The concept of agreement, implicit or explicit, is also central to the inquiry of whether a complaint is sufficient with respect to an individual defendant in an antitrust conspiracy case. Here, as is true in many of these cases, in order to address the meat of a motion to dismiss, the key question is whether **[**20]** the SAC sufficiently alleges that the moving defendant joined the alleged agreement, conspiracy, or concerted action.

HN8[] To evaluate the articulated allegations as to an individual defendant in the context of a multi-defendant, multi-faceted conspiracy, the conspiracy must not be "compartmentalized." The "character and effect of [the] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; *see also* *Jung v. Ass'n of American Med. Colls., 300 F. Supp. 2d 119, 160 (D.D.C. 2004)* (recognizing the same and that this "maxim has been applied in a variety of contexts, including in consideration of motions to dismiss"); *In re Pressure Sensitive Labelstock Antitrust Litig., 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008)* ("[A] district court must consider a complaint in its entirety without isolating each allegation for individualized review."); *In re*

[7] The Supreme Court has cited several examples of allegations of parallel conduct that might suggest collusion sufficient to allege a *§ 1* Sherman Act claim. *Twombly, 550 U.S. at 556 n.4*; *see also* *In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010)*, *cert. denied*, ***131 S. Ct. 2165, 179 L. Ed. 2d 937 (2011)***. Given the nature of the conspiracy alleged in the SAC and the substance of the parties' arguments, however, no further discussion of these examples is required.

Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 630-31 (E.D. Pa. 2010) ("Defendants' briefing attempts to dismember plaintiffs' Complaint in order to show how each allegation, in isolation, fails to sufficiently **[**21]** aver plausibility. However, . . . the allegations in the Complaint must be viewed as a whole. . . . *Twombly* emphasized context." (citations omitted)); *cf.* Petruzzi's, 998 F.2d at 1230 ("[A] court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action." (citation **[*719]** omitted)). In this regard, the Court is mindful of the parable of the blind men and the elephant in which a group of blind men try to agree on a description of an elephant solely on the basis of their own, individual limited perception, leading one (having felt only the tail) to assert that an elephant is rope-like, another (having felt only an ear) to declare that an elephant is a living fan, another (having felt only a leg) to describe the beast like a tree, another (having felt only a tusk) declaring an elephant to be a smooth, hard cone and so forth.

Similarly, courts have held that ***HN9***[] antitrust conspiracy allegations need not be detailed on a defendant-by-defendant basis. *See, e.g.,* In re OSB Antitrust Litig., No. 06-826, 2007 U.S. Dist. LEXIS 56573, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007) ("Antitrust conspiracy allegations **[**22]** need not be detailed defendant by defendant."); In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) (acknowledging that a "complaint need not contain detailed 'defendant by defendant' allegations"). Individual defendants must have reasonable, not exhaustive, notice of the allegations, and such notice is achieved when the plaintiff states a plausible claim for relief against those defendants. *See, e.g.,* OSB, 2007 U.S. Dist. LEXIS 56573, 2007 WL 2253419, at *6 (citing In re Elec. Carbon Prods. Antitrust Litig., 333 F. Supp. 2d 303, 313-14 (D.N.J. 2004)); *see generally* Twombly, 550 U.S. at 555 (discussing fair notice of a claim to a defendant).

HN10[] To provide reasonable notice to a specific defendant of the claim(s) against it, a complaint must plausibly suggest that the individual defendant actually joined and participated in the conspiracy. *See* OSB, 2007 U.S. Dist. LEXIS 56573, 2007 WL 2253419, at *5 ("[T]he plaintiff must allege that each individual defendant joined the conspiracy and played some role in it."); Jung, 300 F. Supp. 2d at 161 (recognizing a plaintiff's "burden of adequately alleging that a conspiracy to restrain trade existed in the first instance and that each defendant knowingly joined or agreed **[**23]** to participate in the conspiracy"); Flat Panel, 586 F. Supp. 2d at 1117 (acknowledging that "the complaint 'must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it.'" (quoting Elec. Carbon, 333 F. Supp. 2d at 311-12)); In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008) ("[Plaintiffs] now [at the motion to dismiss stage] only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.").

At the same time, plaintiffs need not "plead each defendant's involvement in the alleged conspiracy in elaborate detail." Flat Panel, 586 F. Supp. 2d at 1117. Likewise, "[a]ntitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy." Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 221 (5th Cir. 2001) (citing *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 212 (3d Cir.1992))*; *see also* Petruzzi's, 998 F.2d at 1243 (recognizing that for an antitrust **[**24]** conspiracy, "defendants need not share the *same* motive. Rather, all that is required is that they each have a motive to conspire").

Instead, ***HN11***[] a plaintiff's pleading burden is to offer allegations that plausibly suggest that the defendant agreed to the conspiracy, which, in the antitrust context, is a conscious commitment to a common scheme designed to achieve an unlawful objective. *See* Ins. Brokerage, 618 F.3d at 315 ("[T]he plaintiff must show that the defendant was a party to a 'contract, combination . . . or conspiracy' . . . . in other words, a 'unity of purpose or a common **[*720]** design and understanding or a meeting of minds' or 'a conscious commitment to a common scheme.'" (citations omitted) (internal quotation marks omitted)); Jung, 300 F. Supp. 2d at 158 (recognizing that "plaintiffs must allege 'that the challenged restraint is not the result of independent actions by the defendants,' but rather that 'the defendants consciously committed to a common agreement of an unreasonable restraint on trade'" **[**25]** (citations omitted)). In short, the issue is whether the pleading delineates to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy.

HN12[] The Court properly looks for more than mere repetitive generic reference to "Defendants" tacked on to a conclusory verb form to connect an individual defendant to an actual agreement in an antitrust conspiracy. "Simply using the global term 'defendants' to apply to numerous parties without any specific allegations that would tie each particular defendant to the conspiracy is not sufficient." *Elec. Carbon, 333 F. Supp. 2d at 312* (internal quotation marks omitted); *see also In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 905 (6th Cir. 2009)*, *cert. denied sub nom.*, *TAM Travel, Inc. v. Am. Airlines, Inc., 131 S.Ct. 896, 178 L. Ed. 2d 746 (2011)* (rejecting plaintiffs' "attempt to implicate" certain defendants who are not "mentioned in the body of the Amended Complaint," and with respect to whom plaintiffs fail to "specify how [they] are involved in the alleged conspiracy," by "relying on several vague allegations contained in the Amended Complaint that refer to 'defendants' or 'defendants' executives'"); *In re Digital Music Antitrust Litig., No. 06 MD 1780, 812 F. Supp. 2d 390, 2011 U.S. Dist. LEXIS 77442, 2011 WL 2848195, at *20 (S.D.N.Y. July 18, 2011)* **[**26]** (recognizing that "generic references to 'defendants'" are "insufficient" in alleging direct involvement of individual defendants in the alleged conspiracy); *Jung, 300 F. Supp. 2d at 163* ("Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties without any specific allegations as to [an individual defendant]." (citing *Invamed, Inc. v. Barr Labs., Inc., 22 F. Supp. 2d 210, 221 (S.D.N.Y. 1998))*. Conclusory, collective language is too convenient, too undisciplined, and too unfocused in light of exposures to litigation expense and disruption (even without ultimate liability) that are so great in antitrust (and other) cases. Such exposure ought to be limited to those who have been made at least reasonably aware of what they have done or failed to do, lest the litigants be left to wander aimlessly through the wilds and wilderness of discovery to no ultimate destination. *See Twombly, 550 U.S. at 565 n.10* (recognizing that "a defendant seeking to respond to . . . allegations in the **[**27]** *§ 1* context would have little idea where to begin" when a complaint fails to give notice of the claims against it); *In re Fla. Cement & Concrete Antitrust Litig., 746 F. Supp. 2d 1291, 1318 n.23 (S.D. Fla. 2010)* (observing that when allegations are "specific enough," they can "reduce the enormous discovery burden that concerned the Supreme Court in *Twombly*").

V. Legal Discussion[8]

[8] There are several issues that this opinion does not address. For example, the Court does not confront here, or necessarily accept, that the SAC's allegations lead to the legal conclusion of a conspiracy, contrary to Plaintiffs' assertion that they allege facts of direct evidence of an actual agreement and parallel conduct suggestive of an agreement. Pls.' Resp. at 26-27. However, although the specific factual allegations proposing the existence of an overarching conspiracy and the "collective actions" in furtherance of the conspiracy are accepted as true for purposes of these motions, there is no basis for the Court to decide this issue because no motion at bar requires such a decision. Indeed, no movant has objected substantively to the sufficiency of the allegations of the antitrust § 1 claim generally, and **[**28]** their arguments actually presume on some level that the SAC pleads a conspiracy and its particular parameters.

Additionally, Plaintiffs make much ado about the fact that no Defendant moved to dismiss the claim of an overarching conspiracy, and the fact that nine Defendants have chosen to answer the SAC outright. Pls.' Resp. at 20-22. These circumstances are of no moment to the issues at hand. They may be anomalous in an antitrust case of this size and scope. Nevertheless, the Court recognizes that defendants often make strategic choices in defending litigation, and one of those choices includes the option, perhaps for reasons of time or expense, of answering a complaint regardless of whether it satisfies the pleading standard.

Additionally, several of the individual Defendants argue that out of the SAC's hundreds of paragraphs, only a handful of those paragraphs name them specifically. They urge the Court to examine only those few paragraphs and allegations in considering their motions. To do so, however, would contradict the legal principles discussed, *supra*, that **[**29]** require consideration of the entire conspiracy as alleged throughout a complaint rather than compartmentalizing the allegations.

Finally, pervasive in their defense of the SAC is Plaintiffs' reliance on allegations that particular features of or conditions in the egg market favor collusion. For example, Plaintiffs place much in the figurative basket that consumer demand for eggs is inelastic. **HN13**[] It may be that "[i]f demand is inelastic at the current market price, collusion to raise the price will be particularly attractive." Richard A. Posner, ***Antitrust Law*** 71 (2d ed. 2001). And it also may well be that "[a]llegations that a market is characterized by economic factors that courts and antitrust experts and economists have found are conducive to collusive behavior, support an inference of plausibility." *In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987 (E.D. Mich. 2010)*

For the present motions, because Plaintiffs assert a theory of, in their words, an **[*721]** "overarching conspiracy" to restrict the supply of eggs, the question that each motion raises is whether Plaintiffs adequately alleged particularized facts that each Defendant undertook certain acts, or engaged in certain conduct, when viewed in the context of the entire SAC, that plausibly suggest that particular Defendant's embrace of that overarching conspiracy. Thus, the extent to which Plaintiffs have met their burden under *Rule 12(b)(6)* as **[**31]** to each movant is now addressed.

A. Michael Foods' Motion to Dismiss

Michael Foods, Inc. claims that the SAC's specific allegations are insufficient to plausibly support the claim against it. According to Michael Foods, the "only factual allegations made against it with any degree of specificity" are that the company was a member of two defendant trade groups, UEP and UEA; that Michael Foods attended UEP and UEA meetings; and that Michael Foods partook in only one of the eight "coordinated actions" alleged to have advanced the overarching conspiracy—namely, joining the UEP Certification Program. Michael Foods Mot. at 4. [9] These allegations, it contends, are insufficient **[*722]** to suggest that it actually joined the overarching conspiracy to restrict the supply of eggs.

Certainly, pertinent legal authority is clear that ***HN14***[] participation in a trade group association and/or attending trade group meetings, even those meetings where **[**32]** key facets of the conspiracy allegedly were adopted or advanced, are not enough on their own to give rise to the inference of *agreement* to the conspiracy. *See Ins. Brokerage, 618 F.3d at 349* ("[N]either defendants' membership in the [trade association], nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy. . . . While these allegations [of defendant-brokers' membership in a trade group and their common adoption of the trade group's suggestions], indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently . . . ." (citations omitted)); *see also Travel Agent, 583 F.3d at 910-11* ("The fact that [defendants] gathered at industry trade association meetings during the seven-year period when defendants reduced commission rates should not weigh heavily in favor of suspecting collusion. . . . Moreover, a mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because [the defendants'] presence at such trade meetings is more likely explained by their lawful, free-market behavior." (citation omitted)); *LaFlamme v. Societe Air France, 702 F. Supp. 2d 136 (E.D.N.Y. 2010)* **[**33]** ("[M]embership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement." (citing *Twombly, 550 U.S. at 567 n.12* and *In re Elevator Antitrust Litig., No. 04-CV-1178, 2006 U.S. Dist. LEXIS 34517, 2006 WL 1470994, at *30-31 (S.D.N.Y. May 30, 2006)*, *aff'd*, *502 F.3d 47 (2d Cir. 2007))*; *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)* (determining that because "Plaintiffs have not pleaded that defendants ever met and agreed to fix prices; they plead at most that defendants had the opportunity to do so because they attended many of the same meetings.").

Indeed, the SAC alleges that Michael Foods' employees served on UEP or UEA committees, such as UEP's Area #3, Government Relations Committee, Environmental Committee, Quality Assurance/Food Safety Committee, and UEP Producer Committee for Animal Welfare, and the Long Range Planning Committee. SAC ¶ 48. At times, these

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(citing *Standard Iron Works v. ArcelorMittal,, 639 F. Supp. 2d 877, 883 (N.D. Ill. 2009)*, *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 576 (M.D. Pa. 2009)*, and *In re Aftermarket Filters Antitrust Litig., MDL Docket No. 1957, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at *3 (N.D. Ill. Nov. 5, 2009)*. Nonetheless, under **[**30]** the applicable legal standards, Plaintiffs are not absolved from specifically pleading allegations that plausibly suggest each defendant's agreement to or participation in the alleged conspiracy. While the Court certainly considers the alleged market conditions and their "ripeness" for collusion to be a notable factor in considering the totality of the allegations against each defendant and is cognizant of them in its analysis of the issues presented in the motions at bar, the Court does not find those allegations in and of themselves dispositive of whether an individual defendant joined or participated in the offending conspiracy.

[9] By a stipulation between Plaintiffs and Michael Foods, the SAC's reference in Paragraph 331 to Michael Foods as participating in the export program was removed from the SAC. *See* Stipulation (Doc. No. 432). Thus, that feature of the alleged conspiracy is not discussed here.

employees are alleged to have held leadership positions in the trade groups as a whole, such as when Toby Catherman of Michael Foods was elected chairman of UEA in 2004 or when certain Michael Foods' employees served as UEP Board members. *Id.* ¶¶ 437, 284, 298. **[**34]** Plaintiffs also charge that Michael Foods, as represented by its employees, *inter alia*, was present at UEP Board meetings where Defendants purportedly "extolled the benefits of decreased supply on the price of eggs, discussing their own companies' participation in these collective schemes, and encouraging other companies to participate in industry supply restriction efforts," *id.* ¶ 191; attended UEP Animal Welfare Committee meetings where attendees articulated that the "'animal husbandry' program's express purpose was to reduce supply," *id.* ¶ 211; attended UEP Annual Board meetings where the "100% rule" was approved by a 19-to-1 vote and where the Board approved a schedule for early hen disposal or, alternatively, five-percent flock size reduction, *id.* ¶¶ 220-21, **[*723]** 284-85; and attended a meeting of UEP's Producer Committee for Animal Welfare where a motion that "no new licenses to market Animal Care Certified eggs will be issued or renewed to producers who are not ACC certified" was approved by a 19-to-8 vote and a 26-to-2 vote approved a motion to permit "a license to market ACC eggs [to] be issued to shell egg processors and further egg processors who do not own or operate egg production **[**35]** facilities," *id.* ¶ 310.

HN15[] Given that mere membership in a trade group or attendance at a meeting cannot alone sufficiently plead agreement to a conspiracy, active participation, rather than merely passive presence, becomes key in inferring agreement to the conspiracy and potential liability. With respect to the SAC, the only action that is attributed to Michael Foods at a trade group meeting was during an August 12, 2008 earnings conference call. During the call a Michael Foods representative purportedly made comments that, "Another factor supporting high egg prices is a short-term contraction in supply due to broad adoption of animal well-being programs on bird density," *id.* ¶ 402, and that "'[s]upply has been pressured through the animal wellbeing efforts, I think by the industry' and that the UEP Certification Program was the contributor to these material supply restrictions over the last year." *Id.* ¶ 403. However, the SAC does not allege that Michael Foods engaged in any other conduct at the trade group meetings beyond attendance or making comments that can be consistent with mere observation or opinion. As such, the SAC's allegations as to Michael Foods' involvement at trade group **[**36]** meetings are at best alleged facts of an opportunity to conspire, not of agreement to or participation in the alleged conspiracy. *Cf. Graphics Processing, 527 F. Supp. 2d at 1023* (***HN16***[] "Attendance at industry trade shows and events is presumed legitimate and is not a basis from which to infer a conspiracy, without more. . . . Moreover, even where some competitors have admitted to meeting to fix prices at or near trade shows and conferences, it is not reasonable to infer that another competitor in attendance at the same meeting had done likewise." (citing *In re Citric Acid Litig., 191 F.3d 1090, 1097-98 (9th Cir. 1999)))*.

However, although "participation in various trade organizations . . . . cannot alone support Plaintiffs' claims, . . . such participation demonstrates how and when Defendants had opportunities to exchange information or make agreements." *SRAM, 580 F. Supp. 2d at 903*; *see also In re Transpacific Passenger Air Transp. Antitrust Litig., No. C 07—05634, 2011 U.S. Dist. LEXIS 49853, 2011 WL 1753738, at *14 (N.D. Cal. May 9, 2011)* (same). And a fair reading of the SAC demonstrates that, by alleging that Michael Foods was certified under the UEP Certification Program, Plaintiffs have alleged more than mere **[**37]** opportunity to conspire on the part of Michael Foods to suggest plausibly that Michael Foods joined the conspiracy.

The gravamen of the Michael Foods motion thus concerns whether the allegations that Michael Foods joined the UEP Certification Program plausibly suggest, in conjunction with the allegations of Michael Foods' involvement in the trade group associations and meetings, that the company joined the conspiracy. The SAC charges that Michael Foods was listed as a certified company under the UEP Certification Program as of September 30, 2008, and that Michael Foods "adopt[ed] UEP certified guidelines to reduce chick hatch (certification no. 345 and license agreement 509)," SAC ¶¶ 49, 448, yet the SAC lacks any alleged facts concerning when Michael Foods joined the Program and the context of its decision to join or seek certification. Noting the absence of such facts, Michael Foods argues that the SAC fails to "allege any facts suggesting that Michael **[*724]** Foods' eventual decision to sell UEP Certified Eggs was indicative of an unlawful agreement." Michael Foods Mot. at 8. Instead, Michael Foods contends that the SAC itself suggests that Michael Foods had a pro-competitive justification **[**38]** for participating in the Program because "major retailers" such as Kroger Co. and Wal-Mart Stores, Inc. announced that they would only purchase UEP-certified eggs. *See id.* ¶ 236. Michael Foods further argues that such a pro-competitive justification is consistent with the possibility of independent action and the concomitant suggestion that it merely engaged in parallel conduct, rather than committed to a common conspiratorial and actionable scheme.

However, the Court concludes that the facts as set forth plausibly suggest that Michael Foods' certification under the Program, coupled with Michael Foods' other alleged conduct, can be seen as consistent with anti-competitive behavior and tend to exclude the possibility of independent action. This is because, at this stage of the litigation, the UEP Certification Program has been alleged to embrace anti-competitive features that have no apparent alternative pro-competitive rationale. [10] As the SAC alleges, a producer must follow the Program's guidelines, including those that are or would be inconsistent with independent self-interest, in order to attain and maintain certification under the Program. *See, e.g., id.* ¶ 222 (recognizing that **[**39]** in order for a producer to sell "UEP-Certified" eggs, all "egg houses must be maintained in accordance with the supply restriction guidelines").

Without any legitimate business reasons for certain features of the UEP Certification Program, independent self-interest absent agreement tends to be excluded as an explanation for a defendant's certification and the requisite conduct to obtain such status. Hence, agreement to the overarching conspiracy is plausibly suggested when a company, such as Michael Foods, that attended meetings where allegedly key decisions instrumental to the conspiracy were made or where effects of alleged coordinated actions were extolled, is alleged *also* to have been certified under and participated in the UEP Certification Program and concomitantly followed the Program's guidelines. *See James Julian, Inc. v. Raytheon Co., 557 F. Supp. 1058, 1065 n.18 (D. Del. 1983)* (***HN18***[] "While mere membership, even when coupled with knowledge of wrongful conduct of the association, is insufficient to establish knowing participation . . . , once attendance is coupled with a consistent later act, an inference of knowing **[**41]** participation is permissible." (citing *Hunt v. Mobil Oil Co., 465 F. Supp. 195, 231 (S.D.N.Y.1978)*, *aff'd mem.*, *610 F.2d 806 (2d Cir.1979))*.

[*725] Several conventional features of the UEP Certification Program lead the Court to this conclusion.

The Program, as a whole, purportedly implements animal welfare guidelines and reportedly was intended to increase cage space for hens, yet particular features of the Program as alleged in the SAC are methods of restricting egg supply without an apparent legitimate business reason. As a point of reference for this discussion, the Court recognizes at the outset that, given the SAC's factual allegations concerning egg production, cage space guidelines to promote space for egg-laying hens, in and of themselves and without measures for additional cages, necessarily decrease egg supply: fewer hens per cage equate to fewer eggs produced. In the absence of explanations that hens achieve greater egg yields with lower bird density, it is not difficult to accept the plausibility of Plaintiffs' theory of which came first, fewer hens or fewer eggs.

The Court recognizes that unrelated to commercial goals, such guidelines can have apparently legitimate explanations **[**42]** relating to promoting animal welfare. However, other specific aspects of the Program ostensibly lack potentially pro-competitive justification. In particular, the SAC alleges that the Program relied on certified producers to reduce bird density by reducing chick hatch over a phased period of time and thereby achieve the cage space requirements. SAC ¶ 203 ("Defendants decided to implement . . . cage space recommendations as a long term chick hatch reduction program . . .[,] later known as the 'UEP Certified Program.'"); *see also id.* ¶ 253 (identifying chick hatch reduction as a feature of the Program); *id.* ¶ 206 (describing the desired cage space per

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[10] This is not to say Plaintiffs' characterization of the Program in the SAC is necessarily true or without legitimate explanation, but determinations of such inquiries are not appropriate at this time. *See Standard Iron Works, 639 F. Supp. 2d at 895, 902* ("While more innocent inferences can be drawn from [Defendants' conduct] it is not Plaintiffs' burden to allege facts that cannot be squared with the possibility of unilateral action. . . . ***HN17***[] Whether [Defendants' actions] were benign unilateral business decisions made by the individual Defendants or whether they represent concerted effort in violation of the Sherman Act are issues of fact which [this Court] cannot decide on the pleadings and which require discovery prior to resolution.'" (citations omitted)); *cf. Transpacific Passenger, 2011 U.S. Dist. LEXIS 49853, 2011 WL 1753738, at *14* ("The communications discussed herein, as well as numerous others, might well have legitimate explanations. But, at this stage in the litigation, they seem to show would-be competitors discussing the raising or matching of prices."). Moreover, **[**40]** while it is possible that there are innocent explanations for certain features of the Program, it is not within the Court's purview to weave them out of whole cloth in the absence of a documented factual record.

hen); *id.* ¶ 464 (describing the Animal Welfare Committee's approval in 2006 of a policy that allows "any new company now making an 'Application for Certification' to come on to the program by meeting UEP's currently required hatch schedule for cage space rather than depopulating existing flocks"). Chick hatching is the means producers use to acquire their egg-layer stock. *Id.* ¶¶ 125-28. Thus, a producer's reduction in chick hatch would reduce the available stock of hens for egg production and, logically, the attendant output of eggs. Michael **[**43]** Foods, like the other Defendants that have moved to dismiss, has not proffered any pro-competitive explanation (predicated upon the SAC or otherwise) for why the Program requires this particular vehicle to reduce bird density per cage. Based on the facts recounted in the SAC, such an alternative explanation is not discernable. Reducing the supply of egg-laying hens as a general practice, in the absence of agreement, would be contrary to an individual egg producer's business interests. This is particularly true because egg-layers have a short productive cycle—"the majority of hens are between 100 and 130 weeks of age when they reach the end of their egg production cycle," *id.* ¶ 134, and new, younger egg-layers would continually be needed for egg production. [11]

[*726] Furthermore, the Program's requirement to reduce chick hatch, which, as alleged, has no apparent limitations as to hatching numbers or duration of the practice, negates Michael Foods' intimations that adherence to cage space limits would not prevent a producer from reallocating its hens by increasing its overall number of cages or barns, thereby producing more eggs, and demonstrating that its certification under the UEP Certification Program is not indicative of an unlawful agreement. Michael Foods Mot. at 8. A certified producer could not fill additional cages if it reduced its overall supply of egg-laying hens by engaging in chick hatch **[**45]** reduction. Moreover, contrary to Michael Foods' argument on this score, Plaintiffs have alleged "*[a]s part of these [UEP Certified] guidelines* . . . Defendants also agreed not to add capacity or make up for the lost hens that would result through reduced cage densities . . . ." SAC ¶ 208 (emphasis added). [12]

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[11] Moreover, a rational individual producer would seek to maintain, if not increase, the number of hens in order to promote its egg supply consistent with economic theory applicable to a market where demand is inelastic. The SAC avers that the nature of demand for eggs is indeed inelastic. *See id.* ¶ 153 ("[D]emand for eggs is relatively inelastic — that is, consumers do not purchase fewer eggs when prices rise . . . ."); *see also* ***[**44]*** *id.* ¶¶ 154-56. An individual profit-maximizing producer facing an inelastic demand curve has the incentive to maintain or increase its individual product supply in order to maintain or increase market share. *See, e.g.*, [*Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1039 (8th Cir. 2000)*] (Gibson, J., dissenting) ("The effect of this inelastic demand is that low prices are bad for the producers because the low price does not result in greater sales, except insofar as one producer can take sales away from other producers.").

[12] Michael Foods argues that "conclusory assertions or accusations of an agreement not to add capacity like the [assertions] in [P]aragraph 208 which are unaccompanied by any factual allegations cannot state a claim against Michael Foods." Day 1 Tr. at 77:11-14. However, although that factual claim in Paragraph 208 uses the generic "Defendants," the allegation goes on to describe the parameters of the UEP Certified Program's guidelines generally, and by virtue of being a certified producer, Michael Foods allegedly is required to follow the Program's guidelines in order to be certified.

Additionally, Michael Foods' argument that it could still increase its overall number of hens by simply having more hen houses is also discredited by the allegations in the SAC in other ways. For one, the argument has no factual basis in the SAC because the pleading does not contain any allegation that **[**46]** Michael Foods, or any other Defendant whose motion is pending, increased its hen numbers while participating in the UEP Certification Program.

Notably, the SAC also alleges that producers were discouraged from building new hen houses. *See, e.g, id.* ¶ 256 (describing a July 2003 UEP newsletter articled entitled, "Word of Caution" which purportedly stated: "As producers continue to reduce their layer house capacity to meet the UEP Animal Husbandry Guidelines, please don't make the mistake of building new facilities to replace the lost number of birds."). Plaintiffs additionally allege, albeit as to years prior to Michael Foods' alleged joining the Certification Program, that chick hatch reduction was credited for reducing overall hen numbers. *See, e.g., id.* ¶¶ 258-59 (describing an "August 2003 editorial by Gene Gregory of UEP entitled 'Reason Why Industry Could Have Period of Profitability'" articulating that "[s]ince th[e] beginning date [of the "hatch reduction to meet the animal husbandry guidelines" in April 2002] the hatch has been reduced by 14.7 million pullets in comparison to the same period year earlier"); *id.* ¶ 281 (noting that a July 16, 2004 UEP newsletter reported that "Two **[**47]** sources, one of which is the animal welfare audits, have confirmed to UEP that animal care certified companies have in fact reduced their hen numbers in existing houses").

[*727] Another alleged feature of the Program involves guidelines that prohibit the practice of backfilling. *Id.* ¶ 429; *see also id.* ¶ 306 (describing the UEP Board of Directors' decision in 2004 to incorporate a prohibition on backfilling in the Program's guidelines). Backfilling is the practice of replacing hens lost from mortality or illness in **[**49]** a flock with "pullets," which are "young female chickens that will become egg-laying hens when they are sexually mature." *Id.* ¶¶ 23 n.1, 126. Thus, backfilling prevents the attrition of egg-laying hens, and, as a corollary, the prohibition of the practice promotes attrition and the consequent reduction in egg production. This prohibition, as described in the SAC, also appears consistent with supply restriction and further appears contrary to economic self-interest in the absence of an anti-competitive agreement. [13] The Program allegedly places such an emphasis on prohibiting backfilling that the guidelines mandate a severe penalty for engaging in backfilling: producers "automatically fail[] their audit" if they backfill. *Id.* ¶ 429. [14]

Even assuming, *arguendo*, Michael Foods turned tail against the apparent trend of other certified producers' alleged reduction of chick hatch, and instead increased its overall hen population, the SAC's allegations still undermine Michael Foods' argument. The SAC suggests that there were philosophies prevalent in the egg industry that *not every* producer needed to engage in every activity geared to decrease supply in order for such a result to occur *and* that adding more hen housing would not be detrimental to achieving the alleged goal of decreasing supply. *See, e.g., id.* ¶ 193 (describing a document, dated August 2011, that Defendants allegedly distributed, which stated, "[T]here should be a *core segment* of the industry that is willing to reduce egg supply in order to achieve profitable egg prices" (emphasis added)); *id.* ¶ 305 (describing a November 15, 2004 *Feedstuffs* article that examined "problems of oversupply and backfilling" in the egg industry and noting that "[c]easing to backfill houses would fit [Gene] Gregory's **[**48]** suggestion to the [UEP] marketing committee that 'you don't need a plan to reduce the hatch; you don't need a moratorium on new housing: You need to get rid of old hens.'" (alterations in original)). As such, in the world depicted by the SAC, the act of increasing hen numbers, even while UEP-certified, would not necessarily mean that Michael Foods had not consented to or participated in the alleged conspiracy. Nonetheless, when considering all aspects of the Program as alleged (which the Court continues to discuss, *infra*) and in light of the other allegations as to Michael Foods and the overall alleged conspiracy as pled, the Court determines that Michael Foods' participation in the UEP Certified Program—even if Michael Foods did increase its hen numbers—would still suggest that Michael Foods agreed to and participated in the alleged conspiracy.

[13] The facts alleged in the SAC provide no grounds for the Court to infer that a prohibition on backfilling could serve some possible legitimate business purpose, such as animal husbandry practices, animal welfare, or otherwise.

[14] Reporting and auditing practices are alleged components of the UEP Certification Program to ensure compliance with the Program's guidelines. Plaintiffs have alleged that such practices included certified producers self-reporting **[**50]** their compliance in monthly compliance reports to UEP. *Id.* ¶¶ 232, 504. Passing an annual audit, which the SAC never directly describes, also appears to be a predicate to becoming and remaining certified under the Program. *Id.* ¶¶ 423, 428, 429.

In their arguments, Plaintiffs broadly assert that the audit process was not based upon an interest in promoting animal welfare, and they attempt to assign some significance to the fact that there is an apparent disparity in the Program's penalties in the auditing process, claiming that the audits did not go to penalizing animal welfare violations, but instead to "ensur[ing] only that producers were restricting supplies." Pls.' Resp. at 11. In support, Plaintiffs contrast the guidelines on certain animal husbandry practices that purportedly promote humane treatment with those that ostensibly appear to promote supply restriction methods. They note that "toxic ammonia concentrations, cruel killing methods and failure to remove dead birds from cages daily only cost producers a five (5) point deduction on their annual audit,"*id.* ¶ 428, whereas "a producer automatically fails their [sic] audit if they [sic] violate cage spacing formulas, engage in **[**51]** a procedure known as 'backfilling.'" *Id.* ¶ 429.

However, the SAC appears to undermine this argument because an audit failure is also the penalty for using starvation induced molting, which would surely seem to be an inhumane practice. *Id.* Generally, molting is a process employed by producers in an effort to obtain a higher level of egg production from a given flock of hens. *Id.* ¶ 130. The impact of molting is a temporary cessation in egg production for approximately eight weeks. *Id.* Following this period, "[p]ost-molt egg production will increase such that peak egg production in the flock reaches about 80 percent" for a short duration. *Id.* ¶ 132. As alleged in the SAC, in addition to starvation induced molting, producers can induce molting by "reduc[ing] light simulation (artificial day length) and impos[ing] dietary feed restrictions (including limiting food and water or providing diets of low nutrient density)." *Id.* ¶ 131. Plaintiffs contend that molting is a supply restrictive practice because it "reduces the supply of eggs." *Id.* ¶ 130.

Accepting, *arguendo*, that the practice of molting restricts supply, it theoretically would be a desirable practice to promote generally in order to **[**52]** advance the alleged conspiracy. However, given that Plaintiffs plead that one method of molting

[*728] The Program also required as a condition of certification that all of a producer's egg houses be maintained in accordance with the Program, and, implicitly, with the guidelines requiring chick hatch reduction and prohibiting backfilling. *Id.* ¶ 222. The SAC describes this **[**53]** 100% rule as requiring "a company [to] commit to implementing the welfare guidelines on 100% of all production facilities *regardless of how or where eggs may be marketed.*" *See id.* ¶ 221 (emphasis added)); *id.* ¶ 17 (same). [15] It is unclear from the SAC's facts what the legitimate business purpose may be in requiring that all of a producer's facilities meet certification guidelines in order to obtain certification. Indeed, there is no apparent reason, and there are no allegations to suggest, why an independent, self-interested egg producer voluntarily would constrain all of its facilities, and thereby its entire production, without regard for consumer egg preferences, which could include desires for certified and non-certified eggs. *See, infra* (recognizing that the facts in the SAC do not allege that the entire universe of egg consumers demanded UEP-certified eggs and that some consumers purchased non-certified eggs). Plaintiffs have averred that the 100% rule "was implemented solely to ensure that flock sizes were further reduced in line with the goals of the conspiracy . . . ." *Id.* ¶ 223.

Also, the constructs of the UEP Certification Program and marketing licensing policies, as alleged, are such that there is no apparent legitimate business purpose for companies to elect to follow them absent agreement, and raise similar supply constraint issues as the 100% rule because they preclude a company from producing non-certified eggs *and* marketing certified eggs. According to an August 2006 UEP newsletter, "The use of the 'License Agreement' will allow Non-Certified companies to purchase eggs from 'UEP Certified' companies for the marketing of 'Certified' eggs." *Id.* ¶ 464. **[**55]** The SAC alleges that Michael Foods possessed just such a marketing license under "license agreement 509." *Id.* ¶ 448. Allegedly, however, the Program would not allow a company that produced non-certified eggs to obtain a marketing license for certified eggs, *id.* ¶ 310, with the apparent exception being, as reported by the August 2006 UEP newsletter, that licenses could be given to "UEP/UEA egg production companies [that] hav[e] made a commitment to meet **[*729]** the 100% rule while in the process of implementing the cage space requirements of UEP's hatch schedule." *Id.* ¶ 464. In contrast, so long as a company did "not own or operate egg production facilities," that company could receive a marketing license for certified eggs. *Id.* ¶ 310. Similar to the 100% rule, it is seemingly inconsistent for rational companies that are both producers and marketers to restrict voluntarily their product offerings, in both production and marketing capacities, only to certified eggs in the absence of an agreement given the state of consumer demand for eggs. Furthermore, that the licensing agreement to market eggs was contingent on whether a company had production facilities and the added requirement that those **[**56]** facilities comply with or be "committed to" the 100% rule equally appears to be without legitimate business explanation in the absence of an anti-competitive agreement. [16]

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triggers an automatic audit failure—notably, the method that, at least by virtue of comparison, appears to be inhumane since it relies on starving hens outright—the audit penalty system does not conform to the Plaintiffs' characterization that the audit penalties align uniformly with the goals of the alleged conspiracy. This particular line of argument thereby does little to support Plaintiffs' broader argument that the audit process was not based upon an interest in promoting animal welfare.

Of course, this is not to say that the auditing process might not have been used in some form to further the alleged conspiracy. After all, the auditing process imposes a severe penalty for backfilling, which, as the Court discussed above, has no apparent legitimate business purpose as pled and appears consistent with supply restriction.

[15] The Court recognizes that although Michael Foods participated in the UEP Certification Program, **[**54]** 100% of its facilities may not have complied with the guidelines. Plaintiffs aver that an August 2006 UEP newsletter reported that the "Animal Welfare Committee approved the use of a Non-Certified License Agreement for . . . UEP/UEA egg production companies having made a commitment to meet the 100% rule while in the process of implementing the cage space requirements of UEP's hatch schedule." *Id.* ¶ 464. Because Michael Foods allegedly had a license agreement, specifically, license agreement 509 (as well as certification no. 345), *id.* ¶¶ 49, 448, it may have only made the "commitment to meet the 100% rule."

[16] The Court does not find that the SAC on its face alleges any alternative explanations for becoming certified in order to obtain or retain a marketing license. The Court recognizes that in 2005 the UEP's Producer Committee for Animal Welfare voted to approve a motion that instituted the policy "that no new licenses to market . . . Certified eggs will be issued or renewed to producers who are not . . . certified." *Id.* ¶ 310. According to the SAC, the language of the motion ostensibly articulated the purposes for doing so: specifically protecting the integrity of the Program and logo due to "the difficulty in preventing the commingling of" certified and non-certified eggs and "to treat all egg producers equally." *Id.* ("One motion stated, "In order to

Contrary to Michael Foods' contention that the SAC on its face provides a pro-competitive justification for joining the UEP Certification Program—namely, consumer demand—the pleading contains no allegations that would suggest that egg consumers so effectively clamored for UEP-certified eggs as to compel self-interested producers to choose to participate in the Program and thereby commit 100% of their facilities to the guidelines, particularly in the face of alternatives. The SAC does contain certain allegations that the Food Marketing Institute, a grocers' trade organization, "mandate[d] the UEP seal for all egg products used by organization members," *id.* ¶ 234, and that Kroger and Wal-Mart, who are "major retailers," announced that they would only purchase UEP-certified **[**58]** eggs, *id.* ¶ 236. Additionally, Plaintiffs averred that there was an expectation, as published by the industry publication, *Feedstuffs*, in 2004, that other consumers would follow Kroger and Wal-Mart's suit in demanding only UEP-certified eggs. *Id.* ¶ 236.

Apart from these allegations, however, nothing else in the SAC suggests that UEP-certified eggs were in high demand by consumers. Instead, the SAC contains the allegation that by failing to become certified, an egg producer "*may* not be able to market their eggs or sell them through many major retail outlets." *Id.* ¶ 235 (emphasis added). Indeed, the SAC contains several allegations that suggest that consumers purchased non-certified eggs. For example, the Albertson's grocery chain allegedly purchased eggs from Sparboe that were not UEP-certified. *Id.* ¶¶ 241-42. The SAC also contains the allegation—arguably **[*730]** of dubious significance—that another producer, Kreider Farm Eggs, after it withdrew from the Program, sold non-certified eggs to an unnamed "loyal customer." *Id.* ¶ 244. Additionally, the SAC raises the inference that consumer preferences concerning UEP-certified eggs were malleable because Wal-Mart reportedly entertained the possibility **[**59]** of purchasing eggs produced under an alternative animal husbandry program developed by Sparboe in 2009. *See id.* ¶ 249. [17] Furthermore, on a more global level, there certainly exists an inherent consumer interest in, if not outright demand for, non-certified eggs because—and this is a fundamental premise of this litigation—they are cheaper than UEP-certified eggs and generally indistinguishable (notwithstanding marketing and production practices), given that they are homogenous, commodity goods, *id.* ¶ 158. [18] Thus, despite Michael Foods' urging to consider its participation in the Program to be an independent action prompted by consumer demand, the Plaintiffs' pleading on its face does not provide an "obvious alternative explanation," *Twombly, 550 U.S. at 568*, and cannot support inexorably the required inference that the level and elasticity of such demand prompted Michael Foods to become certified.

In a similar vein, Michael Foods' pro-competitive argument is also undermined by the SAC's allegation that alternative animal welfare programs could accomplish the welfare goals through less restrictive means. Specifically, the SAC avers, "Sparboe had designed its own internal 'husbandry' program which was not focused on restricting supply, in order to provide specific eggs to some customers (such as Wal-Mart) that wanted these kinds of products." SAC ¶ 249. It follows that the UEP Certification Program was not an exclusive, or even a sensible or successive, means of advancing animal welfare. **[**61]** The alleged existence of such an alternative to the UEP

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protect the integrity of the ACC program and logo and in view of the difficulty in preventing the commingling of certified eggs with non-certified eggs and to treat all egg producers equally it is hereby moved . . . .").

However, a fair reading of this allegation does not **[**57]** suggest that these were the Committee members' actual reasons for voting for the motion. Nonetheless, these "purported" explanations for why the Committee approved the motion cannot be imputed as the rationale for why companies would choose to become or remain certified in order to have marketing licenses, and as such, the Court does not consider them alternative explanations for seeking to obtain a marketing license.

[17] Ostensibly, the SAC also *could* be read to suggest that Wal-Mart, despite previously announcing that it would only purchase UEP-certified eggs as of January 1, 2003, *id.* ¶ 236, was one of Sparboe's active customers in 2009, apparently purchasing eggs from Sparboe when it was no longer UEP-certified. **[**60]** *See id.* ¶ 248 ("In 2009 . . . UEP contacted Sparboe customer, Wal-Mart, in an attempt to discourage the company from purchasing Sparboe's eggs that had not been certified by the UEP.").

[18] By recounting these SAC allegations, the Court is making no factual, legal or value judgments that would venture into the marketing or related fields or belief systems concerning "free-range," "cage free," "organic," or other concepts advanced in current day agricultural production, product advertising, marketing or consumption. *See also id.* ¶¶ 141, 483 (recognizing such "specialty" eggs are excluded from this suit).

Certification Program raises further inferences that the Program's design, as pled, is consistent with anti-competitive behavior.

Thus, despite Michael Foods' argument that there are pro-competitive reasons for joining the UEP Certification Program in the absence of an illegal agreement the Court cannot adopt them at this time, at least for definitive *Rule 12(b)(6)* purposes. The allegations as to the Program raise enough of a plausible inference that certification in the Program was inconsistent with independent self-interest, at least because no non-conspiring, self-interested company would have followed the Program guidelines concerning chick hatch reduction, prohibiting backfilling, applying the guidelines to 100% of its facilities, and so on. Upon careful consideration of the parties' arguments, and cognizant that this motion must be viewed through the lens of the conspiracy on the whole, the Court concludes that there are enough specific allegations in the SAC—those that explicitly **[*731]** name Michael Foods and its specific conduct, as well as those that cite specific facts and detailed circumstances concerning the nature and context **[**62]** of the entire conspiracy, particularly those pertaining to the UEP Certification Program—to plausibly suggest that Michael Foods joined the alleged conspiracy. Accordingly, the Rule 12(b)(6) motion by Michael Foods must be denied.

B. Daybreak's Motion to Dismiss

Daybreak Foods, Inc. argues that it "is situated quite differently from most, if not all, of the other defendants in the case." Daybreak Mot. at 8. It contends that one reason for this is because the SAC fails to link Daybreak to any of the eight "collective actions" that allegedly advanced the overarching conspiracy. Instead, according to Daybreak, the SAC allegations that specifically identify it by name merely allege that Daybreak was a UEP member and held positions on the Board and certain committees, attended meetings, and expressed comments about the egg market and industry practices. These allegations alone, Daybreak maintains, do not suggest that it agreed to the conspiracy. Yet before the substance of Daybreak's arguments can be tested, an antecedent and dispositive issue requires resolution: whether the SAC specifically alleges Daybreak participated—at least to some degree—in the UEP Certified Program.

1. Whether Daybreak **[**63]** Participated in the UEP Certified Program

Plaintiffs and Daybreak dispute whether the SAC has specifically alleged that Daybreak participated in the UEP Certification Program and, if so, the extent of any such participation. In particular, this issue focuses on the SAC's Paragraph 93:

> Daybreak has participated in and benefited from Defendants' and their co-conspirators' efforts to reduce supply and fix prices, as outlined herein. Daybreak has explicitly agreed to the conspiracy alleged herein by *adopting UEP Certified guidelines to reduce chick hatch* and has conspired to reduce its egg supply as a result. Daybreak participated in a UEP meeting which expanded a 2004 flock/disposal scheme.

SAC ¶ 93 (emphasis added).

Plaintiffs maintain that this Paragraph sufficiently alleges that "Daybreak participated in the [UEP Certification] program." Pls.' Resp. at 40. [19] Daybreak urges the Court to disregard this allegation on the grounds that it is rendered implausible by the SAC's other allegations and that it is a generalized, merely conclusory allegation. Daybreak Mot. at 10; Daybreak Reply at 7. Daybreak further notes that the SAC twice lists the names of certain Defendants that were certified **[**64]** under the UEP Certification Program in 2003 and 2008, but that Daybreak's name is conspicuously and meaningfully absent from those lists. Daybreak also highlights that, unlike other Defendants who are alleged to have been certified under the Program and have a certification number attributed to them, the SAC does not provide any such certification number for Daybreak.

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[19] In contrast, at oral argument, Plaintiffs pushed the pleading envelope and argued that they "alleged explicitly that Daybreak was *in* the UEP certification program . . . ." Day 2 Tr. at 34:15-18 (emphasis).

Given the familiar legal precepts governing pleading standards, the Court is constrained to accept the factual allegations quoted above from Paragraph 93 as true. *Iqbal, 129 S. Ct. at 1950* (***HN19***[] "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to **[*732]** an entitlement to relief."). The statement that Daybreak "adopt[ed] UEP Certified guidelines to reduce chick hatch" constitutes just such a factual allegation that the Court thus must accept as true without an artificial or surgical parsing of the language Plaintiffs used. Indeed, the allegation **[**65]** is a factually specific statement that supports a legal conclusion, "Daybreak has explicitly agreed to the conspiracy . . . , by *adopting UEP Certified guidelines to reduce chick hatch.*" SAC ¶ 93 (emphasis added); *see* *Iqbal, 129 S. Ct. at 1950* (***HN20***[] "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

As previously discussed with respect to Michael Foods, the SAC alleges specific factual details pertaining to chick hatch reduction, which further support this allegation's factual specificity. It is thus not merely a bald statement or a legal conclusion couched as a factual allegation that the Court is not bound to credit. *See* *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (citing *Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981)*, *aff'd on other grounds*, *460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96, (1983)*; 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.07, at 12—64 & n.6 (1985)).

Furthermore, the allegation is not implausible, notwithstanding Daybreak's contention otherwise. Daybreak's name may be absent from the paragraphs listing certain producers that were known to have been certified under the UEP Certification Program as of different dates, but ***HN21***[] Plaintiffs **[**66]** are not obliged to have the same quality or quantity of allegations as to one defendant as unto another. *Cf.* *Beltz Travel Serv., Inc. v. Int'l Air Transport Ass'n, 620 F.2d 1360, 1367 (9th Cir. 1980)* ("Participation by each conspirator in every detail in the execution of the [antitrust] conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result." (citing *Am. Tobacco Co. v. United States, 147 F.2d 93, 119 (6th Cir. 1945))*). The SAC need not aver even similar allegations as to each applicable defendant in identical form or number. *See* *In re Southeastern Milk Antitrust Litig., 555 F. Supp. 2d 934, 949 (E.D. Tenn. 2008)* (recognizing that ***HN22***[] so long as plaintiffs plead the requisite contours of a claim against an antitrust defendant, "[t]hat they require only a few paragraphs or sentences to do so is of no consequence").

Moreover, there is no inconsistency between the allegation that Daybreak adopted UEP Certified guidelines on chick hatch reduction and the SAC's other allegations. A careful parsing of the parties' dispute reveals an issue of semantics. The Plaintiffs' position appears to be that the act of merely **[**67]** "adopting" certain UEP Certification guidelines constitutes "participation" in the UEP Certification Program. As such, while "adopting" guidelines may connote the most minute of actions, it can also reflect the most meaningful embrace of the object of an "adoption." In any event, even in the former interpretation, it is a least some "action" and not merely exclusively passive presence at a meeting where, for example, guidelines are only discussed. In contrast, Daybreak presumes that certification under the Program is an essential prerequisite to "participation" and that, because the SAC does not specifically allege that Daybreak obtained certification under the Program, Daybreak did not participate in it.

A fair reading of the SAC indicates that, while there is no specific factual allegation that Daybreak obtained UEP-certified status, Daybreak still could have "participated" in the Program consistent with Plaintiffs' definition and description of "participation" in the Program. As alleged, certification under the UEP Certification **[*733]** Program requires, *inter alia*, adherence to the Program's guidelines. However, no allegation in the SAC indicates that a producer is precluded from voluntarily **[**68]** "adopting" or following all or some of the Program's guidelines, as if they were a form of standards, even if that producer did not formally become certified under the Program or sell "UEP-Certified" eggs. [20] Indeed, assuming, *arguendo*, that Daybreak never achieved certification under the Program, Daybreak still plausibly could have adopted the guidelines concerning chick hatch reduction. It follows

[20] Notably, other producers who are alleged to have joined the certification program and have assigned certification numbers, such as Michael Foods, Rose Acre, and Ohio Fresh, were also alleged to have "adopted" the chick hatch reduction guidelines under the Program with the identical language of ". . . by adopting UEP Certified guidelines to reduce chick hatch." *See, e.g.*, SAC ¶¶ 48, 67, 90. Thus, "adoption" of certain UEP guidelines does not necessarily equate to (or foreclose) the conclusion that a producer has certified-status.

that Daybreak's lack of a certification number and absence on any certified producer list would not be inconsistent with the allegation that it "adopt[ed] UEP Certified guidelines to reduce chick hatch." [21]

2. Whether Daybreak Joined the Conspiracy

The **[**70]** SAC contains three categories of specific factual allegations with respect to Daybreak. The first category pertains to Daybreak's alleged involvement in UEP as a member by holding positions on the Board and continual presence at UEP meetings where certain actions alleged to advance the conspiracy were adopted or where comments were made urging attendees to participate in actions alleged to promote the conspiracy. The second category of allegations concerns Daybreak's alleged public and private comments about the egg market and industry practices. And the third category involves the allegation that Daybreak adopted UEP Certification guidelines on chick hatch reduction.

It is not apparent that the first two categories of factual allegations when considered together sufficiently allege Daybreak's agreement to the conspiracy. As previously discussed, allegations of mere membership and attendance at meetings are insufficient to suggest agreement to a conspiracy. Here, the SAC alleges that Daybreak employees served on UEP's Area #3, Government Relations Committee, Environmental Committee, and Quality Assurance/Food Safety Committee in 2008. SAC ¶ 92. The allegations also indicate that some **[**71]** of these employees held leadership positions, including a UEP Board position. *See, e.g., id.* ¶ 284. Daybreak employees allegedly attended various UEP meetings. For example, a Daybreak representative attended UEP Animal Welfare Committee meetings where attendees articulated that the "'animal husbandry' program's express purpose was to reduce supply," *id.* ¶ 211. Another representative was present at a UEP Board of Directors Meeting held in May 2002 in Washington, D.C., during which the UEP Marketing Chairman purportedly "announced two ways of reducing egg supply, stating 'that we have a crisis and that a crisis management plan had been communicated to **[*734]** the members calling for early molt and early hen disposal. The current egg prices indicated that this plan was working.'" *Id.* ¶¶ 199-200. According to Plaintiffs, Daybreak representatives were present at UEP Annual Board meetings where the "100% rule" was approved by a 19-to-1 vote and where the Board approved a schedule for early hen disposal or, alternatively, five-percent flock size reduction, *id.* ¶¶ 220-21, 284-85, 93.

At another UEP Board of Directors meeting in Atlanta, Georgia in January 2005, Daybreak was allegedly present and the **[**72]** "minutes reflect discussions about the price fixing proposal and other attempts to reduce supply." *Id.* ¶ 298. Daybreak employees also allegedly attended UEP Marketing Committee meetings in Washington, D.C., at which the committee chairman supposedly made comments that "the industry must do a better job managing the supply between Easter and Labor Day and that perhaps the industry lost focus this year because of high prices," *id.* ¶¶ 398, 404, [22] and a UEP Board of Directors Legislative meeting in May 2003 in Washington, D.C., at which the marketing committee chairman purportedly stated, "Need every producer to be a USEM member. Need more help pulling the wagon instead of riding," *id.* ¶¶ 336-37. As this summary reveals, none of these allegations suggest anything more than Daybreak's passive attendance at these meetings. [23]

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[21] To buttress its argument, Daybreak has attempted to raise **[**69]** doubt as to the truthfulness of the allegation that it adopted the UEP Certified guidelines on chick hatch reduction. In doing so, Daybreak asks the Court to look beyond the SAC at the UEP's Answer to the SAC, which states that Daybreak has never been certified under the UEP Certification Program. Daybreak Reply at 7. Suffice it to say, Daybreak may enlist the UEP pleading in a subsequent motion, but a co-defendant's Answer is unavailing in this *Rule 12(b)(6)* analysis of the SAC.

[22] The SAC alleges in separate paragraphs that the UEP Marketing Committee met in Washington, D.C., in May and October of 2008, where the committee chairman evidently made virtually identical comments. Despite alleging that identical company representatives were present and the chairman's comments at both were verbatim, Plaintiffs appear to consider these were indeed **[**73]** two separate meetings. *See* Pls.' Resp. at 38.

[23] Plaintiffs challenge the defense view that Daybreak was only a passive attendee at UEP meetings by conjuring up the inference that Daybreak twice voted at UEP Board meetings for producers to coordinate and reduce flock sizes. However, the

Similarly, although Plaintiffs suggest that Daybreak's alleged statements are indicative of a conspiratorial purpose or state of mind, the statements, in and of themselves, appear equally consistent with passive or reflective observations and opinions, even in light of Daybreak's membership or attendance at UEP meetings. One such allegation is that Daybreak's President made a comment to *Egg Industry* **[*735]** magazine in February 2007 that "I tend to think that **[**75]** consumers will buy eggs whether the price per dozen is 70 cents or $1.70." *Id.* ¶ 154. On its face, of course, this comment could reflect only that he held the opinion that the demand for eggs is inelastic. Similarly, alleged statements that Daybreak personnel made during an earnings conference call on August 12, 2008 appear to manifest opinions of the market and industry practices: "Another factor supporting high egg prices is a short-term contraction in supply due to broad adoption of animal well-being programs on bird density," *id.* ¶ 402, and "[s]upply has been pressured through the animal wellbeing efforts, I think by the industry," *id.* ¶ 403 (alteration in original). Likewise, an alleged comment attributed in a March 2007 *Egg Industry* article to Daybreak's President can be viewed as observational rather than suggestive of agreement. In that article the president allegedly "credit[ed] high shell egg prices on the 'United Egg Producer's animal welfare program that most shell egg producers participate in.'" *Id.* ¶ 376.

The SAC also avers that Daybreak may have discussed the UEP Certified Program's supply-related implications with another egg producer's in-house counsel: "Mr. Mueller **[**76]** discussed the UEP Animal Welfare Program and its intersection with supply and price with representatives from a number of industry participants, including . . . Bill Rehm of Daybreak Foods." *Id.* ¶ 231. Regardless of whether this allegation sufficiently supports Plaintiffs' characterization that "Sparboe, shared its concern with Daybreak that the program constituted price fixing and could cause trouble for the industry," Pls.' Resp. at 40 (citing SAC ¶ 231), the allegation may also describe more innocuous or observational conversations. Indeed, the allegations suggest no more than that Daybreak representatives were cognizant of certain characteristics of the egg industry and opined about certain practices both publicly and privately.

Even considering these two categories of allegations together, it would only be reasonable to infer that Daybreak was in a position to observe and be aware of what other Defendants were doing, knew the implications of restricted supply and increased prices, and even likely benefited from the increased market prices. This would not be enough to make the requisite factual leap to say that awareness and beneficiary status suggest that Daybreak outright agreed **[**77]** to and participated in the conspiracy. However, those two categories of conduct must also be considered in light of Daybreak's alleged adoption of UEP Certified guidelines on chick hatch reduction.

As discussed above, the alleged guidelines specific to chick hatch reduction are inconsistent with the behavior of an independent, self-interested producer and do not have apparent pro-competitive benefits. In the state of the world described in the SAC, a producer following the guidelines as to chick hatch reduction would be reducing the supply of its egg-laying hens, and thereby limiting its egg production capabilities. In doing so, a producer would be unable to enlarge its operations, fill additional barns, and expand egg production. Even though Plaintiffs have not alleged that Daybreak adopted other elements of the UEP Certification Program, they have averred that it adopted a

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alleged facts do not support this argument by Plaintiffs. The SAC is devoid of facts alleging that Daybreak undertook any coordinated actions to reduce flock sizes, so Plaintiffs implicitly argue that Daybreak's vote to approve such actions demonstrates its agreement to the overarching conspiracy. *See* Pls.' Resp. at 40 ("While Mr. Rehm was a Board member, the UEP twice approved coordinated actions to reduce flock sizes in order to reduce supply and to raise prices . . . . At least one approval was without recorded dissent."). But such an argument is of no ultimate moment, because the SAC does not specifically allege, directly or by inference, that Daybreak cast an affirmative vote at any of these meetings. For example, at one such meeting there was a motion "to extend through Labor Day the current 'intentions program' for members' flocks to be disposed of 4 weeks earlier than previously scheduled and/or **[**74]** flock size reduction by 5%" that was passed by the Board with "no recorded dissents." *Id.* ¶ 300. Even when considering all inferences favoring Plaintiffs, this allegation does not suggest Daybreak actually voted, particularly given that the UEP Board was "governed by . . . three to fifty directors who are elected annually." *Id.* ¶ 446. A lack of recorded dissent cannot indicate whether all Board members were able to vote on the given proposal or that any Board member may have abstained, temporarily left the meeting, or other "unrecorded" action. As such, Plaintiffs merely propose a very possibly false inference. *Cf.* *Twombly, 550 U.S. at 554* (warning against "false inferences" in the context of allegations of parallel conduct without more).

particular element that is highly restrictive of egg supply and without an apparent self-interested business rationale in the absence of agreement to the offending conspiracy.

Given Daybreak's alleged adoption of the guidelines on chick hatch reduction, in conjunction with the allegations that Daybreak was a UEP **[**78]** member and held positions on the UEP Board and certain committees, attended meetings, and expressed **[*736]** pointed comments about the egg market and industry practices, the SAC alleges minimally sufficient facts to plausibly suggest that Daybreak assented to the alleged conspiracy. It follows, again, given the governing case law, that Daybreak's motion to dismiss must be denied. [24]

C. Rose Acre's Motion to Dismiss

Challenging the sufficiency of the SAC, Rose Acre Farms, Inc. embraces the Third Circuit Court of Appeals' admonition that ***HN23***[] "a claim of conspiracy predicated on parallel conduct should be dismissed if . . . the facts alleged in the complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common behavior." *Ins. Brokerage, 618 F. 3d at 326*. Rose Acre recognizes that Plaintiffs specifically allege that it was a member of UEP, UEA, and USEM; that its representatives attended UEP Board meetings and committee meetings at which steps allegedly were undertaken to advance **[**80]** the conspiracy; that some of its representatives held leadership positions on the Board and committees; and that it was certified under the UEP Certification Program. [25] The SAC also alleges that Rose Acre "consistently participated in the export program . . . and tried to encourage other egg producers to participate in the program." *Id.* ¶ 331. [26] These allegations, according to Rose Acre, do not plausibly suggest that it agreed to the overarching conspiracy because the allegations, as well as certain materials incorporated into the SAC by reference, alternatively suggest that Rose Acre acted in its independent self-interest in undertaking those alleged actions.

1. Rose Acre's Participation in the USEM Export Program

Neither Rose Acre nor Plaintiffs dedicate much attention to the export program **[*737]** and Rose Acre's alleged participation in it. *See* Rose Acre Mot. at 22, 23; Pls.' Resp. at 15-18. Indeed, there is arguably little purpose in

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[24] At oral argument, the Court raised the possibility that some of Daybreak's objections to the SAC might be resolved more appropriately through another avenues, such as, *inter alia*, attempting to resolve issues concerning accuracy directly with the Plaintiffs or later through summary judgment. *See* Day 2 Tr. at 30:7-36:8. The Court is confident that the practical professionals managing this case could address and resolve such disputes informally. Insofar that the parties are unable to resolve any of these specific issues on their own, summary judgment "as soon as sufficient evidence is developed to establish or negate a point" can "conserv[e] the resources of the parties and the courts." 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 307, at 99 (3d ed. 2007). Likewise, an appropriate and closely tailored **[**79]** discovery plan can aid in the efficient resolution of these issues. *See* *In re Polyurethane Foam Antitrust Litig., No. 10 MD 2196, 799 F. Supp. 2d 777, 2011 U.S. Dist. LEXIS 85032, 2011 WL 3204712, at *5 (N.D. Ohio July 19, 2011)* (recognizing that certain defendants "differ[] in important respects from the majority of Defendants" and thus requiring that plaintiffs confer with those defendants "to develop a focused and phased discovery plan to determine whether these Defendants should remain in the case"), *clarified on denial of reconsideration on other grounds*, ***799 F. Supp. 2d 777, 2011 U.S. Dist. LEXIS 104419, 2011 WL 4345926 (Sept. 15, 2011)***.

[25] Specifically, the allegations as to Rose Acre representatives' attendance at meetings, leadership positions held, and conversations with other Defendants are similar, if not identical to, allegations concerning other Defendants, discussed *supra. See, e.g.*, SAC ¶¶ 66-67, 231, 252, 284-85, 298, 310, 336, 353, 380, 398, 404, 438. For the same reasons, the Court concludes that these charges as to Rose Acre are insufficient on their own to plausibly articulate Rose Acre's agreement to the alleged conspiracy.

[26] The SAC claims that **[**81]** "Rose Acre was a member of USEM and/or participated in egg exports, sharing any associated financial losses with other members." *Id.* ¶ 67. Rose Acre allegedly began participating in the USEM export program in late 2006. *Id.* ¶ 350. The timing of Rose Acre's alleged participation in the export program coincides with the program's expansion in 2006, following a period of three years in which no exports were facilitated by the program. *Id.* ¶¶ 332, 348.

engaging in an extensive analysis of the export program as to Rose Acre, given that Rose Acre's alleged participation in it constitutes only one facet of the SAC's depiction of Rose Acre in relation to the overarching conspiracy, and the Court must consider Rose Acre's alleged participation in the program in the broader context of the SAC. *See* Pressure Sensitive, 566 F. Supp. 2d at 373 (**HN24**[] "[A] district court must consider a complaint in its entirety without isolating each **[**82]** allegation for individualized review."). Notwithstanding this need to consider the allegations as to Rose Acre *in toto*, practicality requires that the Court address this alleged facet of the conspiracy before evaluating it with all allegations asserted against Rose Acre.

Plaintiffs charge that the USEM export program is one of the eight coordinated actions that advanced the alleged overarching conspiracy. The SAC alleges that USEM is a cooperative group that negotiates egg exports on behalf of its members. *Id.* ¶¶ 179, 176 n.39. The export program, according to Plaintiffs, is designed to export eggs at a loss—due to lower prices in egg markets abroad and high transportation costs in shipping perishable and breakable products?for the exclusive purpose of reducing the domestic supply of eggs. *Id.* ¶¶ 147, 329-30, 332. Plaintiffs allege that the export program sought to capitalize on the inverse relationship that exists between domestic egg prices and domestic supply. *Id.* ¶ 330. [27] Through the export program, certain USEM members allegedly exported eggs at a loss, while other members contributed some substitute or replenishing remuneration to the exporters for those losses. *Id.* ¶ 333.

This characterization of the program may ring of anti-competitive design and effect—particularly since the exports are allegedly sold at a loss and loss sharing purportedly occurs among USEM members—yet this characterization is not fully supported by the SAC's averments. For example, the specific facts contained in the SAC about the program do not plausibly suggest that *all* exports were sold at a loss and that concomitantly loss sharing occurred. Indeed, just before Rose Acre allegedly joined the export program at the end of 2006, *id.* ¶ 350, USEM shipped its first exports in three years, selling the exports "at a price *considerably better* than domestic breaking stock prices." *Id.* ¶ 348 (emphasis added). The SAC presumes that USEM exports were not necessarily always sold at a loss because the "program was designed to have USEM members export shell eggs *even where* the export prices were lower than domestic egg prices." *Id.* at ¶ 332.

Moreover, Plaintiffs **[**84]** broadly allege that exported eggs were sold at a loss, in part because "foreign egg and egg product prices were lower than in the United States," *id.* ¶ 346, but Plaintiffs provide specific facts that do not inexorably support such a conclusion about prices. Indeed, the only specific comparative pricing data in the SAC between exports and domestic sales places domestic prices higher *on average* than exports: "the average price per dozen for all eggs increased 52% from 58.2 cents in 2006 to 88.5 cents in 2007," while in August 2007 an export expected to be delivered the week of August 20, had a "sale price of 60 cents per dozen, 10 cents higher than any previous export." *Id.* ¶¶ 358, 364. [28] On the surface, these **[*738]** allegations would seem to advance Plaintiffs' theories, but an "average" necessarily implies that some domestic egg prices were lower than the average domestic price (just as some could be higher). It follows that some domestic prices could well have been lower than the export price of 50 cents or less in the first half of 2007. Accordingly, such limited and vague facts as to pricing do not suggest the broad conclusion that foreign egg prices were less than domestic prices. *Cf.* In re Optical Disk Drive Antitrust Litig., No. 3:10-md-02143, 2011 U.S. Dist. LEXIS 101763, 2011 WL 3894376, at *9 (N.D. Cal. Aug. 3, 2011) **[**85]** ("Pricing trends and economic data present a potentially fertile ground for inferences of price

[27] At **[**83]** times the SAC appears to misstate this phenomena, which the Court attributes to inadvertence rather than internal actual contradiction. *See, e.g., id.* ¶ 361 ("[T]he pace at which domestic U.S. prices dropped was proportional to supply . . . .").

[28] The SAC alleges other export-related price information, yet it does not provide any supporting comparative data. One such allegation is that the "average European Community price for eggs in 2003 was only 110.57 euros per hundred kilograms" and in 2005 the average per hundred kilograms was 86.08 euros. *Id.* at ¶ 148. There is no similar comparative data on domestic pricing in the SAC to meaningfully compare European and domestic prices in that time period.

manipulation, but the information plaintiffs have presented at this juncture is ambiguous at best, and does not permit reliable conclusions to be drawn about the pricing of [the product at issue] in particular."). [29]

Given that the SAC does not foreclose the possibility that export **[**86]** pricing could have been higher than domestic prices at times of certain exports, it also does not exclude the possibility that Rose Acre's participation in the egg export program might have been for independent, legitimate business reasons. Plaintiffs charge that Rose Acre "participated in egg exports, sharing any associated financial losses with other members." SAC ¶ 67. But, again, not all exports necessarily involved losses (and thus loss sharing). Accordingly, at this juncture who can say—from the Plaintiffs' pleading—that Rose Acre's participation was not limited to exports that did not involve losses?

Furthermore, the SAC's allegations reflect that—unlike the UEP Certification Program, which as pled, mandated certain conduct—the nature and extent of a producer's participation in the export program was not mandated. The SAC claims only that providing eggs for export or loss sharing was encouraged, rather than required by virtue of membership in the program. Sparboe, for example, while a member of the export program merely received "pressure" to provide eggs for export, or in the alternative, "to provide money to make up for the loss that other UEP members experienced by participating **[**87]** in the egg export program." *Id.* ¶ 341. Another SAC allegation suggests that members *agreed* to share in losses on an export-by-export basis, but were not required to do so. *Id.* ¶ 334 (quoting a March 20, 2003 memorandum sent to USEM members stating that an unnamed new member "*agreed* to share in the loss" from a "recent export" (emphasis added)). As phrased, the allegation that Rose Acre participated in the export program, "sharing *any* associated financial losses," leaves wide open the interpretation that there may not have been "any" losses for Rose Acre to share to the extent of its participation, or that Rose Acre did not actually make any such contributions when—and if—the opportunity was presented.

As a final point, the SAC alleges that exports of eggs occurred independently of the USEM export program. Prior to the existence of the USEM export program in 2000, "the United States was the second-largest exporter of eggs in 1998." *Id.* **[*739]** ¶ 145. In the three years prior to November 2006, according to the SAC, no eggs were exported through the program, and yet the SAC claims that 14 million dozen eggs were exported in January to April 2006. *Id.* ¶¶ 348, 354. The existence of such exports, **[**88]** apparently occurring independently of the USEM export program, suggest that at least some U.S. egg producers had independent reasons to export eggs, unrelated to the alleged conspiracy to reduce egg supply. Thus, Plaintiffs' bald statement that "[t]here would have been no independent business reason for each Defendant on its own to undertake costly exports at the expense of more profitable domestic sales" is contradicted by the SAC's own other allegations. *Id.* ¶ 346.

In summary, the specific facts pled as to the export program to some degree support the Plaintiffs' conclusory assertions about the program's anti-competitive attributes, but also they could be equally suggestive of the possibility that Rose Acre had an independent, legitimate business justification for participating in the program. Nonetheless, although Rose Acre's participation in the USEM export program *by itself* could be equally consistent with the possibility of independent, legitimate business justification, the Court must proceed to consider the additional facts that Plaintiffs allege to suggest that Rose Acre agreed to the overarching conspiracy.

2. Whether Rose Acre Joined the Conspiracy

Rose Acre's main arguments **[**89]** in support of its motion concentrate on its alleged participation in the UEP Certification program. Upon close consideration of those arguments, the Court cannot agree with Rose Acre, but instead finds that Plaintiffs have sufficiently alleged specific facts that plausibly suggest that Rose Acre joined the alleged conspiracy.

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[29] In contrast, for example, Plaintiffs allege, without any American comparative data, that "egg and egg product prices [were] far lower in Europe than in the United States" at a time when egg consumption in various European countries was low. *See id.* ¶ 360.

Rose Acre's primary argument is that joining and becoming certified under the UEP Certification Program is consistent with rational self-interest as demonstrated by the facts that consumers demanded eggs raised pursuant to animal welfare standards, and specifically endorsed UEP-certified eggs, and that Rose Acre's business "expanded" while it participated in the Certification Program. This argument is akin to Michael Food's pro-competitive arguments, and for the reasons the Court discussed, *supra*, concerning the nature of the UEP Certification Program with respect to Michael Foods' motion, the Court likewise cannot agree with Rose Acre that the SAC contains allegations that suggest an "obvious alternative explanation" for an egg producer to join the UEP Certification Program.

Rose Acre's argument on this score, however, is, in part, distinguishable from Michael **[**90]** Foods in that it relies on allegations derived from the Plaintiffs' First Amended Complaint and news articles incorporated in the SAC "by reference," but not attached to it as exhibits. For example, the SAC cites a February 2008 *Egg Industry* article entitled, "Infrastructure's role in keeping egg prices high," to support the allegation that Dolph Baker, president of Cal-Maine Foods, made a statement that "What we learned in 2007 is that we have control of our destiny if we work at it, and as an industry, 2008 could be another super year." *Id.* ¶ 392. Excerpting a different portion of the same article, Rose Acres argues that, contrary to the UEP Certification Program's apparent prohibition on expanding facilities, [30] Marcus **[*740]** Rust of Rose Acre made a statement that Rose Acre's business expanded. Rose Acre Mot. at 9.

Despite relying on this excerpt and **[**91]** other materials that are not directly cited in the SAC, Rose Acre proffers no grounds or legal authority as to why the Court can or should consider these materials in connection with the motion to dismiss. Plaintiffs argue that the applicable pleading standard does not permit the consideration of these materials on the grounds that they are not part of the SAC but instead constitute "evidence" in support of an alternative explanation for Rose Acre's conduct, consideration of which would convert the motion to dismiss into a summary judgment motion. Day 2 Tr. at 98:1-4; 100:6-10.

HN25[] Generally, "a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)* (citation omitted). And as stated above, in evaluating the adequacy of a pleading, "a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer, 605 F.3d at 230* (citation omitted). Here, the materials upon which Rose Acre relies to argue that an alternative legitimate **[**92]** explanation for its alleged conduct exists are not properly before the Court on the pending motion to dismiss. The materials were not attached to the SAC as exhibits; it is unclear whether their authenticity is unchallenged; and although some of the materials indeed were quoted in the SAC, their "limited quotation does not constitute incorporation by reference." *Goldman v. Belden, 754 F.2d 1059 (2d Cir. 1985)*. [31]

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[30] Rose Acre does not identify the particular SAC paragraphs that allege this prohibition. As previously discussed, however, Plaintiffs averred that "[a]s part of these [UEP Certified] guidelines . . . Defendants also agreed not to add capacity or make up for the lost hens that would result through reduced cage densities . . . ." *Id.* ¶ 208.

[31] *Twombly* suggests that the Court *might* be able to take judicial notice pursuant to *Fed. R. Evid. 201* of the "full contents of . . . published articles referenced in [a] complaint, from which . . . truncated quotations were drawn." *Twombly, 550 U.S. at 568 n.13*. This suggestion appears in that case in relation to a narrow factual context where a *Chicago Tribune* article reported on a defendant-speaker's thoughts on a matter that were only selectively excerpted in the complaint, and is inapplicable to the scenario at bar where Rose Acre appears to proffer them to the Court for purposes of examining the content of an article published in an unauthenticated industry periodical.

Furthermore, Rose Acre has not articulated any basis for the Court to consider these materials through **[**93]** judicial notice or any other grounds. Rose Acre merely attached the materials to its motion and cited them to support the substance of its arguments. ***HN26***[] Without an invocation of *Fed. R. Evid. 201* and a basis for applying it here, "judicial notice remains discretionary with the trial judge," 21B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5107.1, and the Court adheres here to conventional Third Circuit case law in considering materials outside of a pleading.

Furthermore, Plaintiffs' antitrust claims are not based upon or integral to these documents, or vice versa. ***HN27***[] In circumstances when courts do look beyond a pleading to entire documents that are merely cited in the complaint through isolated statements excerpted from such documents, only those documents that are central to the claim at issue, such as contracts for breach of contract claims or public offering documents containing alleged fraudulent statements in securities misrepresentation suits, are appropriate for that purpose. *See, e.g., Burlington Coat Factory, 114 F.3d at 1426* (recognizing that a "document *integral to or explicitly relied* upon in the complaint" may be considered in a motion to dismiss **[**94]** in relation to a securities fraud claim (citation omitted) (emphasis in original)); *Angstadt ex rel.* ***[*741]*** *Angstadt v. Midd-West School Dist., 377 F.3d 338, 342-43 (3d Cir. 2004)* (determining that consideration of certain school regulations not attached to the complaint is permissible because the claim challenged the reasonableness of those regulations). Here, Plaintiffs' antitrust claim against Rose Acre does not rely on the referenced publications—such materials that may well win the day eventually for Rose Acre or others—in such a way that the Court should consider them now at the motion to dismiss stage. [32] Thus, to the extent that Rose Acre is interjecting factual assertions external to the SAC, the Court declines to consider them. *See Flat Panel, 586 F. Supp. 2d at 1117* ("[A]t this stage of the litigation the Court's review is limited to the pleadings, and the Court may not consider factual assertions about the nature of [a defendant]'s business.").

In support of its contention that an alternative legitimate explanation for its conduct exists, Rose Acre also stresses that it was not part of the "core group" of defendants who initiated the overarching conspiracy. Rose Acre argues that the pleading against it must allege that it "knowingly joined in any agreement with the common purpose of achieving an illicit restraint on competition" and the SAC fails to do so. Rose Acre Reply at 10. In other words, because Rose Acre is not alleged to be an original member of the flock, but rather a latecomer, its conduct alleged in the SAC and eventual certification under the UEP Certification Program do not plausibly suggest Rose Acre knowingly joined or agreed to participate in the overarching conspiracy to reduce the supply of eggs. [33] Notwithstanding this argument—which otherwise may prevail on the merits at a later stage of this suit—"latecomer status" is not enough to undercut the SAC's overall allegations as to Rose Acre which plausibly suggest that it agreed to the overarching conspiracy. As discussed above, certification under the **[*742]** UEP Certification Program, as alleged, is an act consistent with **[**96]** agreement to the offending conspiracy. The SAC alleges that the companies who became certified under the UEP Certification Program were required to undertake, in order to obtain and maintain their certification, certain measures that have the effect of reducing that company's output of eggs and without apparent legitimate business rationale.

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[32] By illustrative contrast, the UEP Certification guidelines are arguably integral to Plaintiffs' antitrust claim under this standard. But this example is purely academic because, *inter alia*, no Defendant has offered authenticated guidelines **[**95]** in connection with a motion to dismiss.

[33] Plaintiffs appear to misconstrue this argument. In response to Rose Acre, Plaintiffs raise the unrelated issue of whether an antitrust conspirator needs to have participated in all aspects of the conspiracy in order to be vulnerable to liability, contending that "late entry into a conspiracy does not exonerate a defendant from liability for what previously occurred." Pls.' Resp. at 44. Given that Rose Acre argues that its alleged latecomer status is a factor that suggests that Rose Acre did *not* agree to the overarching conspiracy to reduce egg supply, Plaintiffs' argument as articulated is irrelevant to Rose Acre's Motion. It follows that the Court need not and shall not address here whether a latecomer can be liable for earlier alleged conspiratorial participation in a civil antitrust action, but observes that the Third Circuit Court of Appeals **[**97]** may not have directly weighed in on this issue in all pertinent respects. *See In re Lower Lake Erie Iron Ore Antitrust Litig., 710 F. Supp. 152, 153-54 (E.D. Pa. 1989)* ("[T]he general rule seems to be that civil liability, too, is unaffected by the duration of one's participation in the conspiracy. Whether the Third Circuit Court of Appeals would apply this 'late joinder' rule is, however, not altogether clear."); *Daniel Boone Area Sch. Dist. v. Lehman Bros., Inc., 187 F. Supp. 2d 400, 414 (W.D. Pa. 2002)* ("[C]o-conspirators might be liable for acts committed prior to their joining the conspiracy." (citation omitted)). *But see Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1491 & n.16 (3d Cir. 1985)* ("Conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. . . . Those who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators." (citation omitted)), *vacated*, ***475 U.S. 1105, 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986)***, *remanded to* 823 F.2d 49 (3d Cir. 1987).

Moreover, Rose Acre's certified status does not exist in a vacuum. The SAC **[**98]** alleges that Rose Acre was represented at meetings at which decisions were made and actions taken that advanced the conspiracy and where conspirators openly acknowledged the virtues of various coordinated actions. Additionally, Rose Acre's representative allegedly made comments evincing awareness of certain features of the egg market that could be manipulated by actions that impacted supply. Moreover, Rose Acre's participation in the export program, while arguably consistent with legitimate, self-interested business conduct if viewed in a vacuum, also must viewed within the framework of Rose Acre's overall alleged conduct. Thus, the allegations as to Rose Acre's mere attendance at meetings and public and private comments, when coupled with the allegation of certification under the UEP Certification Program and participation in the export program, plausibly suggest, at least at this stage of the litigation, that Rose Acre knowingly agreed to join the alleged conspiracy. *See* Southeastern Milk, 555 F. Supp. 2d at 943-44 ("While viewing each of these factual allegations in isolation may lead one to the conclusion drawn by the defendants, i.e., that there is a legitimate business justification **[**99]** for each of the acts, a view of the complaint as a whole, which this Court must take, and accepting all of the factual allegations as true, does support a plausible inference of a conspiracy or agreement made illegal under *§ 1* of the Sherman Act. . . . [T]he fact that multiple instances of parallel conduct are alleged makes it far less likely that a business justification exists for all of the acts taken in total.").

D. Ohio Fresh's Motion to Dismiss

Ohio Fresh Eggs, LLC, takes a "Sam-I-am" approach in opposing the SAC, raising numerous arguments in support of its one menu item, but even when considering the motion in a house, with a mouse, in a box, or with a fox, [34] the Court is unpersuaded to bite. First, Ohio Fresh emphasizes that the SAC does not allege that it engaged in a wide range of conduct that is purported to have advanced the offending conspiracy. Ohio Fresh Mot. at 4; Ohio Fresh Reply at 3. For example, Ohio Fresh emphasizes that there is no allegation that it served on a UEP Board or committee or that it participated in the USEM export program. Ohio Fresh also argues that there are no allegations that charge that it was part of the "core group" that devised or advanced **[**100]** the alleged conspiracy. Ohio Fresh likewise points out that there is no averment that it participated in the coordinated actions alleged to have occurred in the early years of the conspiracy. As discussed above, however, there is no requirement that allegations pertaining to one defendant mirror those against other defendants in terms of specific conduct or "quantity" of alleged "bad acts." Indeed, a defendant need not be accused of having engaged in all activities alleged to have advanced the conspiracy. In this respect, the absence of certain allegations as to Ohio Fresh when compared to other named defendants does not represent a debilitating deficiency in the SAC. [35]

[*743] Second, Ohio Fresh urges the Court to categorize it separately because it operates pursuant to a federal court decree and a state consent order that apparently place restrictions on Ohio Fresh's hen population:

> In its initial motion to dismiss *(Dkt. 152)*, [Ohio Fresh] noted that it was incorporated on April 21, 2003 and, since its inception, it has operated under a federal court decree and a state consent order which placed specific conditions and limits on the total number of birds which could be housed by **[**102]** [Ohio Fresh] at its facilities.

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[34] *See* Dr. Seuss, *Green Eggs and Ham* (1960).

[35] Additionally, the Court notes that Plaintiffs have argued that their theory as alleged does not require participation by all Defendants in all coordinated actions at all points throughout the time period at issue. They contend that Defendants agreed to manipulate supply and from there, "looked around at the industry and the economy," and determined the means to best achieve the alleged agreement, which resulted in Defendants engaging in "different means over the time to control **[**101]** or manipulate supply." Day 1 Tr. at 94:5-15. It remains to be seen at a later stage in this litigation if this theory ultimately proves too much or too little, such as if the evidence eventually discloses so many different, differing, and distinct acts by the various remaining Defendants that no image of a defined "conspiracy" emerges.

Additionally, the Court also notes that while Ohio Fresh appears to raise a latecomer-esque argument in simple chronological terms, its claims in this regard do not have the same implications as Rose Acre's latecomer argument. The Court does not here credit Ohio Fresh with authentic latecomer status for purposes of trying to avoid potential liability.

> Nevertheless, in the [SAC], the Direct Purchaser Plaintiffs do not allege how [Ohio Fresh] participated in their alleged conspiracy given the federal and state operating restrictions of its facilities and its bird populations.

Ohio Fresh Mot. at 2 (emphasis in original). Although Ohio Fresh cross-references its prior motion to dismiss Plaintiffs' First Amended Consolidated Complaint, it does not explicitly request that the Court consider the substance of that prior motion. Likewise, it does not provide grounds or supporting legal authority as to why the Court can or should consider that mooted motion. *See* January 6, 2010 Order (Doc. No. 226). More to the point, the consent decrees are not made exhibits to the new motion, and Ohio Fresh neither asks, nor provides any basis for, the Court to consider these decrees in connection with its motion.

Even assuming, *arguendo*, that the consent orders are consistent with Ohio Fresh's advocacy here and, indeed, do limit the maximum number of birds that Ohio Fresh can house, it is unclear at this stage of litigation whether such a limitation would be at odds with the alleged conspiracy to reduce the supply of eggs **[**103]** and Ohio Fresh's alleged conduct that supposedly exposes its agreement to join the conspiracy. [36] While Ohio Fresh may ultimately prevail upon an argument premised upon the consent orders, the argument is an affirmative defense, more appropriate for resolution on the merits than for testing the sufficiency of the SAC. Without full explication as to the consent orders, the Court declines to consider and interpret them in connection with Ohio Fresh's current motion to dismiss.

[*744] Third, Ohio Fresh attacks the SAC for failing **[**104]** to allege that Ohio Fresh "acted independently or separately from the alleged activity of Hillandale Farms—Ohio Fresh's alleged involvement is only as an 'affiliate and supplier' of Defendant Hillandale Farms as an 'integrated enterprise.'" Ohio Fresh Mot. at 4; Ohio Fresh Reply at 3. Indeed, the allegations as to the relationship between companies with the "Hillandale" name and Ohio Fresh are rather ambiguous. The SAC alleges "[p]ursuant to agreements executed December 26, 2003, Hillandale PA purchases all eggs produced by Ohio Fresh" and that Ohio Fresh is an "affiliate and supplier" of Hillandale Farms. SAC ¶¶ 79, 89-90. As discussed, *infra*, with respect to the Hillandale Entities' motion to dismiss, the SAC alleges that "Hillandale Farms" is "a vertically integrated supplier . . . directly involved in every aspect of egg production and distribution." *Id.* ¶ 80.

Ohio Fresh may protest that there are no allegations that it acted "independently or separately" from "Hillandale Farms," but this characterization of the SAC does not bear out upon a fair reading of its allegations. The SAC is not ambiguous in pleading specific facts as to Ohio Fresh and its alleged conduct. In order for **[**105]** the SAC to survive Ohio Fresh's motion, those specific facts need only plausibly suggest Ohio Fresh's agreement to the overarching conspiracy, notwithstanding its alleged relationship to "Hillandale Farms." Plaintiffs have satisfied this requirement. The SAC expressly avers that Ohio Fresh adopted the UEP Certification guidelines to reduce chick hatch and obtained a certification number. Ohio Fresh also allegedly was a UEP member and attended UEP meetings at which aspects of the conspiracy supposedly were outlined. *See, e.g., id.* ¶¶ 225, 291. As discussed above, these actions are enough to suggest plausibly Ohio Fresh's agreement to the conspiracy for initial pleadings' purposes.

Additionally, the SAC charges Ohio Fresh with other conduct that is consistent with the conspiracy. As averred at least, Ohio Fresh agreed to a plan similar to one that required producers to "molt flocks at 62 weeks and dispose of spent hens by 108 weeks and that this plan of action take place immediately and carry through until Aug. 1, 2004." *Id.* ¶¶ 279-80. Ohio Fresh also allegedly signed a written commitment agreeing to one of two options: either to dispose of hens four weeks earlier than scheduled during **[**106]** the first quarter of 2005 or to reduce flock size by five percent during that same time period." *Id.* ¶¶ 290-91. Notably, these management mechanisms—molting,

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[36] Similarly, as Plaintiffs argue, consideration of the Ohio Fresh's argument would require consideration of whether Ohio Fresh complied with the orders and to what extent its conduct is connected to the orders, which would be inappropriate at the motion to dismiss stage. *See* Pls.' Resp. at 64 n.22; *see also* S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 426 (3d Cir. 1999) ("Specifically, ***HN28***[] on a motion to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." (citations omitted)).

disposal, and flock reduction—all, at least facially, function *to reduce hen numbers and ergo total egg supply (in the case of molting, hens cease egg output* for about two months, *id.* ¶ 130). Through these agreements, it appears that producers consented to manage their flocks based upon fixed time periods or percentages because other producers agreed to do the same, rather than making flock management decisions based upon more typical factors—such as their own flocks' productivity—specific to an individual producer. *See, e.g., id.* ¶¶ 129-30 (describing that "post-peak egg production (after 30 to 32 weeks of age) continually decreases to approximately 50 percent around 60 to 70 weeks of age" and that "[w]hen the flock declines to around 50 percent production, producers may decide to molt the flock"). As alleged, the agreements seem to be mechanisms to cut egg supply deliberately and arbitrarily, without a legitimate, independent business explanation in the absence of agreement. Accordingly, the SAC presents facts as to Ohio Fresh **[**107]** that establish sufficient grounds to infer at this stage of the litigation that Ohio Fresh agreed to the overarching conspiracy.

[*745] Fourth, Ohio Fresh argues that despite the SAC's allegations that it twice agreed to molt and dispose of hens in 2004, the SAC does not allege that Ohio Fresh actually reduced flock size after making such agreements or ever "during any other timeframe [sic] throughout the alleged ten-year conspiracy at the request of UEP or a competitor." Ohio Fresh Reply at 3. According to Ohio Fresh, even if the SAC had alleged that Ohio Fresh disposed of hens pursuant to such a commitment, doing so "does not mean that you're not filling with p[u]llets, hatcheries, and increasing your supply in the future." Day 2 Tr. at 134:8-11. In raising these points, it appears that Ohio Fresh is arguing that agreement to engage in at least early hen disposal does not necessarily imply agreement to the overarching conspiracy to reduce egg supply because a producer could indeed increase its overall supply of eggs through other means. As discussed above as to Michael Foods' and Rose Acre's motions, Ohio Fresh's argument that it could have increased its egg production while concurrently **[**108]** participating in the UEP Certification Program and making commitments to molt or reduce its flock is not consistent with the egg-producing world alleged in the SAC.

Because Plaintiffs have alleged specific facts sufficient to suggest that Ohio Fresh joined the alleged conspiracy to reduce the supply of eggs, Ohio Fresh is "on notice concerning the basic nature of [the Plaintiffs'] complaints against [it] and the grounds upon which their claims exist." *See* *Southeastern Milk, 555 F. Supp. 2d at 943*. Accordingly, the Court denies Ohio Fresh's motion.

E. Hillandale Entities' Motion to Dismiss

Hillandale Gettysburg L.P., Hillandale Farms Inc., and Hillandale Farms East, Inc. (collectively, the "Hillandale Entities") assert that they are entitled to dismissal because the SAC lacks sufficient allegations specific to these Defendants to support any inference that they each were a party to the agreement to restrict the supply of eggs. They argue that Plaintiffs, by lumping the three entities together, have failed to allege specific facts that either connect each or any individual entity to the overarching conspiracy, or alternatively, satisfy the requirements for imputing another affiliated entity's **[**109]** liability to the Hillandale Entities. They are, to the Court's satisfaction, correct.

The SAC alleges that although the three entities have separate legal forms and principal places of business located variously in Pennsylvania, *id.* ¶¶ 85-87, the Hillandale Entities have an affiliated relationship *inter se.* Plaintiffs aver that they share ownership or control in common through three individuals, Orland Bethel, Gary Bethel, and Don Hershey. *Id.* ¶ 80. Plaintiffs plead that Gary Bethel and Orland Bethel allegedly own Hillandale Farms East, and are, respectively, the company's president, and secretary and treasurer; Orland Bethel and Gary Bethel own Hillandale Farms, Inc. with Gary Bethel serving as the company's president; Orland Bethel and Don Hershey own Hillandale-Gettysburg with Mr. Hershey serving as president and general partner. *Id.* ¶¶ 85-87. The Hillandale Entities also together are purported to "function as an integrated enterprise producing and selling shell eggs" along with a fourth entity, Hillandale Farms of Pa., Inc. [37] *Id.* ¶ 79. **[*746]** The SAC refers to the four entities collectively as "Hillandale Farms." *Id.*

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[37] Hillandale Farms of Pa., Inc., is also a named Defendant and chose **[**110]** to answer the SAC. *See* Answer (Doc. No. 246).

The concept of "vertical integration" is central to the Plaintiffs' theory that the Hillandale Entities are involved in the overarching conspiracy, and the SAC describes vertical integration in one of two contexts. As alleged, a business that is "vertically integrated" is "integrated from the point of production through final marketing and sale." *Id.* ¶ 457; *see also id.* ¶ 408. As such, according to Plaintiffs, "vertically integrated firms mill their own feed, hatch chicks, rear pullets, confine hens, produce and/or purchase eggs, wash, candle, grade, store, market, transport and distribute their own eggs." *Id.* ¶ 457. Vertical integration is purportedly the predominant business model across the egg industry and "[m]ost of the large firms now either own egg production facilities or have production contracts with local egg producers." *Id.* ¶ 124. The SAC further pleads that "Hillandale Farms" is "a vertically integrated supplier . . . directly involved in every aspect of egg production and distribution," and that each of the Hillandale Entities "is part of the Hillandale Farms integrated enterprise." *Id.* ¶¶ 80, 85-87.

The SAC predominantly attributes **[**111]** alleged conduct that ostensibly advanced the conspiracy to "Hillandale Farms." For example, Plaintiffs charge that "Hillandale Farms" "adopt[ed] UEP Certified guidelines to reduce chick hatch (certification nos. 182 and 328)", "signed a commitment sheet in late 2004 to either reduce flock size or dispose of hens", was a "member of USEM and/or participated in egg exports, sharing any associated financial losses with other members." *Id.* ¶ 90. As pled, "UEP newsletters also reported that Hillandale Farms completed animal care certified audits, was a certified company and licensed marketer, and displayed the animal care certified logo on its packages." *Id.* ¶ 82.

Although these factual allegations are rather specific in nature, more robust factual details explicitly link only Hillandale Farms of Pa., Inc. or "Hillandale Farms — PA" to these alleged activities. For example, the SAC alleges that "Hillandale Farms — PA" agreed to the UEP Certified Program as of 2003, maintains certification no. 182 under the program, and signed a written commitment sheet to either reduce flock size or dispose of hens earlier than scheduled. *Id.* ¶¶ 257, 291, 301, 448. The SAC also alleges that the *Pittsburgh-Post* ***[**112]*** *Gazette* reported that Gary Bethel, as "a spokesman for Hillandale Farms of Pennsylvania," commented that, "We've been taking a proactive approach towards allowing caged chickens more space . . . . If we had a house that held 100,000 chickens five years ago, it would house 80,000 now, and that means quite a reduction in total egg numbers." *Id.* ¶ 369.

The remaining, more specific SAC allegations that use the arguably non-specific or, alternatively, "umbrella" term "Hillandale Farms" refer to "Gary Bethel (Hillandale Farms)" as a member of the UEP marketing committee on January 26, 2004 and May 10, 2004, and as a board member who attended a Board of Directors Legislative Meeting on May 12-15, 2003. *Id.* ¶¶ 264, 272, 336. "Hillandale Farms" allegedly maintains Certification No. 182 under the UEP certification program. *Id.* ¶ 448. The SAC also alleges that "Hillandale," a name or term that is undefined in the SAC, was a USEM member that received a March 20, 2003 memorandum from Gene Gregory addressed to all USEM members. *Id.* ¶ 334.

As this narrative of the SAC's allegations against the Hillandale Entities, "Hillandale Farms," and "Hillandale" demonstrates (and as Plaintiffs appear to concede), **[**113]** Plaintiffs have not directly alleged **[*747]** that any of the Hillandale Entities individually agreed to or participated in the conspiracy to reduce the supply of eggs. There simply is an absence of specific factual allegations in the SAC to connect each (or any) of the Hillandale Entities directly to the conspiracy. *See* *Digital Music, 2011 U.S. Dist. LEXIS 77442, 2011 WL 2848195, at *20* (granting motion to dismiss as to three defendant corporations, in part, because the complaint does not allege their "direct involvement" in the alleged conspiracy"); *In re TFT-LCD (Flat Panel) Antitrust Litig., Nos. M 07-1827 SI, C 09-5609, 2010 U.S. Dist. LEXIS 64930, 2010 WL 2629728, at *7 (N.D. Cal. June 29, 2010)* (granting PENAC's individual motion to dismiss, in part, because "[t]here is nothing in paragraph 53 [the only allegation that "mentions" PENAC] or elsewhere alleging *how* PENAC participated in the conspiracy"); *see also* *Invamed, 22 F. Supp. 2d at 221*, ("[Plaintiff] must allege some circumstances from which the existence of an anticompetitive agreement, express or implied, of which the Affiliates were a part can be inferred." (citation omitted)).

HN29[] When defendant corporate entities "are not plausibly alleged to be directly liable—that is, are not plausibly **[**114]** alleged to have themselves entered into unlawful agreements," there must be some "other basis imputng *§ 1* liability to" those entities. *Ins. Brokerage, 618 F.3d at 341 n.44*; *cf.* *In re Cal. Title Ins. Antitrust Litig., No. C 08-01341, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *7 (N.D. Cal. May 21, 2009)* ("[T]o state a claim against the Parent Corporations, Plaintiffs either must set forth facts establishing direct participation in the alleged conspiracy or set forth sufficient allegations showing that the Parent Corporations are vicariously liable for the acts of their subsidiary corporations."). This is because "[a]s a matter of well-settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship." *Ins. Brokerage, 618 F.3d at 341 n.44* (citing William Meade Fletcher, *Cyclopedia of Law of Private Corporations* § 33, at 89 (perm. ed. rev. vol. 2006)); *Burks v. Lasker, 441 U.S. 471, 478, 99 S. Ct. 1831, 60 L. Ed. 2d 404 (1979))*. Indeed, absent some basis for imputing liability, subsidiary entities cannot automatically sustain liability "under *§ 1* for any agreements to which the parent is a party." *Id.*

In an attempt to assert some "other **[**115]** basis" for liability against the Hillandale Entities, Plaintiffs argue—without using the term—what is essentially a "single enterprise" theory for imputing liability. They claim that in the antitrust context separately incorporated legal entities may, as a practical matter, be treated as a single entity for purposes of illegal conduct and hence liability: "[T]he actions of the multiple Hillandale Defendants were really unilateral behavior flowing from decisions of a single enterprise." Pls.' Resp. at 52. It follows, they contend, that piercing the corporate veil or other established theories for imputing liability among corporate entities by permeating their borders are inapposite to the issue at hand. Indeed, Plaintiffs expressly do not raise these theories in support of the SAC. The issue, according to Plaintiffs, concerns whether the Hillandale Entities were "integrated," or in other words, operated together, with respect to alleged conduct that advanced the conspiracy. Plaintiffs submit that the pleading requirements of "integration" for antitrust liability purposes apply a less stringent standard than those of veil piercing. Their argument follows that they have sufficiently alleged **[**116]** that the entities played a role in the conspiracy through a "single enterprise" theory by alleging that through vertical integration and overlapping owners and management each of the Hillandale Entities is a part of an integrated enterprise. Plaintiffs maintain **[*748]** that on the basis of their "single enterprise" theory the conduct alleged as to "Hillandale Farms" is thereby attributable to each of the Hillandale Entities. As such, Plaintiffs contend, it is unnecessary for the SAC to allege additional facts that directly connect each of the Hillandale Entities to the conspiracy.

This argument is unpersuasive for several reasons. As a predicate, Plaintiffs claim that the separately incorporated entities can constitute a single entity with respect to illegal antitrust conduct. But this is unsupported by the spare legal authority Plaintiffs present in their brief and oral argument materials. Notably, such legal authorities as Plaintiffs offer primarily entail excerpted case quotations, which when read in the context of the actual cases, do not carry the import of what Plaintiffs attempt to muster.

This is certainly true concerning Plaintiffs' reliance on *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. **[**117]** Plaintiffs attempt to invoke the concept articulated in *Copperweld* that "the concerted activity of two entities [within a corporate family] . . . is really unilateral behavior flowing from decisions of a single enterprise," *id. at 766-67*, by asserting that a parent and its wholly owned subsidiaries "are not unlike a multiple team of horses drawing a vehicle under the control of a single driver," *id. at 771*. Plaintiffs' application of *Copperweld* in this manner is an attempt to unhitch the team from the harness. Indeed, the Court of Appeals for the Third Circuit recognized this when it confronted and rejected a virtually identical line of argument:

> Plaintiffs argue that subsidiary companies "act[ ] at the common direction of the parent[]," Plaintiffs' Comm. Reply Br. 12, and that "in reality a parent and a wholly owned subsidiary always have a unity of purpose or a common design," Plaintiffs' EB Reply Br. 35 (quoting *Copperweld, 467 U.S. at 771*) (internal quotation marks omitted). Emphasizing these features of the parent-subsidiary relationship, the Supreme Court held in *Copperweld* that ***HN30***[] parents and subsidiaries could not conspire for purposes of *§ 1 of the Sherman Act*. *467 U.S. at 776*; **[**118]** *see* *Am. Needle, 130 S. Ct. at 2212, 176 L. Ed. 2d 947* (noting that an "agreement" is cognizable under *§ 1* only if it "joins together 'independent centers of decisionmaking' " (quoting *Copperweld, 467 U.S. at 769*)). Contrary to plaintiffs' suggestion, . . . it does not follow from *Copperweld* that subsidiary entities are automatically liable under *§ 1* for any agreements to which the parent is a party."

Ins. Brokerage, 618 F.3d at 341 n.44. Other courts have likewise rejected this attempt to draw a "single enterprise" theory from *Copperweld. See* *Fla. Cement, 746 F. Supp. 2d at 1324* (". . . Plaintiffs do not explain why, if *Copperweld* eliminated antitrust liability for cooperation between parent corporations and subsidiaries . . . , [the parent] should be held liable for [the subsidiary]'s alleged participation in the concrete conspiracy in this case."

(relying on *Mitchael v. Intracorp, Inc., 179 F.3d 847, 857 (10th Cir.1999))*; *cf.* *Sun Microsystems Inc. v. Hynix Semiconductor Inc., 608 F. Supp. 2d 1166, 1185-86 (N.D. Cal. 2009)* ("While true that a single entity doctrine was announced in *Copperweld*, . . . [t]he doctrine . . . expressly deals with the question whether a parent and subsidiary corporation may **[**119]** be charged with conspiring with each other, and not, as is the case here, with the question whether those two entities may collectively be treated as a single entity for purposes of jurisdictional antitrust standing.").

[*749] Furthermore, the allegations of "vertical integration" and overlapping ownership and control, as they are advanced, do not support the heavy load that Plaintiffs have lifted upon them. Vertical integration is a term that the SAC defines vaguely, [38] but in essence, it is alleged to be a business model, one that is structured around the egg supply chain. As used by Plaintiffs, the term alone certainly does not intimate that the Hillandale Entities, by allegedly being a part of a vertically integrated enterprise, are so linked that they effectively function as single entity with respect to alleged antitrust conduct.

This conclusion remains undisturbed even considering Plaintiffs' contention that the Hillandale Entities have common ownership and control. Plaintiffs have not alleged that the Hillandale Entities are a part of a conventional parent and wholly-owned-subsidiary corporate structure. Instead, the entities merely are alleged to have individuals in overlapping ownership or controlling roles, and it cannot be said these allegations plausibly suggest that the entities are under common ownership or control such that a single decision-making source exercises definitive control over each of them. *See* Fletcher, *supra* § 43 ("Common officers and management are not incompatible with separate entities **[**121]** or conclusive of identity . . . ."); *cf.* *In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 290 (E.D. Pa. 2009)*, *appeal denied*, *Nos. 09-2257, 09-2258, 655 F.3d 158, 2011 U.S. App. LEXIS 17530, 2011 WL 3672510 (3d Cir. Aug. 23, 2011)* ("While some overlap existed in ownership between the affiliated distributors and the member growers, they were not under common control in the same sense as is a corporation and its wholly-owned subsidiary, a corporation and its divisions or as are two corporations owned in identical proportions by the same set of investors . . . . The affiliated distributors do not have 100% ownership or a de minimis deviation from complete ownership and there is no indication that the overlapping owners would have control independent of their co-owners." (citations omitted)). Moreover, ***HN31***[] the mere "fact that two corporations have common shareholders, officers or directors, or that their names are similar," does not "impose liability on one for the torts of the other or its agents." Fletcher, *supra* § 4878. Without specific allegations that would support how or why overlapping, but non-identical, ownership and management combinations might intimate common ownership and control, Plaintiffs' contentions **[**122]** of common ownership are entirely unsupported by the SAC.

Due to the absence of allegations in the SAC suggestive of either independent liability or a basis for imputing liability, Plaintiffs have not met their pleading obligations as to the "Hillandale Entities." Plaintiffs' proposed basis for imputing liability premised on a "single enterprise" theory is unsupported by legal authority and does not provide occasion to disregard the separate corporate forms of these entities and impose liability on them.

[*750] Additionally, the allegations in the SAC concerning vertical integration and the entities' ownership and control dynamics do not conform with the characterizations that Plaintiffs attempt to assign them. Given that their

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[38] The Hillandale Entities argue that the vagueness of "vertical integration" is akin to that of "governing sponsor," used by the plaintiffs in *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d 119*. Indeed, there are parallels between the terms. With respect to "governing sponsor" the *Jung* Court found:

> [The] meaning of the term "governing sponsor" **[**120]** is far from self-evident, and plaintiffs do not make any assertions with respect to what role governing sponsors play for [other individual defendants]. The Court will not speculate as to the purpose or activities of a "governing sponsor" or infer from this vague term that [an alleged sponsor engaged in certain alleged conduct] . . . . While all inferences are to be drawn in favor of plaintiffs on a motion to dismiss, the Court will not draw inferences from such vague, unsupported allegations."

Id. at 163.

basis for imputing liability is not cognizable and that Plaintiffs raise no other theories for imputation of liability, general allegations as to "Hillandale Farms" or "Hillandale" are insufficient to give notice to the Hillandale Entities of the claims against them. *See* *TFT-LCD, 586 F. Supp. 2d at 1117* ("[G]eneral allegations as to all defendants, to 'Japanese defendants,' to a single corporate entity such as 'Hitachi' is insufficient to put specific defendants on notice **[**123]** of the claims against them."); *cf.* *Flat Panel, 2010 U.S. Dist. LEXIS 64930, 2010 WL 2629728, at *7* ("[A]llegations and assertions about [alleged related companies] are insufficient to state a claim against PENAC unless the complaint alleges a specific connection between PENAC and the alleged conspiracy."). The SAC's few specific allegations as to the Hillandale Entities in no way imply that the entities directly agreed to or participated in the conspiracy, and as such, fail to provide such notice so that any of the Hillandale Entities seeking to respond to the SAC "would have little idea where to begin." *Twombly, 550 U.S. at 565 n.10*. Accordingly, the Court concludes that the Hillandale Entities' motion should be granted in part but without prejudice for Plaintiffs to seek leave to amend the complaint to more specifically plead how these defendants allegedly joined the alleged conspiracy other than as a conveniently scrambled group. [39]

F. UEA's Motion to Dismiss

UEA argues that the SAC's allegations pertaining to it either are merely conclusory, or simply do not support the inference that UEA joined or participated in the alleged conspiracy. According to UEA, the SAC fails **[**125]** to allege any freestanding conduct that could suggest participation—namely, any conduct by UEA relating to the eight coordinated actions alleged to have advanced the conspiracy—and there are insufficient alleged facts to perceive UEA's participation through any imputation of liability theories. The Court agrees.

Plaintiffs allege that UEA is a 501(c)(6) nonprofit corporation organized under the laws of the District of Columbia. SAC ¶¶ 108, 178. [40] Its principal place of business **[*751]** is located in Alpharetta, Georgia. *Id.* ¶ 108. The SAC twice mentions that UEA shares the same address with UEP and USEM. *Id.* ¶¶ 181, 441. UEA, as averred, "has three divisions: (I) Further Processors (egg breaking and further processing), (ii) Producers and Packers, and (iii) Allied Industries (products, services, and consulting)" and its IRS Form 990 allegedly states its "'primary exempt purpose' is to 'promote, educate [and] defend issues for [the] egg industry.'" *Id.* ¶ 178; *see also id.* ¶ 410. These three divisions are said to be part of "an 'alliance' of five separate organizations providing services to the egg industry" and "represent[ing] the interests of all sectors of the egg industry." *Id.* ¶¶ 176, 463. **[**126]** The other two alleged members of the "United Egg 'Alliance,'" *id.* ¶ 463, are UEP and USEM, *id.* ¶ 176. The SAC further generally alleges that UEP "manages" and "oversees" the "United Egg 'Alliance'" and "manages" the UEA. *Id.* ¶¶ 177-78.

Plaintiffs repeat throughout the SAC the general claim that there was overlap in membership and leadership across UEA, UEP, and USEM. *Id.* ¶¶ 437, 450. For example, the SAC alleges that "Gene Gregory is president of all three entities (UEP, UEA, and USEM)." *Id.* ¶ 450; *see also id.* ¶ 443. Additionally, Mr. Gregory's son, Chad Gregory, is said to be a senior vice president for UEA and UEP. *Id.* ¶ 444. [41] According to the SAC, "[i]n 2004, Toby Catherman

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[39] ***HN32***[] "Leave to amend must generally be granted unless equitable considerations render it otherwise unjust." *Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*, and *Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993))*. The Hillandale **[**124]** Entities urge the Court to dismiss the SAC with prejudice and without leave to amend the complaint, arguing that "[t]o allow Plaintiffs to amend their Complaint yet again, imposing still more expense and delay on the Moving Defendants for their own failures to plead, would not be fair to the Moving Defendants, to the other parties in this suit, or to the Court." Hillandale Entities Mot. at 11. At this juncture, while acknowledging that such arguments are not unexpected and are not without certain objective merit, the Court does not find that these arguments provide sufficient grounds to weigh against granting Plaintiffs leave to seek to amend the claims against the Hillandale Entities. Of course, the Court would expect any new effort by Plaintiffs to amend as to any of the Hillandale Entities would represent and entail a meaningfully more substantive claim as to the individual entities than was mounted against any one of—or all of—them in the SAC.

[40] There is a conflict in the SAC concerning the UEA's state of incorporation. In contrast to Paragraph 108, Paragraph 178 alleges that UEA is an "organization existing under the laws of Georgia." *Id.* ¶ 178. At oral argument, however, UEA's counsel noted that UEA was organized in the District of Columbia. Day 2 Tr. at 145:6-8.

of Michael Foods was elected chairman of UEA and Dan Meagher of Moark was elected vice chairman. Michael Foods and Moark were also members of UEP and their employees held positions in the **[**127]** UEP, as well." *Id.* ¶ 437. As another example, the SAC avers "in October 2005, Dan Meagher of Moark was elected chairman of UEA, and Greg Hinton of Rose Acre Farms was elected vice-chairman. Rose Acre Farms was a member of UEP and its employees held positions in the UEP." *Id.* ¶ 438. Plaintiffs also broadly and unprecisely charge that "UEP and UEA share staff." *Id.* ¶ 451.

Additionally, the SAC contains a hodgepodge of statements asserting that on occasions UEA members attended UEP Board and committee meetings, and that UEA and UEP held meetings at concurrent times and places. For example, one such allegation avers that a UEP April 2004 newsletter implies that UEA members had attended past UEP meetings and expresses UEP's "hope the [UEA] Allied members will continue to attend UEP's Spring Legislative meeting because this meeting is so critically important to our customers (egg producers)." *Id.* ¶ 434 (alteration in original). The UEP's May 2004 newsletter allegedly reported that UEA members attended the UEP's Spring Legislative Meeting **[**128]** in Washington, D.C., and "participated in committee meetings [and] [the] board meeting." *Id.* ¶ 435 (first bracket in original).

Plaintiffs also plead that UEP and UEA scheduled their organizations' respective annual meetings to be held "in conjunction" with the others' "and members of both organizations attend joint meetings." *Id.* ¶ 433. For example, UEA apparently held its annual meeting "in conjunction" with the UEP annual meeting in 2007 in San Antonio. *Id.* ¶ 433 n.96. Another such occasion is mentioned as to when both annual meetings were held was on October 20-22, 2004 in New Orleans. *Id.* ¶¶ 284, 434. The SAC generally refers to these meetings as "UEP's and UEA's joint Annual Board Meeting in New Orleans," *id.* ¶ 284, but specifically pleads that the meetings were distinct: "[I]n its April 2004 newsletter, UEP noted: 'UEP's Annual **[*752]** Meeting will be held in New Orleans on October 20-22. UEA will schedule a time during the October dates to hold their [sic] annual membership meeting.'" *Id.* ¶ 434. Additionally, the SAC alleges that the UEA division for "Further Processors" invited the UEP Executive Committee to its meeting on April 27, 2004. *Id.* ¶ 436.

The SAC further alleges that "after **[**129]** the filing of this action . . . UEP . . . prohibited UEA and non-egg producers from participating in . . . meetings. . . ." *Id.* ¶ 466. UEP's January 20, 2009 newsletter allegedly states:

> It should be noted that the Animal Welfare and Marketing Committees will be closed to <u>UEP members only.</u> Additionally, the Board of Directors meeting will include a time period at the close of the meeting, for <u>UEP Board members only.</u> UEP meetings have always been open to everyone and therefore we apologize that circumstances now warrant some meetings or portions of some meetings to be closed to selected members. We hope [UEA] allied members and others will be understanding.

Id. (emphasis and alteration in original).

The final category of allegations as to UEA concerns its purported "financial support for many of UEP's projects." *Id.* ¶ 451. Plaintiffs charge two such instances of UEA's alleged financial support. The first is recounted in an article reporting on what seems to be the New Orleans UEA annual meeting in the October 2004 UEP newsletter, which states:

> UEA-Allied members continue to be extremely supportive of UEP and of assistance to the egg industry. The members held their annual membership meeting **[**130]** in New Orleans and voted to set aside $20,000.00 that may be used by UEP for animal welfare research projects. Additionally the organization approved a budget, which will provide $40,000.00 for UEP[']s management.

Id. ¶ 452. The other instance referenced in the SAC as to UEA's alleged financial support entails UEA allegedly "approv[ing] a budget which will provide approximately $70,000.00 [in] support for UEP programs and management," as described by UEP's October 2005 newsletter. *Id.* ¶ 453.

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[41] There is a conflicting allegation in the SAC's Paragraph 331 that Chad Gregory was "Senior Vice President of the UEP and member of the UEA." *Id.* ¶ 331.

Based on these allegations, the Court concludes that Plaintiffs have failed to suggest plausibly that UEA joined the alleged conspiracy. The specific facts alleged simply do not support the SAC's bald contention that "UEP has conspired with UEA and its non-producer members and USEM to implement its unlawful supply control campaign at numerous industry meetings." *Id.* ¶ 465. The SAC's allegation that "UEA and its members were aware of, supported, and participated in the conspiracy . . . ." is similarly unsupported. *Id.* ¶ 411.

HN33[] A claim for a *§ 1* violation cannot merely rest upon allegations of common resources and membership between incorporated trade groups, much the same as such allegations cannot sustain **[**131]** a *§ 1* claim against corporate entities that have common management. There is nothing inherently illegal or actionable for separately incorporated trade groups to share a mailing address, a president, common leadership, or staff. Likewise, no nefarious conclusions can be drawn necessarily from the fact that meetings are held at the same time in the same town. Indeed, Plaintiffs provide no support for such a contention despite arguing that these factual allegations demonstrate that the SAC "directly alleges UEA's role as a co-conspirator in implementing the supply restriction scheme." Pls.' Resp. at 65. At most, such circumstances suggest opportunities (and hardly exclusive opportunities as that) to conspire with arguably greater convenience.

[*753] ***HN34***[] A trade association "can only be held liable for concerted action if it acted as an entity . . . . [and] concerted action does not exist every time a trade association member speaks or acts." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1007 (3d Cir. 1994)* (citing *Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 117-18 (3d Cir.1988))*; *see also* *Jung, 300 F. Supp. 2d at 165* (same). Therefore, "the Court will not impute the activities **[**132]** of [an] organization's members to the organization itself absent allegations that the entity participated in the conspiracy." *Jung, 300 F. Supp. 2d at 165*. That UEA allegedly has overlapping members with UEP and USEM, and that UEA members may have attended UEP and USEM meetings, or vice versa, are not sufficient alone to plausibly suggest that UEA as an entity participated in the conspiracy. Moreover, the specific meetings that allegedly were attended jointly do not appear to be connected to approving or discussing conduct that allegedly advanced the conspiracy. The Court recognizes that a possible exception to this may be the New Orleans UEP meeting where the UEP Board in 2004 allegedly approved a flock disposal plan, SAC ¶¶ 284-85, and UEA members *might* have been in attendance. However, as stated above, mere attendance at a meeting is not enough to sustain liability for an individual corporate defendant, and certainly could not extend to UEA merely through its members' alleged attendance.

Similarly, ***HN35***[] the Court cannot automatically impute the conduct of UEA leadership or staff to UEA. Certainly, a trade organization can be liable for antitrust violations of its agents premised on a **[**133]** theory of apparent authority. *See* *Alvord-Polk, Inc., 37 F.3d at 1009* ("[A] principal will be liable for an antitrust violation if an agent acting with apparent authority violates the antitrust laws . . . by conspiring with another person." (citation omitted)). As a corollary, however, Plaintiffs must allege facts sufficient to demonstrate the agents were acting with the apparent authority of UEA. *Cf.* *Restatement (Second) of Agency § 8* (1958) ("Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.").

The allegations as to UEA's leadership's actions do not raise the specter that they were conducted with UEA's apparent authority. For example, the SAC alleges that Dolph Baker, Chad Gregory, and Joseph Fortin, who are each alleged to have held leadership positions in both UEA and UEP "were strong proponents and vocal advocates of exporting large amounts of eggs outside of the United States for the sole purpose of increasing domestic egg prices," SAC ¶ 331, however, there are no allegations that would suggest **[**134]** that these individuals' alleged advocacy was undertaken with UEA's apparent authority. There also is no support for the notion that Mr. Gregory acted with UEA apparent authority when he purportedly wrote "numerous articles in 'United Voices' urging egg industry output restrictions." *Id.* ¶ 450. Indeed, "United Voices" is alleged to be solely a UEP bi-weekly publication. *Id.* ¶ 175.

To the extent that the SAC specifically pleads that Mr. Gregory attended "numerous meetings with UEP, UEA and USEM and other participants in the conspiracy," *id.* ¶ 450, there are no allegations that suggest that Mr. Gregory was acting in a dual capacity in his attendance at such meetings—*i.e.*, that he might be acting as president to both

UEA and UEP when attending a UEP meeting. Likewise, there is no allegation that Mr. Gregory acted in a dual capacity when he allegedly "directed, participated in, and authorized **[*754]** UEP's unlawful conduct as detailed" in the SAC. *Id.* ¶ 450. Nor do the facts alleged suggest, contrary to Plaintiffs' intimation at oral argument, that Mr. Gregory (when acting as UEA president) applied the knowledge that he might have acquired as president for UEP or USEM, and that such knowledge was **[**135]** imputable to UEA. Day 2 Tr. at 166:7-21.

Rather, the SAC frequently is explicit in deliberately delineating Mr. Gregory's affiliation when alleging his actions, and throughout the SAC he is predominantly alleged to have acted under the auspices of the UEP. *See, e.g., id.* ¶ 210 (describing that at "UEP meetings around this time . . . Gene Gregory (UEP) publicly praised the economic benefits of decreased supply from [the UEP Certified] program."); *id.* ¶ 271 ("In a May 6th, 2004 email . . . , Gene Gregory of UEP wrote of his concerns with the current supply demand situation and asked the industry to participate in a new supply restriction scheme . . . ."); *id.* ¶ 286 ("On November 1, 2004, *Feedstuffs* also reported on the October meeting . . . . UEP's Gene Gregory was quoted . . . ."). On the few occasions when the SAC does not explicitly identify Mr. Gregory's affiliation, there are no allegations from which to infer reliably that he acted under UEA's apparent authority. *See, e.g., id.* ¶¶ 272-75 (describing Mr. Gregory's presentation, entitled "Market Analysis (Now & Future)," given at a UEP's Marketing Committee meeting on May 10, 2004 in Washington, D.C.); *id.* ¶ 334 ("[O]n March 20, 2003, **[**136]** Gene Gregory sent a memo to all USEM members . . . ."); *id.* ¶ 353 ("On May 14, 2007, UEP hosted a Marketing Committee meeting in Washington, DC [sic]. . . . Minutes from this meeting reflect: Gene Gregory reported on the sales since UEP assumed management of USEM.").

The Plaintiffs' defense of the SAC also highlights the allegation of UEA's purported "alliance" with UEP and USEM, and that UEP "manages" this alliance. But it is unclear for what purpose or in support of what legal theory that Plaintiffs raise these allegations. Plaintiffs merely cite these factual allegations to support their broader claim that the SAC "alleges the conspiracy to reduce supply involved UEA and other non-producers." Pls.' Resp. at 64. In any case, the Court concludes that generic allegations of "alliance" and UEP's management of the "alliance" and UEA are too vague to buoy any inference that there was such a close nexus between UEA, UEP, and USEM that would suggest that UEA, by virtue of association, agreed to or participated in the conspiracy.

As stated above, UEA can only sustain *§ 1* liability when it acted as an entity. But even considering the few allegations of UEA's actual conduct as an entity in connection **[**137]** with overall allegations against UEA and the entirety of the alleged conspiracy, the Court cannot agree that Plaintiffs have adequately stated a claim against UEA.

Indeed, very little can be divined from the allegation that UEA's "Further Processors" division invited the UEP Executive Committee to a meeting on April 27, 2004, particularly because the allegation stands virtually unadorned by any additional factual context. Plaintiffs do not allege any additional information about the meeting, such as whether it actually was held, whether the Executive Committee accepted the invitation, what was discussed at the meeting, and so forth.

Furthermore, UEA's alleged financial support of UEP similarly fails to provide indicia of agreement to or participation in the purported conspiracy. The vague allegations that UEA approved the provision of funds for UEP to apply to "animal welfare research projects," UEP's "management," and UEP's "programs and management" **[*755]** do not suggest that UEA has financially supported UEP projects relating to the alleged output restriction scheme. There are no allegations in the SAC from which to connect these broad terms of "management," "programs," and "animal welfare **[**138]** research project" to the eight collective actions that allegedly advanced the conspiracy, and certainly, the use of these generic terms do not support the inference that UEA agreed to the conspiracy. In particular, the SAC does not rule out the possibility that UEP, while allegedly participating in the conspiracy, actually undertook at least some animal welfare research projects for a legitimate purpose. The SAC alleges that UEP did engage in animal welfare research. *See, e.g.*, SAC ¶ 422 (describing a study involving "preference testing and use of space studies, [which] indicate that hens need and want more space than 72 sq. in.").

Accordingly, upon review of the SAC, the Court agrees that the pleading cannot survive UEA's motion to dismiss for failure to state a claim. The Court concludes that the UEA motion must be granted, but also without prejudice.

Plaintiffs may endeavor to amend their complaint to enhance their claims against UEA if, after considered evaluation, such a request seems substantively warranted.

VI. Conclusion

For the foregoing reasons, the Court concludes that Plaintiffs have adequately alleged that Michael Foods, Daybreak, Rose Acre, and Ohio Fresh joined in the alleged **[**139]** conspiracy to reduce the supply of eggs. The Court thereby denies these Defendants' motions to dismiss. In doing so, the Court is certainly cognizant that "[i]n the end, it may be found that . . . certain . . . defendant[s] [were] not involved in the conspiracy, or had a lesser, or greater, role in the conspiracy. Clearly, the plaintiffs will be required to prove each particular defendant's culpability prior to obtaining relief from that defendant in this action." *Elec. Carbon, 333 F. Supp. 2d at 313*.

Because the SAC fails to suggest plausibly that the Hillandale Entities and UEA joined the conspiracy, the Court grants those Defendants' motions to dismiss, but without prejudice to Plaintiffs to seek the Court's leave to amend their complaint against them, provided Plaintiffs do so in a timely manner. [42]

An Order consistent with this Memorandum follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, this 26th day of September, 2011, upon consideration of the six motions to dismiss filed by Defendants Michael Foods, Inc., Daybreak Foods, Inc., Rose Acre Farms, Inc., Ohio Fresh Eggs, LLC, Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc., and United Egg Association, and the Direct Purchaser Plaintiffs' response and the parties' supplemental filings thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED as follows:

1. The Motion to Dismiss Direct Purchaser Second Consolidated Amended Complaint as to Defendant Michael Foods, Inc. (Doc. No. 236) is DENIED.
2. The Defendant Daybreak Foods, Inc.'s Motion to Dismiss Direct Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 233) is DENIED.

3. The Motion to Dismiss the Direct Purchasers' Second Consolidated Amended Class Action Complaint on Behalf of Defendant Rose Acre Farms, Inc. (Doc. No. 234) **[**141]** is DENIED.
4. The Defendant Ohio Fresh Eggs, LLC's Renewed Motion to Dismiss the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint (Doc. No. 238) is DENIED.
5. The Motion to Dismiss the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint on Behalf of Defendants Hillandale-Gettysburg, L.P., Hillandale Farms, Inc., and Hillandale Farms East, Inc. (Doc. No. 240) is GRANTED without prejudice. Plaintiffs may seek leave to file an amended complaint consistent with the terms of the Court's Memorandum.

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[42] Given that the SAC spans hundreds of paragraphs, many of which are themselves quite lengthy, the Court advises Plaintiffs that if they elect to seek the Court's leave to amend their pleading and attach a proposed amended version, in order to facilitate a comparative review of any proposed version, they should also attach as an exhibit a "redline version" inline tracking any revisions **[**140]** to the SAC and provide the Court with an electronically searchable version of the amended pleading, *i.e.*, .pdf format.

6. The United Egg Association's Motion to Dismiss the Claims Against it in Direct Purchasers' Second Consolidated Amended Class Action Complaint (Doc. No. 232) is GRANTED without prejudice. Plaintiffs may seek leave to file an amended complaint consistent with the terms of the Court's Memorandum.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

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Colabella v. AICPA

United States District Court for the Eastern District of New York

September 28, 2011, Decided; September 28, 2011, Filed

10-cv-2291 (KAM)(ALC)

Reporter

2011 U.S. Dist. LEXIS 110982 *; 2011 WL 4532132

PATRICK R. COLABELLA and COLABELLA & COMPANY, Plaintiffs, - against - AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS, SAMUEL M. BRONSKY, and THOMAS W. MORRIS, Defendants.

Core Terms

peer review, peer-review, plaintiffs', Engagement, deprivation, entities, defendants', reviewer, peer, allegations, antitrust, motion to dismiss, conducting, audits, state actor, public accountant, entwinement, regulation, suspension, notices, nexus, prong, accounting, documents, private entity, Robinson-Patman Act, commodities, promulgated, declaratory judgment, ad hoc committee

Counsel: **[*1]** For Patrick R. Colabella, Colabella & Company, LLP, Plaintiffs: Richard S. Bonfiglio, The Law Firm of Richard S. Bonfiglio, Esq., Brooklyn, NY.

For American Institute of Certified Public Accountants, New York State Society of Certified Public Accountants, Samuel M. Bronsky, Thomas W. Morris, Defendants: Joseph W Muccia, Thompson Hine LLP, New York, NY.

Judges: Kiyo A. Matsumoto, United States District Judge.

Opinion by: Kiyo A. Matsumoto

Opinion

MEMORANDUM & ORDER

MATSUMOTO, UNITED STATES DISTRICT JUDGE:

Certified public accountant Patrick R. Colabella ("Colabella") and his accounting practice, Colabella & Company, LLP ("Colabella & Company") (collectively, "plaintiffs"), commenced this action against defendants American Institute of Certified Public Accountants ("AICPA"), New York State Society of Certified Public Accountants ("NYSSCPA") and NYSSCPA officers Samuel M. Bronsky ("Bronsky") and Thomas W. Morris ("Morris") (collectively, "defendants"), seeking declaratory relief and damages, alleging, *inter alia*, under federal and state law that pursuant to *42 U.S.C. § 1983*, defendants unlawfully deprived Colabella of his right to conduct peer reviews of fellow Certified Public Accountants ("CPAs") under the auspices **[*2]** of AICPA and NYSSCPA; unlawfully subjected him to loss of business profits; and violated certain sections of the Sherman and Clayton Acts by monopolizing the market for peer review of CPAs in New York State. Defendants move to dismiss the Amended Complaint (ECF No. 12, "Am. Compl.") for failure to state a claim pursuant to *Federal Rule of Civil Procedure*

12(b)(6) ("*Rule 12(b)(6)*").[1] For the reasons that follow, defendants' *Rule 12(b)(6)* motions are granted as to plaintiffs' federal claims. In addition, the court declines in its discretion to exercise supplemental jurisdiction over plaintiffs' state law claims because none of the federal claims survive this motion to dismiss. Therefore, the court also dismisses plaintiffs' state law claims, without prejudice to re-file such claims in state court.

BACKGROUND

I. Facts

The following facts are drawn from plaintiffs' Amended Complaint and are taken as true, except where noted, for purposes of this motion.

A. The Parties

Plaintiff Colabella is a CPA licensed to practice as a public accountant in New York State; he received his license in 1973, and has actively practiced in New York and elsewhere since that time. (Am. Compl. ¶ 111.) Plaintiff Colabella & Company is his accounting practice. (*Id*. ¶¶ 6, 200.) Colabella has never been suspended or disciplined by the New York State Education Department or the State Board of Accounting, the entities that govern admission to and regulation of the practice of accounting. (*Id*. ¶¶ 107, 111.) In addition, at all times relevant to the present action, he was a member in good standing of two national professional associations for CPAs: AICPA and NYSSCPA. (*Id*. ¶¶ 46, 60, 100.)

Defendant AICPA is a national professional organization that solicits membership among CPAs in each of the United States, the District of Columbia and elsewhere. (*Id*. ¶¶ 1, 100.) Defendant NYSSCPA, a professional organization for CPAs in the State of New York, **[*4]** acts on behalf of AICPA to administer certain functions. (*Id*. ¶¶ 63, 102.) Defendants Bronsky and Morris were, at all relevant times, officers of NYSSCPA. (*Id*. ¶¶ 3-4.)

B. Role of the AICPA In Certified Public Accountancy[2]

Although public accountants perform a broad range of accounting, auditing, tax and consulting activities for their clients, some functions--such as filing a report with the United States Securities and Exchange Commission ("SEC"), for instance --must be performed by a CPA. (Am. Compl. ¶¶ 11.A, G.) Authority to license CPAs resides within each state's Board of Accountancy. (*Id*. ¶ 11.H.) Passage of the Uniform CPA Examination, which is prepared and graded by AICPA, is required by the Boards of Accounting in all fifty states as a prerequisite to CPA licensure. (*Id*. ¶¶ 11.H-J., 110.) Membership in professional organizations such as AICPA **[*5]** and NYSSCPA is not required for one to remain in good standing as a licensed CPA, however. (*Id*. ¶¶ 101, 103.)

Standards issued by AICPA are often incorporated into frameworks and guidelines used for conducting audits of private, public and government entities. (*Id*. ¶¶ 12, 30, 32.) The Generally Accepted Auditing Standards ("GAAS"), which govern private-sector financial statement audits, are established largely by AICPA. (*Id*. ¶¶ 12.C-E.) In addition, AICPA contributes to Generally Accepted Accounting Principles ("GAAP"), which are conventions, rules

[1] The parties have submitted the following briefs in connection with defendants' motions to dismiss: ECF No. 18, Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint ("Defs.' Mem."); ECF No. 22, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint ("Pls.' Opp'n"); and ECF No. 20, Reply Memorandum of Law In Support of **[*3]** Defendants' Motion to Dismiss the Amended Complaint ("Defs.' Reply").

[2] Because adjudication of defendants' motion to dismiss requires context regarding the accounting profession, peer review of CPAs and the role of the AICPA, sections B and C herein provide relevant background facts pleaded in the Amended Complaint, while sections D and E set forth the alleged facts immediately underlying plaintiffs' claims.

and procedures that define accepted financial accounting practices for public companies. (*Id*. ¶¶ 12.F-H, 13-16.) Moreover, various standards and criteria first established by AICPA are incorporated into the Generally Accepted Government Auditing Standards ("GAGAS"), which are used for audits of government entities and entities that receive government awards. (*Id*. ¶¶ 24-36.)

C. Peer Review of Certified Public Accountants

Through the peer-review process, CPAs independently assess each others' work to evaluate and maintain the quality of work within the profession. (Am. Compl. ¶¶ 48, 50.) Peer review is mandated by law for CPAs in forty-two states; **[*6]** notably, however, peer review is not yet compulsory for CPAs in New York State.[3] (*Id*. ¶¶ 52.F., 112.)

Even where the law does not necessarily mandate peer review, a CPA's clientele, or the nature of his or her work, may require it. Any CPA firm required to register with the Public Company Accounting Oversight Board ("PCAOB") must submit to periodic peer review by the PCAOB.[4] (*Id*. ¶¶ 52.G., 114-18.) In addition, regulations promulgated by various government agencies make peer review obligatory for CPAs who engage in specific types of work, including audits of: government entities; entities that receive government awards; FDIC-insured and Federally Insured Thrift institutions; publicly traded companies; and borrowers of the Rural Utility Service. (*Id*. ¶¶ 52.A-E.)

Separately, any CPA who seeks **[*7]** admission to or retention of membership in AICPA must be enrolled in a "practice-monitoring," or peer-review, program. (*Id*. ¶ 53.) AICPA maintains its own "Peer-Review Program" (the "PRP"), although AICPA itself does not perform peer reviews; rather, the peer reviews are conducted by entities approved by AICPA to perform such evaluations. (*Id*. ¶¶ 55, 57.) Firms and individuals who choose to enroll in the PRP must undergo triennial peer reviews conducted by independent evaluators known as "peer reviewer[s]," who are authorized by the AICPA to perform the peer reviews. (*Id*. ¶ 57.)

AICPA has promulgated standards for the administration, planning, performance, reporting and acceptance of peer reviews conducted by its peer reviewers for CPA firms and individuals enrolled in the PRP. (*Id*. ¶¶ 55, 67-95.) Under these standards, an entity that administers the PRP on behalf of AICPA may appoint a "peer review committee to oversee the administration, acceptance and completion of peer reviews." (*Id*. ¶ 77.) NYSSCPA, which administers the PRP on behalf of AICPA in the State of New York, is bound by all of the PRP standards promulgated by AICPA, and oversees peer reviews conducted as part of the PRP **[*8]** in New York, the firm or CPA being reviewed, and the peer reviewer. (*Id*. ¶¶ 64, 76.)

AICPA's Peer Review Board supervises NYSSCPA to ensure compliance with, and consistency in the implementation of, AICPA's standards for peer review. (*Id*. ¶ 64.) Those standards make clear that reviewed firms, peer reviewers and the administering entity (NYSSCPA, in New York) are expected to cooperate in the oversight process, and AICPA has issued procedures to be followed if a reviewer "fails to cooperate in a timely, professional manner." (*Id*. ¶¶ 64, 94.) In the event that NYSSCPA and either the peer reviewer or the reviewed firm cannot resolve a disagreement through good-faith efforts, NYSSCPA may request referral of the matter to AICPA's Peer Review Board. (*Id*. ¶¶ 69, 78.)

D. *Section 1983* and Tort Claims

The facts, assumed to be true for purposes of this motion, are alleged in the Amended Complaint as follows. In May 1988, Colabella qualified to become a peer reviewer for the PRP, based on criteria established by AICPA. (Am.

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[3] The State of New York recently enacted *New York Education Law § 7410*, which makes peer review mandatory for CPAs, but the law does not go into effect until January 1, 2012. (Am. Compl. ¶ 112.)

[4] The Sarbanes-Oxley Act of 2002 created the PCAOB, which is charged with the oversight, regulation, inspection, and discipline of American and foreign accounting firms that audit public companies. (*Id*. ¶ 21.)

Compl. ¶ 199.) Since then, Colabella (acting through Colabella & Company) has conducted peer reviews of CPA firms under the auspices of AICPA and NYSSCPA, and plaintiffs have derived **[*9]** material income from those peer-review engagements. (*Id*. ¶¶ 200, 202.)

This action arose out of Colabella's participation in the PRP as a peer reviewer of four companies and individuals who were members in good standing of NYSSCPA and AICPA. The first peer-review engagement at issue began on October 25, 2007, when Colabella commenced a peer review of FL&Z,[5] a public accounting company ("FL&Z Engagement"). (*Id*. ¶¶ 128-29.) He conducted the FL&Z Engagement in a timely, competent, and professional manner, and consulted with an NYSSCPA technical reviewer for assistance prior to submitting his proposed findings to NYSSCPA on April 23, 2008. (*Id*. ¶¶ 130-132.)

The second peer-review engagement at issue began on December 16, 2007, when Colabella commenced a peer review of DK&W, a public accounting company ("DK&W Engagement"). (*Id*. ¶¶ 142-43.) He conducted the DK&W Engagement in a timely, competent, and professional manner, and submitted his proposed findings to NYSSCPA on February 26, 2008. (*Id*. ¶¶ 144-45.)

The third peer-review engagement at issue began on January 17, 2008, **[*10]** when Colabella commenced a peer review of RMB, a public accountant ("RMB Engagement"). (*Id*. ¶¶ 138-39.) Colabella conducted the RMB Engagement in a timely, competent, and professional manner, and submitted his proposed findings to NYSSCPA on June 30, 2008. (*Id*. ¶¶ 140-41.)

The last peer-review engagement at issue began on April 30, 2008, when Colabella commenced a peer review of IK, a public accountant ("IK Engagement"). (*Id*. ¶¶ 133-34.) Colabella conducted the IK Engagement in a timely, competent, and professional manner, and submitted his proposed findings to NYSSCPA on June 30, 2008. (*Id*. ¶¶ 135-36.)

Upon review of Colabella's proposed findings in each of the above-mentioned Engagements, defendants Bronsky and Morris, both members of NYSSCPA's Peer Review Committee (Bronsky was Chairman of the Peer Review Committee), issued a series of notices to Colabella regarding his peer-review submissions for the FL&Z, DK&W, RMB, and IK Engagements. (*Id*. ¶¶ 146-48, 152, 162.) In each notice, Bronsky and Morris demanded that Colabella make certain changes to his proposed findings. (*Id*. ¶ 151.) Colabella did not make all of the changes demanded, however, because in plaintiff's opinion, they were **[*11]** stylistic rather than substantive, and unrelated to the accuracy, quality, and professionalism of his actual reports. (*Id*. ¶¶ 147, 151.) Consequently, in Colabella's estimation, the changes demanded were not "necessary" under the guidelines issued by AICPA and NYSSCPA, and did not warrant issuance of notices from Bronsky and Morris because Colabella was actually in compliance with all relevant guidelines. (*Id*. ¶ 151.) Bronsky and Morris persisted in issuing notices to plaintiff, however, because he did not make all of the changes they demanded. (*Id*. ¶ 147.) Colabella alleges that their notices overstated any actual unresolved issues between Colabella and his NYSSCPA technical reviewers; created the appearance of his non-compliance with AICPA's peer review standards and guidelines; and mischaracterized him as uncooperative, when in fact he was merely expressing an "independent, professional dispute" with the basis for and manner in which the Peer Review Committee reviewed his work product. (*Id*. ¶¶ 147-149.) The issuance of repeated notices from Bronsky and Morris resulted in Colabella's immediate suspension from the practice of conducting peer reviews on behalf of AICPA and NYSSCPA **[*12]** without the benefit of a prior hearing to determine the propriety of the issuance of such notices.[6] (*Id*. ¶¶ 156, 172, 195.)

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[5] As noted in the Amended Complaint, the reviewed firms have been assigned fictitious names. (*Id*. ¶¶ 128, 133, 138, 142.)

[6] Plaintiffs allege that Colabella was suspended from engaging in "any further [p]eer [r]eviews" in the State of New York and elsewhere due to the issuance of notices from Bronsky and Morris. (Am. Compl. ¶¶ 156, 172.) Those allegations do not make sense in light of other facts pleaded in the Amended Complaint, namely, that firms registered with the PCAOB must undergo peer reviews routinely (id. ¶ 52.G), and that all CPAs for whom peer review is mandatory and who "are *not registered and supervised by the PCAOB*" must be peer-reviewed by AICPA through NYSSCPA (id. ¶¶ 114-18, 195) (emphasis added). The well-pleaded allegations indicate that peer reviews in New York State are conducted by at least two organizations: PCAOB and

In addition, on June 25, 2008, Bronsky ordered Colabella to produce proof of his compliance with the continuing professional education ("CPE") requirements mandated by AICPA and NYSSCPA. (*Id*. ¶ 162.) Colabella furnished proof of his total CPE credits on July 10, 2008, demonstrating that he had earned sufficient credits in specific subcategories in satisfaction of the CPE requirements of New York State, AICPA and NYSSCPA. (*Id*. ¶¶ 157-163; ECF No. 12, Ex. A, Summary of Continuing Professional Education Credits, dated August 5, 2005-November 15, 2009 ("CPE Credit Summary").)[7] **[*14]** Nevertheless, Bronsky rejected Colabella's proof and refused to credit him with sufficient compliance with GAGAS requirements, knowing that a finding of Colabella's non-compliance with CPE requirements would disqualify him from conducting further peer reviews until sufficient proof of compliance was submitted and accepted by NYSSCPA's Peer Review Committee. (Am. Compl. ¶¶ 164-65.)

In a January 8, 2009 letter addressed to Susan Coffey, Colabella complained to AICPA about NYSSCPA's Peer Review Committee, alleging that the NYSSCPA improperly noticed and suspended him on the basis of "repetitive, arbitrary and unfounded criticisms" of his work that were inconsistent with sound administration of the PRP. (*Id*. ¶¶ 174-75.) On July 8, 2009, PRP Director Gary Freundlich advised Colabella that an **[*16]** ad hoc committee of AICPA's Peer Review Board (the "Ad Hoc Committee") would hold a hearing to consider all outstanding issues, and its decision on the issues would be final. (*Id*. ¶¶ 175-76.) A body of materials to be used in the Ad Hoc Committee hearing--including peer-review documents, emails, and written correspondence--was served on Colabella and NYSSCPA in advance of the hearing. (*Id*. ¶¶ 177-78.) When the Ad Hoc Committee convened to consider the identified issues on August 31, 2009, it did not call for any testimony from Colabella or accept any argument from his counsel. (*Id*. ¶ 178.) Two days later, chairperson Susan Lieberum advised Colabella of the following findings and recommendations of the Ad Hoc Committee, *inter alia*: (1) that with respect to the DK&W Engagement, Colabella did not meet government-specific CPE requirements, and consequently, he was unqualified to perform the Engagement; (2) that with respect to the FL&Z and RMB Engagements (a) NYSSCPA's comments with respect to Colabella's work were valid, and he should have revised documents as requested on a timely basis, (b) Colabella should be given feedback for not doing so, and (c) "[i]n **[*17]** fairness to the reviewed firm," NYSSCPA should accept the peer-review documents submitted by Colabella and send each reviewed entity an acceptance letter notwithstanding NYSSCPA's valid comments regarding Colabella's work;[8] and (3) that with respect to the IK

NYSSCPA. Plaintiffs have not pled any relationship between PCAOB and AICPA or NYSSCPA, such that suspension under NYSSCPA's PRP would foreclose Colabella's ability to perform peer reviews for another organization such as PCAOB. "Allegations are not well pleaded if they are 'made indefinite or erroneous by other allegations in the same complaint.'" **[*13]** *Am. Centennial Ins. Co. v. Seguros La Republica, S.A., No. 91-CV-1235, 1996 U.S. Dist. LEXIS 7729, 1996 WL 304436, at *16 (S.D.N.Y. June 5, 1996)* (quoting *Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679, 683 (S.D.N.Y. 1969))*. Therefore, "draw[ing] all reasonable inferences in favor of the non-moving party," *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 115 (2d Cir. 2008)*, while disregarding allegations that are not well-pleaded, the court accepts as fact that Colabella was suspended only from engaging in any further peer reviews on behalf of AICPA and NYSSCPA as a result of the notices issued by Bronsky and Morris.

[7] Contrary to Colabella's assertion that the CPE Credit Summary reflects that he earned "in excess of 273 hours of total continuing education, in excess of 127 hours of which were in satisfaction of the 80 hour requirement . . . and 100 hours of which were in satisfaction of the 24 hour government auditing requirement," the CPE Credit Summary instead shows that *as of July 10, 2008* (the date on which Colabella furnished the CPE Credit Summary to Bronsky), plaintiff had earned 208.5 hours of total continuing education; 82.5 hours in satisfaction of the "80-hour requirement"; and 80 hours in satisfaction of the "24-hour government auditing requirement." (CPE Credit Summary.) The CPE Credit Summary accounts for continuing education credits accrued between August 5, 2005, and November 15, 2009, but the court will **[*15]** consider only data on the CPE Credit Summary that reflects hours accrued as of July 10, 2008, because the court "need not feel constrained to accept as truth conflicting pleadings . . . that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely . . . ." *In re Livent, Inc. Noteholders Secs. Litig., 151 F. Supp. 2d 371, 405-406 (S.D.N.Y. 2001)*; *see also* *Palm Beach Strategic Income, LP v. Salzman, No. 10-CV-261, 2011 U.S. Dist. LEXIS 46867, 2011 WL 1655575, at *8 (E.D.N.Y. May 2, 2011)* (if documents deemed to be part of the complaint contradict the complaint's allegations, "the documents control" and the court need not accept the complaint's misstatements as true) (quoting *Rapoport v. Asia Elecs. Holding Co., Inc., 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000))*.

[8] Colabella alleges that by recommending that his peer-review reports be accepted, the Ad Hoc Committee implicitly acknowledged that his work product conformed to AICPA standards. (Am. Compl. ¶ 183.) A September 2, 2008 letter from

Engagement, (a) three of the outstanding issues presented to the Ad Hoc Committee were in fact sufficiently resolved by Colabella, (b) NYSSCPA's comments with respect to Colabella's work were valid as to one remaining item, and (c) "due to the lateness of [Colabella's] review and in fairness to the reviewed firm," NYSSCPA should accept the peer-review documents submitted by Colabella and send IK an acceptance letter notwithstanding the NYSSCPA's valid comments regarding his work. (*Id*. ¶¶ 179-182, 184; Lieberum Letter at 1-2.) The Ad Hoc Committee did not make any findings regarding the grievances Colabella communicated to AICPA through his January 8, 2009 letter to Coffey. (Am. Compl. ¶¶ 174, 187.)

Colabella contends that the Ad Hoc Committee's conclusions were contrary to overwhelming evidence--including his detailed and professional responses--that he had timely responded to each of NYSSCPA's requests for changes to his work product such that there were no outstanding matters to address, and that he had indeed met the mandatory CPE requirements. (*Id*. ¶¶ 181, 185, 188.) He also alleges that the Ad Hoc Committee's findings were designed to create an appearance of compliance with AICPA's PRP procedures, while preventing him from exercising independence in conducting peer reviews under the auspices of AICPA and NYSSCPA, and discouraging others like him who might object to the "pettiness and impracticality in the administration" of the PRP. (*Id*. ¶¶ 190-192.)

As a result of the Peer Review Committee's **[*19]** issuance of notices to Colabella, delivery of final peer-review reports to his clients was unreasonably delayed, and the cost of his compliance with the technical review of his peer-review engagements was unreasonably and unnecessarily increased. (*Id*. ¶¶ 206.B-C.) Furthermore, following his suspension from conducting peer reviews for the PRP, Colabella was deprived of fees that he would have derived from future peer-review engagements performed under the auspices of AICPA and NYSSCPA. (*Id*. ¶ 206.E.) In addition, Colabella alleges that through the suspension, AICPA and NYSSCPA summarily deprived him, without due process, of his right to conduct future peer reviews. (*Id*. ¶ 224.)

John A. Demetrius peer-reviewed Colabella for the period ending April 30, 2009--which encompassed the FL&Z, DK&W, RMB, and IK Engagements--and on April 29, 2010, Demetrius opined that Colabella was fully compliant with the continuing education requirements of the AICPA, New York State, and Government Auditing Standards for the relevant period. (*Id*. ¶ 168.) Susan M. Rowley, a Senior Technical Manager of the AICPA PRP who supervised Demetrius' peer review, likewise concluded that Colabella was in compliance with **[*20]** AICPA's continuing education requirements. (*Id*. ¶ 169.)

E. Antitrust Claims

Plaintiffs allege that the PRP constitutes a "virtual monopoly" in the market for peer review of CPAs in states such as New York where a "statutory peer review program" through which CPAs can undergo peer review is lacking. (Am. Compl. ¶ 195.) Regulations promulgated by various government agencies make peer review obligatory for CPAs who engage in specific types of work, including audits of: government entities and entities that receive government awards; FDIC-insured and Federally Insured Thrift institutions; publicly traded companies; and borrowers from the Rural Utility Service. Plaintiffs allege that all CPAs in New York State who perform such audits *must* be peer-reviewed through NYSSCPA under the AICPA's PRP (id. ¶¶ 52.A-E; 195), although the court notes that at least one other entity--the PCAOB--also conducts peer reviews of CPAs in this state.[9]

Susan **[*18]** Lieberum, writing on behalf of the AICPA PRP, makes clear, however, that AICPA directed NYSSCPA to accept Colabella's report--*notwithstanding* the errors therein--for the sake of the reviewed firm, and that he should be given feedback regarding the outstanding errors. (ECF No. 19, Affidavit of Virgil W. Webb ("Webb Aff."), Ex. 2, September 2, 2009 letter from Susan Lieberum ("Lieberum Letter").)

[9] Although plaintiffs allege that peer reviews of CPAs in the State of New York are administrated solely by AICPA through NYSSCPA (*see* Am. Compl. ¶ 113), the court does not accept this allegation as true for purposes of this motion because it is contradicted by other **[*21]** statements in the Amended Complaint, and as explained *supra*, the Court "need not feel constrained to accept as truth conflicting pleadings that make no sense . . . or that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *In re Livent, 151 F. Supp. 2d at 405*. The Amended Complaint also states

Plaintiffs allege that AICPA selectively and inconsistently applies its rules, thereby purging and excluding from its pool of approved peer reviewers those who truly seek to exercise independence and intellectual honesty, and restricting the performance of peer review to "those who accept the arbitrary and capricious administration of the Peer Review Program." (*Id*. ¶ 196.) Consequently, plaintiffs allege, AICPA and NYSSCPA restrain trade by restricting the class of peer reviewers for its PRP to those who are "favored" by personnel **[*22]** charged with administration of the PRP, and reducing competition among CPAs who want to be peer reviewers for AICPA and NYSSCPA. (*Id*. ¶¶ 196.D-E; 197.) Plaintiffs further allege that AICPA and NYSSCPA restrain trade among businesses required to engage CPAs by limiting the class of peer-reviewed CPAs available to conduct certain statutorily required audit services (e.g. auditing FDIC-insured institutions) to those who accept and abide by AICPA and NYSSCPA's inconsistent application of their own standards under the PRP. (*Id*. ¶ 198.A.)

II. Procedural History

Plaintiffs initially brought this action against defendants on May 19, 2010. (*See* ECF No. 1, Complaint.) After defendants notified the court of their intention to file a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim (*see* ECF No. 7, Letter from AICPA Requesting Pre-Motion Conference), plaintiffs filed an Amended Complaint on October 20, 2010, asserting claims identical to those in the Complaint. Shortly thereafter, defendants filed the instant motion to dismiss all claims pursuant to *Rule 12(b)(6)*. (*See* ECF No. **[*23]** 17, Defendants' Motion to Dismiss.) Defendants have not yet filed an answer and discovery has not yet commenced.

DISCUSSION

I. Standard of Review

A. Reviewing the Motion to Dismiss

A complaint may be dismissed under *Federal Rule of Civil Procedure 12(b)(6)* if a plaintiff "fail[s] to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. Therefore, in order to survive a motion to dismiss under *Rule 12(b)(6)*, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Matson v. Bd. of Educ., 631 F.3d 57, 63 (2d Cir. 2011)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted)). Assessing the plausibility of claims set forth in a complaint is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ruston v. Town Bd., 610 F.3d 55, 58-59 (2d Cir. 2010)* (quoting *Iqbal, 129 S.Ct. at 1950*). In conducting such an assessment, a court must draw all inferences in favor of the non-movant. *Vietnam Ass'n, 517 F.3d at 115* (quoting *Gorman v. Consol. Edison Corp., 488 F.3d 586, 591-92 (2d Cir. 2007))*. However, allegations must **[*24]** consist of more than mere labels, legal conclusions, or a "formulaic recitation of the elements of a cause of action." *Arar v. Ashcroft, 585 F.3d 559, 594 (2d Cir. 2009)* (quoting *Iqbal, 129 S.Ct. at 1949*). Moreover, bare legal conclusions unsupported by factual allegations are "not entitled to the assumption of truth." *Ruston, 610 F.3d at 59* (citing *Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010))*.

B. Consideration of Documents Outside the Amended Complaint

Because both parties submitted materials outside the pleadings in their moving papers, the court must determine whether to treat the instant motion as a motion to dismiss or convert it to one for summary judgment. *See* *Friedl v.*

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that CPAs in New York who are "not registered and supervised by the PCAOB" must submit to peer review conducted by AICPA through NYSSCPA. (Am. Compl. 114-18.) If CPAs in New York could only be peer-reviewed through the PRP administered by AICPA and NYSSCPA, the specific PCAOB-related allegations would be superfluous.

City of New York, 210 F.3d 79, 83 (2d Cir. 2000) ("[w]hen matters outside the pleadings are presented in response to a Rule 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material.") (internal quotations omitted). The district court has "complete discretion" to determine whether to convert the **[*25]** motion to dismiss into one for summary judgment. Hoy v. Inc. Village of Bayville, 765 F. Supp. 2d 158, 164 (E.D.N.Y. 2011) (citing Carione v. United States, 368 F. Supp. 2d 186, 191 (E.D.N.Y. 2005)). Furthermore, summary judgment is generally inappropriate before the parties have had the opportunity to engage in discovery. Kalin v. Xanboo, Inc., 526 F. Supp. 2d 392, 399 (S.D.N.Y. 2007); *compare* United States v. City of New York, 683 F. Supp. 2d 225, 245 (E.D.N.Y. 2005) (conversion to summary judgment deemed appropriate where there was a "highly developed record before the court" that contained years' worth of discovery materials because interrogatories and document requests had been exchanged, litigated, and answered; named defendants had been deposed; and experts on both sides had submitted reports and been deposed, such that neither side should be surprised by the court's decision to convert the motion), *with* Kalin, 526 F. Supp. 2d at 399 (declining to convert motion to dismiss where the issue raised--sufficiency of the pleadings--did not require discovery, and discovery was stayed pending motion to dismiss). The present case is still in its nascent stages; defendants have not yet **[*26]** filed an answer, and the parties have not engaged in discovery, which would significantly aid the court in rendering a decision on a summary judgment motion. The court therefore finds that conversion of defendants' motion to dismiss is inappropriate and will decide defendants' motion pursuant to Rule 12(b)(6).

In deciding defendants' motion to dismiss, the court may properly consider facts alleged in the complaint, any exhibits attached to the complaint, and documents incorporated by reference in the complaint. DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010) (citing Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)). Notably, "limited quotation" from a document does not render the document "incorporate[ed] by reference" into the complaint for purposes of a Rule 12(b)(6) motion. Goldman v. Belden, 754 F.2d 1059, 1066 (2d Cir. 1985). Even if a document is not incorporated by reference, however, the court may still consider it if the complaint "relies heavily upon its terms and effect," rendering the document "integral" to the complaint. Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006) (quoting Chambers, 282 F.3d at 152-53). Contracts that underlie **[*27]** the claims brought in a suit are classic examples of documents that may be considered on a motion to dismiss even though the plaintiff does not physically attach them to the Amended Complaint. Ackerman v. Local Union 363, Int'l Bhd. of Elec. Workers, 423 F. Supp. 2d 125, 127 (S.D.N.Y. 2006).

In their moving brief, defendants attempt to introduce seven exhibits and an affidavit sworn to by the assistant general counsel of AICPA. (Defs.' Mem. at 1; Webb Aff. and attached Exhibits 1-7.) Likewise, in their opposition memorandum, plaintiffs attempt to introduce three exhibits and an affidavit sworn to by Colabella. (Pls.' Opp'n at 2; ECF No. 21-2, Affidavit of Patrick R. Colabella in Opposition ("Colabella Aff.") and attached Exhibits A-C.) Applying the standards set forth *supra*, the court will disregard all documents attached to the parties' motion papers except: (1) the Amended Complaint, attached as Exhibit 1 to the Webb Affidavit; and (2) the Lieberum Letter. The Lieberum Letter may be considered in deciding the present motion because plaintiffs referred to the letter and "relie[d] heavily on its terms and effect," Mangiafico, 471 F.3d at 398, in drafting their Amended Complaint. (*See* **[*28]** Am. Compl. ¶¶ 179-192) (discussing various aspects of the Lieberum Letter to support claim of defendants' unfair treatment of plaintiffs). Because the remaining documents submitted by the parties were not attached to the Amended Complaint, incorporated by reference, or so heavily relied upon as to render them integral to the Amended Complaint, the court excludes them from consideration for purposes of deciding the Rule 12(b)(6) motion to dismiss for failure to state a claim.

II. Sufficiency of the Pleadings as to Section 1983 Claim

A. Pleading Standard

In relevant part, 42 U.S.C. § 1983 ("Section 1983") provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1983 itself does not create any substantive rights; rather, it provides a procedural mechanism for redressing the deprivation of **[*29]** rights created by the Constitution or laws of the United States. *Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993)* (citing *City of Oklahoma City v. Tuttle, 471 U.S. 808, 816, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985))*. To state a cognizable claim under *Section 1983*, plaintiffs must allege that "(1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." *Weiss v. Inc. Village of Sag Harbor, 762 F. Supp. 2d 560, 568 (E.D.N.Y. 2011)* (quoting *Snider v. Dylag, 188 F.3d 51, 53 (2d Cir. 1999))*.

The Supreme Court, in *Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*, established a two-prong test for determining when a private party's actions can be deemed to satisfy *Section 1983*'s requirement that the challenged conduct was "under color of state law." Actions of a private party can be deemed "fairly attributable" to the state, and therefore treated as action taken "under color of state law," when (1) the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom **[*30]** the State is responsible," and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Hollander v. Copacabana Nightclub, 624 F.3d 30, 33 (2d Cir. 2010)* (quoting *Lugar, 457 U.S. at 937*). A private party's actions may be attributable to the state under the second *Lugar* prong if it meets one of three tests: (1) "The 'compulsion test': the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state"; (2) "The 'public function test': the entity 'has been delegated a public function by the [s]tate,'"; or (3) "The 'joint action test' or 'close nexus test': the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the entity's functions are 'entwined' with state policies." *Hollander, 624 F.3d at 34* (quoting *Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008)*(internal citations omitted)).

In addition, to state a cognizable *Section 1983* claim, plaintiff must identify a constitutionally protected liberty or property interest of which he was deprived without due process. *See* *Narumanchi v. Bd. of Trs. of Conn. State Univ., 850 F.2d 70, 72 (2d Cir. 1988)* **[*31]** ("whether the plaintiff has a property or liberty interest protected by the Constitution" is a threshold issue in analysis of *Section 1983* claims).

B. Application

1. State Actor Requirement

To adequately plead a *Section 1983* claim, plaintiffs must allege that defendants acted under color of state law when they suspended Colabella from the practice of conducting peer reviews for CPAs under the auspices of AICPA and NYSSCPA. As plaintiffs' allegations fail to meet either *Lugar* prong, they fail to plead the requisite state actor requirement.

a. First *Lugar* Prong

Applying the first *Lugar* prong, plaintiffs fail to plead that the deprivation Colabella suffered--namely, his "right to conduct future peer reviews" (*see* Am. Compl. ¶ 224)--resulted from the "exercise of a right or privilege having its source in state authority . . . ." *LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 432-33 (2d Cir. 1995)* (quoting *Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 620, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991))*. In other words, plaintiffs must allege that AICPA and NYSSCPA acted with state-given authority when they revoked Colabella's approval to conduct peer reviews under their auspices. Plaintiffs purport to satisfy this prong by

[*32] alleging that the State of New York relies on AICPA and NYSSCPA as the sole administrators of CPA peer reviews and as the state's "surrogate[s]" to "implement[] [its] policy . . . [regarding] the Peer Review process for Certified Public Accountants within the State." (Am. Compl. ¶¶ 113, 123.)

Besides the fact that AICPA and NYSSCPA are not the "sole administrators" of CPA peer reviews in New York State,[10] plaintiffs' allegation of the state's reliance on AICPA and NYSSCPA conflicts with their simultaneous assertion that the state recently demonstrated its *bona fide* interest in regulating the peer review of public accountants by promulgating a statute providing for mandatory peer review of CPAs, beginning on January 1, 2012. (*Id*. ¶ 112.) The recency of the state's promulgation of this new law--one that has not yet even taken effect--to mandate and regulate, *for the first time*, the peer review of CPAs in New York, strongly implies that the state did not have a policy regarding the peer review of CPAs before.

Therefore, plaintiffs' allegations that AICPA and NYSSCPA were **[*33]** acting as "surrogates" of the state to "implement" a state policy that was heretofore nonexistent are conclusory and not well-pleaded, and therefore not accepted as true for purposes of deciding this motion. While a court deciding a motion to dismiss must interpret the Amended Complaint liberally and draw all reasonable inferences in the non-movant's favor, *Chambers, 282 F.3d at 152*, the court "need not feel constrained to accept as truth conflicting pleadings that make no sense . . . or that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely . . . ." *In re Livent, 151 F. Supp. 2d at 405*; *MMC Energy, Inc. v. Miller, No. 08-CV-4353, 2009 U.S. Dist. LEXIS 83777, 2009 WL 2981914, at *7 (S.D.N.Y. Sept. 14, 2009)* (dismissing claim where necessary supporting allegation was specifically contradicted by other portions of the complaint).

Plaintiffs also argue that they "satisfy the first prong [of *Lugar*] by . . . showing that Colabella was sanctioned on four separate occasions, by being precluded from the conduct of peer reviews, because of the actions taken by Defendants, AICPA and NYSSCPA, as an exercise of their disciplinary authority--this despite Colabella's **[*34]** certification and good standing as a CPA in New York State . . . ." (Pls.' Opp'n at 13.) This argument does not support plaintiffs' position, however, because the mere fact of Colabella's sanction does not satisfy the first *Lugar* prong as it fails to demonstrate, or even assert, that New York State created AICPA and NYSSCPA's right to sanction Colabella, or that such sanctioning was a "rule of conduct imposed by the State or by a person for whom the State is responsible." *Hollander, 624 F.3d at 33* (quoting *Lugar, 457 U.S. at 937*). Therefore, the court finds that plaintiffs' Amended Complaint fails to satisfy the first *Lugar* prong.

b. Second *Lugar* Prong

Even assuming that plaintiffs satisfied the first *Lugar* prong by adequately pleading that AICPA and NYSSCPA were acting with authority from New York State in administering the PRP, however, plaintiffs fail to allege facts that meet the second *Lugar* prong, as no well-pleaded facts in the Amended Complaint properly allege that defendants met the "compulsion," "public function," or "joint action/close nexus" tests outlined in *Sybalski, 546 F.3d at 257*.

i. Compulsion Test

Under the "compulsion test," a nominally private entity may be considered **[*35]** a state actor when the party acted pursuant to the coercive power of the state or was controlled by the state. *Sybalski, 546 F.3d at 257* (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001))*. The "coercion" inquiry focuses on whether the challenged activity was "compelled or even influenced" by state regulation. *Husain v. Springer, 193 F. Supp. 2d 664, 672 (E.D.N.Y. 2002)* (quoting *Rendell-Baker v. Kohn, 457 U.S. 830, 841, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982))*. For example, in *Brentwood*, the Supreme Court noted that Amtrak, though nominally private, was considered a "state actor" for the purpose of determining if individual

[10] As alleged in the Amended Complaint, PCAOB also conducts peer reviews, as discussed *supra*. (*See* Am. Compl. ¶¶ 114-18.)

rights guaranteed by the Constitution were violated because Amtrak was created pursuant to a federal law to achieve governmental objectives, and the government retains authority to appoint the majority of Amtrak's directors; therefore, Amtrak could fairly be said to act under the compulsion of the state. *Brentwood, 531 U.S. at 296* (citing *Lebron v. Nat'l R.R. Passengers Corp., 513 U.S. 374, 400, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995))*. In contrast, in *Rendell-Baker*, the Supreme Court found that terminations of employment effected by a private school that (1) received ninety to ninety-nine **[*36]** percent of its funding from the state; (2) was subject to state regulation; and (3) contracted with the state to perform certain services for students, did not constitute "state action." *457 U.S. at 832-33*. The Second Circuit explained in *Horvath v. Westport Library Ass'n* that the "decisive factor" in the Supreme Court's *Rendell-Baker* decision was that "the school's personnel decisions were uninfluenced by public officials and that 'the decisions to discharge the petitioners were not compelled or even influenced by any state regulation.'" *362 F.3d 147, 152 (2d Cir. 2004)* (quoting *Rendell-Baker, 457 U.S. at 841*).

In the instant case, plaintiffs failed to allege facts that, if established, would show that defendants' suspension of Colabella was action compelled by the State of New York. Plaintiffs do not allege that AICPA, NYSSCPA, or their leaders act under the coercion or influence of the state, or that the state influenced or compelled defendants to suspend Colabella as a peer reviewer for AICPA and NYSSCPA. Nor do plaintiffs allege that the state has any role in choosing or directing the leadership of AICPA and NYSSCPA. At most, plaintiffs contend that defendants acted as "surrogates" **[*37]** of the state (an assertion that would imply coercion), but the court does not accept that allegation for the reasons set forth *supra*.

ii. Public Function Test

The "public function" test centers upon an inquiry of whether the challenged activity is one that is "traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co., 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)* (quoted in *Rendell-Baker, 457 U.S. at 842*). "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978)*. Activities that have met the "public function" test include those that are "traditionally associated with sovereignty, such as eminent domain . . . ." *Jackson, 419 U.S. at 352*; *see also* *Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953)* (election); *Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946)* (company town); *Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966)* (municipal park); *West v. Atkins, 487 U.S. 42, 54-57, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)* (imprisonment of individuals as punishment for criminal activity); *Flagg Bros., 436 U.S. at 163* (citing education, fire and police protection, and tax collection as examples of exclusive "municipal functions").

Plaintiffs have **[*38]** not alleged that defendants' administration of peer reviews conducted under the auspices of AICPA and NYSSCPA is an activity that is "traditionally exclusively reserved to the State." Plaintiffs do assert that New York State's Board of Accountancy uses the Uniform CPA Examination in determining which public accountancy candidates should be licensed as CPAs, and that AICPA prepares and grades the examination. (*See* Am. Compl. ¶¶ 11.H-J., 110.) Even if AICPA and NYSSCPA were serving a "public function" by developing and grading the Uniform CPA Examination for use by the state's Board of Accountancy, that alone would be insufficient to confer "state actor" status for purposes of this analysis because preparation of the Uniform CPA Examination is not the activity complained of in the present action and plaintiff's status as a CPA has not been affected by defendants' challenged activities. For a private entity to be considered a state actor, "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." *Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968)*. In other words, "the state action, **[*39]** not the private action, must be the subject of complaint." *Id*. Here, the subject of plaintiffs' Amended Complaint does not meet the "public function" test because defendants' administration of a peer-review program for CPAs--unlike elections, tax collection, and education--is not a function "traditionally exclusively reserved to the State."

iii. Joint Action/Close Nexus Test

The "joint action/close nexus" test is met when the relationship between a private entity and the government is so "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings" that actions of the private entity must be viewed as actions of the state. Brentwood, 531 U.S. at 298. Put another way, "[a] nexus of 'state action' exists between a private entity and the state when the state . . . is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert . . . or is entwined with governmental policies." Flagg v. Yonkers Savs. and Loan Ass'n, FA, 396 F.3d 178, 187 (2d Cir. 2005) (quoting Cranley v. Nat'l Life Ins. Co., 318 F.3d 105, 111 (2d Cir. 2003)).

Determination of whether specific **[*40]** conduct constitutes state action is a "'necessarily fact-bound inquiry.'" Cranley, 318 F.3d at 111-12 (quoting Brentwood, 531 U.S. at 298). Plaintiffs claim that a number of facts alleged in the Amended Complaint demonstrate the requisite entwinement between defendants and New York State, but the court is not persuaded that the proffered allegations satisfy the "joint action/close nexus" test. Plaintiffs claim, for instance, that AICPA's role in preparing and grading the Uniform CPA Examination, which is used by the State Board of Accounting (*see* Am. Compl. ¶¶ 11.H-J., 110), renders AICPA and NYSSCPA "entangle[d]" with the state. (Pls.' Opp'n at 15-16.) The state's use of professional assessments privately executed by a private entity does not automatically cloak the entity with the state's authority, however. In *Rohan v. Am. Bar Ass'n*, another court within this district determined that the American Bar Association ("ABA")--which, like AICPA and NYSSCPA, is a professional association--is not a state actor, even though admission to practice law in New York State requires graduation from an ABA-accredited law school, because "the State of New York has not explicitly delegated to the **[*41]** ABA its responsibility for setting the requirements that an individual must meet in order to be licensed as an attorney-at-law" and "any conferral of monopoly status on the ABA by New York State does not convert the ABA into a state actor." No. 93-CV-1338 (SJ), 1995 U.S. Dist. LEXIS 21944, 1995 WL 347035, at *5 (E.D.N.Y. May 31, 1995), *aff'd on other grounds*, *100 F.3d 945 (2d Cir. 1996)*; *see also* Anderson v. La. Dental Ass'n, 372 F. Supp. 837, 841-42 (M.D. La. 1974), *aff'd*, 502 F.2d 783 (5th Cir. 1974) (professional association not liable as a state actor for denying plaintiff membership because practice of dentistry in the state is not contingent upon membership in association and "none of these purely private associations have any control whatsoever over the practice of dentistry in the [state]"). Similarly, plaintiff's ability to practice as a CPA is not contingent upon membership in the private defendant associations.

Plaintiffs' allegation that AICPA's promulgation of many standards used in GAAS, GAAP, and GAGAS (*see* Am. Compl. ¶¶ 12-16, 24-36) is evidence of entwinement between the state and AICPA and NYSSCPA (*see* Pls.' Opp'n at 15) also fails in light of the Supreme Court's recognition that a state's adoption **[*42]** of rules and standards promulgated by a private entity does not convert the private entity into a "state actor." *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 195, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988) (private athletic association not a state actor even though state university adopted association's standards to govern its athletic activities). Furthermore, the court disagrees with plaintiffs' contention that entwinement with the state is evident from the tax-exempt status of AICPA and NYSSCPA, through which both entities receive substantial assistance from the State of New York. (Am. Compl. ¶¶ 124-26; Pls.' Opp'n at 16.) In *Blum v. Yaretsky*, the Supreme Court concluded that a "close nexus" did not exist between a private mental facility and the government--even though the state subsidized the cost of the facility, paid the expenses of the patients, and licensed the facility--because the state had no role in the complained-of activity, the discharge and transfer of patients without a hearing. 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982). Here, plaintiffs do not allege the state's involvement or role in the events leading to Colabella's suspension as a peer reviewer for AICPA and NYSSCPA. Therefore, the mere fact that **[*43]** AICPA and NYSSCPA are tax-exempt, non-profit corporations is insufficient to demonstrate entwinement between defendants and the state.

Nor is the court persuaded by plaintiffs' claim that the state depends on AICPA for the peer review of CPAs who audit specific types of entities[11] because AICPA and NYSSCPA are--with the exception of PCAOB--the "sole source of accreditation" for CPAs who must fulfill a mandatory peer-review requirement. (Pls.' Opp'n at 14, 16; Am. Compl. ¶¶ 52, 114-18, 195.) Without more, plaintiffs' allegation fails to show a sufficiently close nexus between

[11] Government entities and entities that receive government awards; FDIC-insured and Federally Insured Thrift institutions; publicly traded companies; and borrowers from the Rural Utility Service. (Am. Compl. ¶¶ 52.A-E.)

NYSSCPA and the state. The purpose of the close nexus test is "to assure that constitutional standards are invoked only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains." *Blum, 457 U.S. at 1004* (emphasis in original).

In *Brentwood*, the Supreme Court found that a nominally private athletic association in Tennessee was a "state actor" for purposes **[*44]** of a *Section 1983* action because the association was marked by "unmistakable" and "overwhelming" entwinement with the state: public school officials comprised the overwhelming majority of membership; those members elected representatives, all of whom were public officials at the time of the Court's decision; and the representatives promulgated the rules for which the association was challenged on constitutional grounds. *531 U.S. at 298-99, 302*. In addition, the Court observed that the state had "provided for entwinement from top down," assigning state board members *ex officio* to serve as members of the association's board of control and legislative council, and treating the association's ministerial employees as state employees in terms of eligibility for membership in the state retirement system. *Id. at 300*.

Plaintiffs have alleged no facts that begin to approach the level of entwinement found in *Brentwood*. Rather, plaintiffs' allegations more closely resemble those in *Flagg*, in which the Second Circuit affirmed the district court's finding that a private savings and loan association did not engage in "state action" when it refused to pay interest on the plaintiffs' escrow account **[*45]** because the association did not have a "close nexus" with the state. *396 F.3d at 187*. In so finding, the court noted that the association did not withhold interest due to a federal mandate or direction or advisement from a state agent; that the relevant government agency maintained a neutral position regarding the association's actions; and that the agency and association did not form a "joint enterprise." *Id*. In sum, the court observed, the association was a "private entity participating in a regulated field of activity," and no state action had occurred. *Id*.

Plaintiffs here have not alleged that the state encouraged or was responsible for AICPA and NYSSCPA's decision to suspend plaintiff from conducting peer reviews on behalf of those entities. Nor have plaintiffs alleged any facts to support a finding that the state was so entangled with AICPA and NYSSCPA such that any action taken by defendants should be considered state action. As such, the court finds that the allegations set forth in the Amended Complaint fail to satisfy the "joint action/close nexus" test.[12]

2. Deprivation Requirement

Plaintiffs' *Section 1983* claim cannot survive a motion to dismiss for failure to state a claim because plaintiffs failed to allege facts sufficient to support a finding of state action. The court also finds that plaintiffs have not alleged a constitutionally protected property or liberty interest that would entitle them to due process protection. To meet the deprivation requirement of a *Section 1983* claim, "[t]he threshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution." *Narumanchi, 850 F.2d at 72*. Only after that threshold is met must the court consider whether the deprivation was effected without due process. *Id*.

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[12] The court notes that plaintiffs' reliance on a five-factor test articulated by the Second Circuit in *Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1973)*, **[*46]** to support their claim that the Amended Complaint adequately alleges state action (see Pls.' Opp'n at 14) is misplaced. In *Statler*, the Second Circuit laid out "five factors which are particularly important to a determination of 'state action': (1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms." *496 F.2d at 629*. The Supreme Court later "tightened the proof required for a showing of state action," rendering the *Jackson* analysis inapposite. *Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1191 (S.D.N.Y. 1988)*; *see also Blum, 457 U.S. at 1011* (government may subsidize private entities without assuming constitutional responsibility for their actions); *Rendell-Baker, 457 U.S. at 842* **[*47]** (private entity's performance of a function that serves the public does not make its acts governmental action); *Jackson, 419 U.S. at 350* (extensive regulation by the government does not transform the actions of the regulated entity into those of the government)).

Colabella alleges that defendants deprived him of "his right . . . to practice his profession as a peer reviewer" and the "substantial fees" that he would have earned by conducting peer reviews during the period following the date of **[*48]** his suspension, until present. (Am. Compl. ¶¶ 219, 222, 224, 226-27.) The court notes that the Amended Complaint is unclear as to whether Colabella alleges deprivation of a property right or a liberty right, and the parties' briefs do not elucidate the matter: defendants frame the issue as one involving a liberty interest (see Defs.' Mem. at 17), while plaintiffs refer only to a "property right" (*see* Pls.' Opp'n at 11). Although the court will analyze the alleged deprivation under both standards, its conclusion is the same: Plaintiffs have not alleged deprivation of a constitutionally protected interest.

a. Deprivation of a Property Interest

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it" and "[h]e must have more than a unilateral expectation of it." *Clarry v. U.S., 85 F.3d 1041, 1046 (2d Cir. 1996)* (quoting *Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972))*. "'[He] must, instead, have a legitimate claim of entitlement to it' under state or federal law in order to state a *[Section] 1983* claim." *Seymour's Boatyard, Inc. v. Town of Huntington, No. 08-CV-3248, 2009 U.S. Dist. LEXIS 45450, 2009 WL 1514610, at *4 (June 1, 2009)* (quoting *Finley v. Giacobbe, 79 F.3d 1285, 1296 (2d Cir. 1996))*. **[*49]** The Constitution does not create such entitlements; rather, entitlements are created and defined by "existing rules or understandings that stem from an independent source such as state law." *Harrington v. County of Suffolk, 607 F.3d 31, 34 (2d Cir. 2010)* (quoting *Town of Castle Rock v. Gonzales, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005))*. "When determining whether a plaintiff has a claim of entitlement, [the court] focus[es] on the applicable statute, contract or regulation that purports to establish the benefit." *Martz v. Inc. Village of Valley Stream, 22 F.3d 26, 30 (2d Cir. 1994)* (citing *Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170, 175 (2d Cir. 1991)*, *cert. denied*, *502 U.S. 907, 112 S. Ct. 300, 116 L. Ed. 2d 244 (1991))*.

In the Amended Complaint, Colabella claims a property interest primarily in "his right to practice his profession as a peer reviewer," and secondarily in the "substantial fees" he would have earned through such peer review. Plaintiffs do not cite to any "statute, contract, or regulation" that purportedly confers on Colabella the benefit at issue--the right to conduct peer reviews on behalf of AICPA and NYSSCPA. The court has also searched, without success, for any such statute or regulation that might have conferred **[*50]** upon Colabella a "legitimate claim of entitlement" to the right to conduct peer reviews. Accordingly, the court finds that Colabella's interest in practicing his profession as a peer reviewer for AICPA and NYSSCPA, and the fees he would have generated through that work, are outside the scope of constitutional protections that may underlie a *Section 1983* claim.

b. Deprivation of a Liberty Interest

It is well-settled that a person's freedom "to engage in any of the common occupations of life" is a liberty interest protected by the *Fourteenth Amendment*. *Cityspec, Inc. v. Smith, 617 F. Supp. 2d 161, 169 (E.D.N.Y. 2009)* (quoting *Roth, 408 U.S. at 572*). Courts in the Second Circuit have consistently held, however, that "one must have no ability to practice one's profession at all in order to state a claim for deprivation of a liberty interest." *Rodriguez v. Margotta, 71 F. Supp. 2d 289, 296 (S.D.N.Y. 1999)* (citations omitted), *aff'd*, *225 F.3d 646 (2d Cir. 2000)*; *Thomas v. Held, 941 F. Supp. 444, 450 (S.D.N.Y. 1996)* (one's liberty interest in pursuing the occupation of his choosing is implicated only when action is "so damaging . . . that [it] would hinder seriously the employee from finding **[*51]** work in that field").

Plaintiffs do not claim that as a result of defendants' actions, Colabella has lost the ability to participate in the entire field of accounting, and they have not alleged that Colabella's suspension has had any effect on his ability to earn fees by performing work in the field of certified public accounting. Plaintiffs' well-pleaded allegations do not even state that Colabella has been hindered from pursuing work in the entire field of performing peer reviews for CPAs. As the Amended Complaint makes clear, PCAOB also conducts peer reviews (Am. Compl. ¶¶ 52.G., 114-18), and plaintiffs have not alleged that Colabella is unable to conduct peer reviews on behalf of PCAOB. Rather, plaintiffs allege only that Colabella is unable to perform further peer reviews on behalf of AICPA and NYSSCPA. Such pleadings fall short of demonstrating that defendants' actions implicated a cognizable liberty interest, and accordingly, the court grants defendants' motion to dismiss plaintiffs' *Section 1983* claim for failure to state a claim.

III. Sufficiency of the Pleadings as to Antitrust Claims

A. Antitrust Standing

Plaintiffs assert two antitrust claims against defendants: a restraint-of-trade **[*52]** claim based on Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2* ("Section 1" and "Section 2," respectively), and a price-discrimination claim based on Sections 2 and 4 of the Clayton Act, *15 U.S.C. §§ 13*, *15*. The court begins its analysis of these claims by addressing defendants' claim that plaintiffs lack antitrust standing (*see* Defs.' Mem. 18).

It is well-settled that Plaintiffs who bring antitrust claims must have "antitrust standing" in addition to Article III standing. *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009)* (citing *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006))*. To establish antitrust standing, a plaintiff must first show that he has suffered an antitrust injury, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id*. (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. In addition, a plaintiff must show that he is an "efficient enforcer" of the antitrust laws. *Id*. (citing *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988))*. Determination of whether **[*53]** one is an "efficient enforcer" of the antitrust laws depends on the following factors:

> (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Volvo, 857 F.2d at 66 (citing *Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

Plaintiffs allege that AICPA and NYSSCPA "acted in combination and in conspiracy to administer the [PRP] in restraint of trade" by administering the PRP in a manner that contradicts its own published and advertised standards and guidelines, and by excluding from its ranks of peer reviewers those who, like Colabella, "place their independence and intellectual honesty above the dictates of . . . [defendants'] inconsistent application and enforcement" of the PRP standards and rules. (Am. Compl. ¶¶ 196.A-E, 198.A-B., 230.) Plaintiffs allege that AICPA and NYSSCPA so acted with **[*54]** the intent of restraining competition "between and among otherwise competent peer reviewers in the State of New York, and elsewhere, so as to limit the number of peer reviewers and control the number of firms actually conducting peer reviews." (*Id*. ¶ 243.)

Plaintiffs claim that three antitrust injuries have resulted from defendants' acts in violation of antitrust laws: (1) deprivation of fees that Colabella otherwise would have earned by conducting peer reviews but for defendants' suspension, which resulted from their "arbitrary and capricious" administration of the PRP; (2) deprivation of Colabella's right to compete for peer review engagements, a deprivation shared by other CPAs who may likewise be arbitrarily and capriciously suspended from AICPA's program; and (3) deprivation to members of the general public who might need services of peer-reviewed CPAs of their "right and ability to secure competent, independent, peer reviewed" CPAs. (Am. Compl. ¶¶ 232, 236-41.)

1. Antitrust Injury

As an initial step in alleging antitrust injury, a plaintiff must "identify[] the practice complained of and the reasons such a practice is or might be anticompetitive." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117,* 122 (2d Cir. 2007). **[*55]** To meet that requirement, the plaintiff must show "that the challenged action has had an actual adverse effect on competition as a whole in the relevant market . . . ." *George Haug Co., Inc. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998)* (quoting *Capital Imaging v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993)* (emphasis in original)).

Plaintiffs fail to allege an anticompetitive practice that affects "competition as a whole in the relevant market," however. *George Haug Co., 148 F.3d at 139*. The practice of which plaintiffs complain is defendants' administration of the PRP in a manner that removes from the pool of AICPA and NYSSCPA peer reviewers otherwise-competent peer reviewers who insist on exercising independence and resist bending to the arbitrary whims of the PRP administrators. (Am. Compl. ¶¶ 196.E, 197-98.) Plaintiffs allege that this practice harms competition in the overall market for peer review by "restrict[ing] the class of peer reviews to those who are 'favored' by those charged with the administration of the Peer Review Program . . . thereby reducing competition for no purpose other than to monopolize and control the administration of the **[*56]** Peer Review Program by those charged with [its] administration . . . ." (Am. Compl. ¶ 197.)

Apart from allegations that Colabella himself has suffered a loss by being suspended from conducting peer reviews for AICPA and NYSSCPA, the Amended Complaint is devoid of any other well-pleaded facts that support his contention that competition has been reduced. Without more, plaintiffs fail to demonstrate any antitrust injury, because "[a]lleging injury as an individual competitor within the market does not suffice to state a claim for an antitrust injury as antitrust statutes were enacted to protect competition and not individual competitors." *Wolf Concept S.A.R.L. v. Eber Bros. Wine and Liquor Corp., 736 F. Supp. 2d 661, 669 (W.D.N.Y. 2010)*; *see also* *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* ("Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.")

Moreover, plaintiffs have failed to even allege injury to themselves as individual competitors in the market for peer review: as discussed *supra*, **[*57]** the Amended Complaint does not allege that because Colabella cannot conduct peer reviews on behalf of AICPA and NYSSCPA, he cannot conduct peer reviews on behalf of *any* entity. Plaintiffs have not alleged that Colabella's suspension from conducting peer review on behalf of AICPA and NYSSCPA has any bearing on his ability to conduct peer reviews on behalf of PCAOB, for example. For these reasons, the court finds that plaintiffs have not pleaded facts sufficient to show an antitrust injury. Plaintiffs therefore lack antitrust standing to bring their claims under the Sherman and Clayton Acts, and the court need not analyze the "efficient enforcer" factors. Even assuming that plaintiffs did have antitrust standing, however, as discussed *infra*, plaintiffs' claims under the Sherman and Clayton Acts would nevertheless fail under *Rule 12(b)(6)*.

2. Pleading Standards for Sherman Act Claims

a. Section 1 Claim

Under Section 1 of the Sherman Act, every contract, combination, or conspiracy "in restraint of trade or commerce among the several States" is illegal. *15 U.S.C. § 1*. This court recently recognized in *LaFlamme v. Societe Air France*, that "[b]ecause Section 1 of the Sherman Act does not prohibit **[*58]** all restraints of trade, but rather only *agreements* to restrain trade, '[t]he crucial question in a Section 1 case is therefore whether the challenged conduct stem[s] from independent decision or from an agreement, tacit or express.'" *702 F. Supp. 2d 136, 146 (E.D.N.Y. 2010)* (Matsumoto, J.) (quoting *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010))*. Allegations of parallel conduct or "specific allegations of actual agreement among defendants" may be sufficient to state such an agreement, *LaFlamme, 702 F. Supp. 2d at 146* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. at 564-565 n.10 (2007))*, but "'a few stray statements speak[ing] directly of agreement . . . are merely legal conclusions resting on . . . prior allegations,' and cannot be accepted as true." *Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 333 (D.Vt. 2010)* (quoting *Twombly, 550 U.S. at 564*)).

b. *Section 2* Claim

Section 2 of the Sherman Act prohibits monopolization of "any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To state a monopolization claim under *Section 2* of the Sherman Act, one must establish "(1) the possession of monopoly power in the relevant market and (2) the **[*59]** willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)* (per curiam) (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.

3. Application

a. Section 1 Claim

An "agreement, tacit or express," is central to a Section 1 claim. *Starr, 592 F.3d at 321* (quoting *Theatre Enters. Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*. Although plaintiffs assert that AICPA and NYSSCPA "acted in combination and in conspiracy to administer the Peer Review Program in restraint of trade" (Am. Compl. ¶ 230), they fail to state any specific facts to elevate the bald assertion to a "plausible claim for relief." *See* *Iqbal, 129 S.Ct. at 1950*.

Plaintiffs contend, for example, that NYSSCPA's Peer Review Committee unjustifiably issued notices to Colabella based on erroneous claims that his work in specific engagements did not conform to the PRP's standards, and that the issuance of multiple notices led to his suspension from the PRP. (Am. Compl. ¶¶ 147-56.) Plaintiffs further allege that when Colabella **[*60]** appealed to AICPA about his alleged mistreatment leading to NYSSCPA's suspension, AICPA's Ad Hoc Committee rubber-stamped NYSSCPA's decision to "create the appearance of propriety" of NYSSCPA's actions. (Am. Compl. ¶¶ 174-90.) Such facts, without more, do not give rise to a plausible inference of conspiracy. In *RxUSA Wholesale, Inc. v. Alcon Labs., Inc*., the district court dismissed plaintiff's Section 1 claim because the complaint contained nothing more than "the naked conclusion that the . . . Defendants have 'agreed with each other' not to deal with Plaintiff." *661 F. Supp. 2d 218, 231 (E.D.N.Y. 2009)*, *aff'd*, *391 Fed. App'x 59 (2d Cir. 2010)*. The court observed that the complaint offered no facts that would indicate the existence of an illegal agreement, such as "when the alleged conspiracy began, where it occurred, or what statements the . . . [d]efendants made to one another." *Id*. Similarly, in the instant case, plaintiffs have pleaded no more than a "[t]hreadbare recital[] of the elements" of a Section 1 claim. *Iqbal, 129 S.Ct. at 1949-50* (citing *Twombly, 550 U.S. at 555*). Because "a conclusory allegation of agreement at some unidentified point does not supply facts adequate **[*61]** to show illegality [under Section 1]," *Twombly, 550 U.S. at 557*, defendants' motion to dismiss the Section 1 claim under *Rule 12(b)(6)* is granted.

b. Section 2 Claim

"Monopoly power, or 'the power to control prices or exclude competition,'" is a "central element" of a *Section 2* claim. *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., 562 F. Supp. 2d 392, 398 (E.D.N.Y. 2008)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. Plaintiffs allege that a wide swath of CPAs must be peer-reviewed because they conduct certain types of audits, and only one other entity (PCAOB) conducts peer reviews. (Am. Compl. ¶¶ 52.A-G., 114-18.) Apart from those assertions, however, plaintiffs provide no further allegations to support their conclusion that AICPA and NYSSCPA have "monopolized the market for Peer Review of Certified Public Accountants" in the United States and in New York State. (Am. Compl. ¶ 234.) Hence, plaintiffs' allegations fall far short of the required showings, either directly through "evidence of the control of prices or exclusion of competition" or indirectly, through evidence that "the defendant has a large percentage share of the **[*62]** relevant market." *In re Payment Card, 562 F. Supp. 2d at 399* (quoting *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006))*. Furthermore, plaintiffs leave utterly unaddressed the second required showing for a Section 2 claim--that defendants willfully acquired or maintained their monopoly power, versus growing or developing it due to a superior product, business acumen, or historic accident. *See* *PepsiCo, 315 F.3d at 105*. Therefore, defendants' motion to dismiss the Section 2 claim under *Rule 12(b)(6)* is granted.

4. Pleading Standard for Robinson-Patman Claim

Plaintiffs bring a claim under Section 2 of the Clayton Act, *15 U.S.C. § 13* (as amended by the Robinson-Patman Act of 1936 and hereafter referred to as the "Robinson-Patman Act"), and its enforcement provision, *15 U.S.C. § 15*, which provides for treble damages. The Robinson-Patman Act proscribes price discrimination "between different purchasers of commodities of like grade and quality" where, as a consequence of such discrimination, competition is substantially lessened, injured, destroyed, or prevented; or a monopoly is created. *15 U.S.C. § 13(a)*. It is well-settled that the Robinson-Patman Act applies only to **[*63]** transactions involving "commodities," a term that courts have "strictly construed" to denote only "tangible products of trade." *Innomed Labs. v. ALZA Corp., 368 F.3d 148, 156 (2d Cir. 2004)* (citing *May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1214 (9th Cir. 1980)* (internal quotation marks omitted)). Unlike commodities, "intangible goods and services" are not subject to the Robinson-Patman Act. *Nat'l Comm'ns Ass'n v. Am. Tel. & Tel. Co., 808 F. Supp. 1131, 1136 (S.D.N.Y. 1992)*, *rev'd on other grounds*, *46 F.3d 220 (2d Cir. 1995)*; *see also* *Innomed Labs., 368 F.3d at 156* ("The Robinson-Patman Act's prohibition on price discrimination extends only to transactions involving 'commodities,'" and not "intangible rights or services"); *Gordon v. New York Stock Exch., Inc. 366 F. Supp. 1261, 1263 (S.D.N.Y. 1973)* ("The authorities are clear that services and intangibles . . . are not 'commodities' within the meaning of the [Robinson-Patman] Act.") (citing *Columbia Broad. Sys. v. Amana Refrigeration, 295 F.2d 375 (7th Cir. 1961))*.

5. Application

Plaintiffs concede, and the court agrees, that the peer review of accounting practices constitutes a service and not a commodity. (Pls.' Opp'n at **[*64]** 22.) Therefore, peer review of accounting practices is not subject to the price discrimination provisions of the Robinson-Patman Act. Plaintiffs nevertheless attempt to analogize their peer-review engagements to the process of newspaper production, which the Eighth Circuit held was a "commodity" within the meaning of the Act in *Morning Pioneer v. Bismarck Tribune Co*. because, notwithstanding the extensive services involved in producing the paper, it is "predominantly a tangible good" that "takes on a tangible form and [] is bought and sold in the market place." (Pls.' Opp'n at 22 (citing *Morning Pioneer, 493 F.2d 383, 389 n.11 (8th Cir. 1974))*. Plaintiffs claim that the peer-review reports that they draft as a result of their peer-review engagements are, like the newspapers described in *Morning Pioneer*, bought and sold in the market for peer review, and therefore "commodities" governed by the Robinson-Patman Act. (Pls.' Opp'n at 22.)

The Second Circuit recognizes the "dominant nature" or "dominant purpose" test employed in *Morning Pioneer* as a means to determine whether subjects that combine both tangible goods and intangible services are "commodities" for purposes of the Robinson-Patman **[*65]** Act. *See* *Innomed Labs., 368 F.3d at 156* (citing *Tri-State Broad. Co., Inc. v. United Press Int'l, Inc., 369 F.2d 268, 270 (5th Cir. 1966))*. Employing that test here, however, the court finds that the dominant purpose of peer review among CPAs is not the procurement of a report containing the peer review results; rather, the primary purpose is to be evaluated by others in the same field to maintain and enhance the quality of work performed in the field. (*See* Am. Compl. ¶ 48.) Although peer-reviews do result in a tangible report, they are not "bought and sold in the market place," *Morning Pioneer, 493 F.2d at 389 n.11*. Therefore, the facts as alleged in the Amended Complaint do not state a claim under the Robinson-Patman Act, and defendants' motion to dismiss plaintiffs' price-discrimination claim for failure to state a claim is granted.

IV. Remaining Claims: Declaratory Judgment and State Law Claims

A. Declaratory Judgment Claim

Plaintiffs request declaratory relief under the Declaratory Judgment Act, *28 U.S.C. §§ 2201* and *2202*. The Declaratory Judgment Act, however, provides only a federal remedy, not a federal claim, so it can only be applied in cases in which there is an independent **[*66]** basis for the exercise of federal subject matter jurisdiction. *See Goldberg v. Cablevision Sys. Corp., 281 F. Supp. 2d 595, 604 (E.D.N.Y. 2003)* ("As all the federal claims must be dismissed, the Court lacks jurisdiction to grant relief pursuant to the Declaratory Judgment Act.") Here, all of Plaintiff's federal claims are dismissed for failure to state a claim, and no substantive federal claim remains upon which plaintiffs can base their request for declaratory relief.

In addition, the purpose of declaratory relief is "to . . . settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." *Beacon Constr. Co., Inc. v. Matco Elec. Co., Inc., 521 F.2d 392, 397 (2d Cir. 1975)* (quoting *Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937))*; *see also* *28 U.S.C. § 2201(a)* (Declaratory Judgment Act provides that a federal court "may declare the *rights and other legal relations* of any interested party seeking such declaration . . . .") (emphasis added). Plaintiffs' request that this court declare, *inter alia*, that "[Colabella] is fit to be engaged to perform peer reviews in **[*67]** the State of New York and elsewhere," is not within the purview of the Declaratory Judgment Act, as an evaluation of Colabella's fitness to perform peer review for fellow CPAs does not involve an adjudication of legal rights or relations. Therefore, the declaratory judgment claim is dismissed.

B. State Law Claims

Finally, the court respectfully declines to exercise jurisdiction over plaintiffs' state law claims. Pursuant to *28 U.S.C. § 1367(c)*, a district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." Because the court has dismissed plaintiff's federal claims, the court will decline to exercise jurisdiction over plaintiff's state law claims.

CONCLUSION

For the reasons explained above, the plaintiffs' claims are dismissed in their entirety with prejudice. Plaintiff has had two opportunities to assert sufficient allegations, most recently in the Amended Complaint with 281 paragraphs, some of which contain subparagraphs. Accordingly, the Clerk is respectfully requested to enter judgment in favor of defendants and close the case.

SO ORDERED.

Dated: September 28, 2011

Brooklyn, New York

Kiyo A. Matsumoto **[*68]**

United States District Judge

In re TFT-LCD (Flat Panel) Antitrust Litig.

United States District Court for the Northern District of California

September 28, 2011, Decided; September 28, 2011, Filed

No. M 07-1827 SI; MDL. No. 1827

Reporter

2011 U.S. Dist. LEXIS 110635 *; 2011-2 Trade Cas. (CCH) P77,634

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION. This Order Relates to: All Indirect-Purchaser Plaintiff Class Actions

Subsequent History: Motion denied by *In re TFT-LCD Antitrust Litig., 2011 U.S. Dist. LEXIS 115212 (N.D. Cal., Oct. 5, 2011)*

Prior History: *In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 U.S. Dist. LEXIS 109186 (N.D. Cal., Sept. 26, 2011)*

Core Terms

unjust enrichment, defendants', plaintiffs', summary judgment, purchasers, indirect, products, cases, antitrust, consumer, practices, courts, unfair, deceptive act, regulation, conferred, circumstances, price-fixing, disparity, exemption, panels, confer a benefit, direct relation, monitoring, allegations, summary judgment motion, genuine issue, indirect-purchaser, transactions, definitions

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For Chimei Innolux Corp., Defendant: Adam Michael Raviv, Steven F. Cherry, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

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For Apple Inc., Interested Party: Caroline Nason Mitchell, Robert Allan Mittelstaedt, LEAD ATTORNEYS, **[*16]** Jones Day, San Francisco, CA.

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For NEC LCD Technologies, Ltd., Intervenor: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING IN PART DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON VARIOUS ISSUES OF STATE LAW

On September 22, 2011, the Court heard argument on defendants' joint motion for partial summary judgment on various issues of state law. Having considered the moving papers and the arguments of the parties, and for good cause appearing, the Court hereby GRANTS IN PART defendants' motion.

BACKGROUND

This antitrust class action stems from allegations of a global price-fixing conspiracy in the market for thin-film transistor liquid-crystal display ("TFT-LCD") panels. Plaintiffs, indirect purchasers of TFT-LCD panels, claim that "[d]efendants and their co-conspirators formed an international cartel illegally to restrict competition in the LCD panel market, specifically targeting and severely injuring **[*18]** indirect-purchaser consumers and affecting billions of dollars of commerce throughout the United States." Third Consolidated Amended Complaint ("TAC"), ¶2. Plaintiffs' TAC includes a claim under the Sherman Act, as well claims brought under the antitrust, unfair competition, and unjust enrichment laws of a number of states. TAC at ¶¶270-312.

On July 29, 2011, defendants filed a joint motion, seeking summary judgment on plaintiffs' state-law unfair competition and unjust enrichment claims.

LEGAL STANDARD

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* *Fed. R. Civ. P. 56(a)*. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The moving party, however, has no burden to disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *Id. at 325*.

Once **[*19]** the moving party has met its burden, the burden shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" *Id. at 324* (quoting then *Fed. R. Civ. P. 56(e)*). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

In deciding a summary judgment motion, the Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id. at 255*. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment." *Id.* However, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir.1979)*. **[*20]** The evidence the parties present must be admissible. *Fed. R. Civ. P. 56(c)*).

DISCUSSION

Defendants seek summary judgment on two broad categories of state-law claims: (1) state-law consumer protection claims; and (2) state-law unjust enrichment claims.

I. Consumer Protection Claims

Defendants move for summary judgment on the consumer-protection claims plaintiffs have brought under the laws of New Mexico, New York, Vermont, Rhode Island, and Missouri.

A. New Mexico

Plaintiffs' TAC includes a claim under the New Mexico Unfair Practices Act ("NMUPA"). The NMUPA forbids "unconscionable trade practices," which it defines as "an act or practice in connection with the sale . . . of any goods or services . . . that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." *N.M. Stat. §§ 57-12-2*, *57-12-3*. Plaintiffs' complaint invokes the second of these definitions. TAC at ¶308(b).

Defendants claim that plaintiffs cannot prove that a "gross disparity" existed between the price they paid for their LCD products and the value **[*21]** they received. They rely on a handful of cases in which courts found that price differences of up to 15% did not amount to gross disparities. *See* *Taylor v. United Management, Inc., 51 F. Supp. 2d 1212, 1217 (D.N.M.1999)* (finding $600 difference between $4,000 dealership gave as trade-in value for car and $4,600 dealership later sold car for did not amount to "gross disparity"); *see also* *Wyatt v. Petrila, 752 S.W.2d 683, 686 (Tex. App. 1988)* (finding $625,000 purchase price of house worth $575,000 did not amount to gross disparity); *Holland Mortg. and Inv. Corp. v. Bone, 751 S.W.2d 515, 521 (Tex. App. 1987)* (finding $6,000 difference "between the value received and the consideration paid" for a house was "not a 'gross disparity' as a matter of law because it constitute[d] less than 7% of the $86,900 consideration paid").

Defendants argue that plaintiffs' evidence shows that the conspiracy only inflated the price of LCD panels by an average of either 8.9% or 12.1%. *See* Declaration of Lee F. Berger in Support of Defendants' Joint Motion for Partial Summary Judgment Based on Various Issues of State Law ("Berger Decl."), Exh. A (8.9%); Declaration of Janet S. Netz, Ph.D. in Support of Indirect-Purchaser **[*22]** Plaintiffs' Opposition to Defendants' Joint Motion for Summary Judgment on Plaintiff Benjamin Larry Luber's Claims, Master Docket No. 3172-1, at 2 n.5 (July 22, 2011) (12.1%). They assert that this is insufficient as a matter of law to constitute a gross disparity.

The Court disagrees. None of the cases defendants rely on involved price-fixing or similar surreptitious activity. Rather, they involved ordinary, arms-length transactions and thus were premised on nothing more than the terms of the bargains the plaintiffs had agreed to. Here, in contrast, defendants secretly conspired to increase the prices of LCD panels to supra-competitive levels. In such circumstances, plaintiffs have raised a genuine issue of fact regarding whether the 8.9% to 12.1% overcharge amounts to a gross disparity. *See In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 586 n.60 (M.D. Pa. 2009)* (noting "compelling trend favorable to consumer protection claims in price-fixing actions"); *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 171-72 (D. Me. 2004)* (finding that allegations of a "gross disparity" were sufficient where plaintiff alleged vehicles were sold at **[*23]** prices "ten to thirty percent greater than prices for the same vehicles in Canada").

B. New York

Defendants also move for summary judgment on plaintiffs' claims under *section 349 of New York's General Business Law*. *Section 349* prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce." *N.Y. Gen. Bus. L. § 349*. In order to prevail under *section 349*, plaintiffs must establish "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *In re TFT-LCD (Flat Panel) Antitrust Litigation, 586 F. Supp. 2d 1109, 1127 (N.D. Cal. 2008)*. Defendants argue that plaintiffs were not aware of any of defendants' deceptive acts, and that plaintiffs therefore could not have been deceived by those acts. *See* Berger Decl., Exh. B at 1 (admission of named-plaintiff DiMatteo that he was unaware of defendants' allegedly deceptive statements at the time he bought his monitor); Berger Decl., Exh. C at 2 (same for named-plaintiff Ferencsik).

This Court has already held that plaintiffs' allegations that defendants "took efforts to conceal their [price-fixing] **[*24]** agreements from the New York plaintiffs and the indirect class" were sufficient to state a claim under *section 349*. *See Flat Panel, 586 F. Supp. 2d at 1127-28* ("Defendants move to dismiss plaintiffs' claim under *New York's General Business Law § 349* because the complaint does not specifically allege that defendants made any misrepresentations to the indirect plaintiffs."). Although couched in slightly different terms, defendants' summary judgment motion largely seeks to revisit this ruling.

The Court adheres to its earlier decision that plaintiffs' *section 349* claim is viable. Contrary to defendants' argument, plaintiffs need not have been aware of defendants' deceptive conduct to recover under *section 349*. This is because "reliance is not an element of a *section 349* claim." *Stutman v Chemical Bank, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000)*. All that plaintiffs must establish is that defendants committed "material deceptive acts" and "that the defendant[s'] 'material deceptive act' caused the[ir] injury." *Id.*

Courts have found that a defendant's affirmative steps to conceal its price-fixing activities can amount to material deceptive acts within the meaning of *section 349*. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 536 F. Supp. 2d 1129, 1143-44 (N.D. Cal. 2008)*; **[*25]** *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1030 (N.D. Cal. 2007)*; *cf. Leider v. Ralfe, 387 F. Supp. 2d 283, 296 (S.D.N.Y. 2005)* (rejecting *section 349* claim because "De Beers' conduct, while certainly reprehensible, was not secretive"); *New Motor Vehicles, 350 F. Supp. 2d at 197* (rejecting claim because price differential forming basis of *section 349* claim was public knowledge). In this case, plaintiffs have introduced evidence that defendants took steps to ensure that their collusive activities remained hidden from consumers. *See* Clayton Decl., Exhs. 1-12 (examples of attempts to keep meetings secret). The Court agrees with plaintiffs that a reasonable jury could conclude that this conduct could deceive a consumer into believing that he was paying a competitive price for LCD products. Accordingly, the Court finds that a genuine issue of fact exists regarding whether defendants' secret, collusive activity violated *section 349*.

C. Vermont

Defendants also move for summary judgment on plaintiffs' claims under the Vermont Consumer Fraud Act ("VCFA"), which prohibits "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce **[*26]** . . . ." *9 V.S.A. § 2453(a)*. "To prevail on a [VCFA] claim, one must show that: (1) there was a representation, practice, or omission likely to mislead the consumer; (2) the consumer interpreted the message reasonably under the circumstances; and (3) the misleading effects were material, that is, likely to affect the consumers conduct or decision with regard to a product." Lang McLaughry Spera Real Estate, LLC v. Hinsdale, 35 A.3d 100, 2011 VT 29, 2011 WL 1347032, at *8 (Vt. 2011).

As above, defendants argue that they should be granted summary judgment on plaintiffs' VCFA claims because plaintiffs were not aware of any of defendants' allegedly deceptive acts. *See* Berger Decl., Exh. D at 2 (admission of named-plaintiff Watson that he was unaware of defendants' allegedly deceptive statements at the time he bought his laptop computer). VCFA violations, however, are evaluated under an objective standard. Lang McLaughry, 2011 VT 29, 35 A.3d 100, 2011 WL 1347032 at *8. Thus, the question is whether defendants' omissions would have been material to a reasonable consumer. 2011 VT 29, Id. at *9. The Court finds that plaintiffs have established that a genuine issue of fact exists concerning whether defendants' concealment of their **[*27]** price-fixing activities were "likely to affect the consumer's conduct or decision with regard to a product." *See* Elkins v. Microsoft Corp., 174 Vt. 328, 817 A.2d 9, 13 (Vt. 2002) ("The Legislature clearly intended the VCFA to have as broad a reach as possible in order to best protect consumers against unfair trade practices.").

D. Rhode Island

The Rhode Island Unfair Trade Practices and Consumer Protection Act ("UTPCPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." R.I. Gen. Laws § 6-13.1-2. This Court has already held that plaintiffs' complaint alleges a cognizable legal theory under the UTPCPA. Flat Panel, 586 F. Supp. 2d at 1129 (approving plaintiffs' theory that "consumers were misled or deceived to believe that they were paying a fair price for [LCD products] or the price increases for [LCD products] were for valid business reasons").

Defendants raise three arguments as to why summary judgment should be granted on this claim. First, defendants seek summary judgment on the ground that plaintiffs' claims are exempted from coverage under the UTPCPA. The UTPCPA contains an exclusionary provision that provides: "Nothing **[*28]** in this chapter shall apply to actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States." R.I. Gen. Laws § 6-13.1-4. The Rhode Island Supreme Court has held that this provision "exempt[s] from the Act all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers." State v. Piedmont Funding Corp., 119 R.I. 695, 382 A.2d 819, 822 (R.I. 1978).

Defendants argue that plaintiffs' antitrust claims fall within this statutory exemption because antitrust claims are "subject to regulation [by] the United States Department of Justice, the Federal Trade Commission and the Rhode Island State Attorney General . . . ." Motion at 10. The Court disagrees with defendants' argument. The focus of the UTPCPA's exemption is not the defendants' wrongful acts, otherwise every illegal practice would be subject to the regulation of DOJ or the Rhode Island Attorney General and exempted from UTPCPA. Rather, the proper inquiry is whether the specific "transactions which constitute the basis of th[e] complaint" are subject to regulation. **[*29]** Piedmont Funding, 382 A.2d at 822; *see also* Lynch v. Conley, 853 A.2d 1212, 1214 (R.I. 2004) ("[S]tep one of the exemption analysis requires the party claiming the exemption to demonstrate that the general activities complained of are subject to monitoring or regulation by a state or federal government agency."); Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 672 (R.I. 2004) ("Under the first prong of the analysis, the question is whether the 'general activity in question,' in this case credit-card solicitations, is subject to control and monitoring by governmental agencies.").

Thus, in *Piedmont Funding*, the plaintiff's lawsuit was precluded because he alleged deceptive acts in the sale of insurance and securities, areas regulated by "the office of the insurance commissioner and the SEC respectively." Piedmont Funding, 382 A.2d at 822. Other cases have similarly limited the UTPCPA's exemption to the transactions on which the plaintiff's complaint was based. *See* New Motor Vehicles, 350 F. Supp. 2d at 201 (holding that claims based on deceptive practices in sales of automobiles were not cognizable because "[m]otor vehicle manufacturers, distributors and dealers are regulated by the State **[*30]** of Rhode Island pursuant to a separate statute"); *Lynch, 853 A.2d at 1214* (excluding claim based upon inadequate lead-paint disclosure because "[l]ead paint disclosure in connection with the sale of residential real estate, already is comprehensively regulated by the state and federal government"); *Chavers, 844 A.2d at 672* (finding claims of deceptive advertising in credit card solicitations exempted because "credit card solicitations by a national bank . . . are subject to monitoring, supervision and regulation by federal agencies").

The Court concludes that the relevant "transactions which constitute the basis" of plaintiffs' complaint" are the sale and pricing of LCD products or consumer electronics. Defendants have identified no regulations governing such transactions. Accordingly, the Court rejects defendants' first basis for summary judgment.

Defendants' second argument is that their failure to disclose the alleged conspiracy was not material. Of the twenty separate definitions that the UTPCPA provides for "unfair methods of competition and unfair or deceptive acts or practices," one requires that the defendants "mislead or deceive members of the public in a material respect." *R.I. Gen. Laws § 6-13.1-1* **[*31]** ("Using any other methods, acts or practices which mislead or deceive members of the public in a material respect."). As above, defendants argue that plaintiffs were not aware of any statements made by the defendants, and that any deceptive conduct therefore could not have been material to plaintiffs' purchasing decisions. *Cf.* Berger Decl., Exh. F at 2 (testimony of Rhode Island named-plaintiff Mastronardi that he purchased his laptop computer without reviewing "marketing materials or brochures").

"A material effect is one which is likely to influence a consumer's conduct or purchase decision." *In re Int'l Harvester Co., 104 F.T.C. 949, 1042-43 (Dec. 21, 1984)*; *see also* *R.I. Gen. Laws § 6-13.1-3* ("It is the intent of the legislature that in construing *§§ 6-13.1-1* and *6-13.1-2* due consideration and great weight shall be given to the interpretations of the federal trade commission and the federal courts relating to § 5(a) of the Federal Trade Commission . . . ."). For the reasons stated above, the Court agrees with plaintiffs that the existence of a price-fixing conspiracy is "likely to influence" the average consumer. *Chocolate Confectionary, 602 F. Supp. 2d at 587* (finding allegations **[*32]** sufficient where plaintiff alleged that "defendants conspired to raise prices in Rhode Island, that they issued misleading statements about the true reasons for these price increases, and that they caused Rhode Island consumers to believe that prices for chocolate candy were the result of fair competition in an open marketplace" (citations omitted)). Accordingly, the Court rejects defendants' second basis for summary judgment.

Finally, defendants seek summary judgment as to any plaintiff who did not purchase an LCD product "primarily for personal, family or household purposes." *See* *R.I. Gen. Laws § 6-13.1-5.2(a)*. Although this Court has previously granted defendants' motion to dismiss plaintiffs' complaint to the extent it sought claims that did not meet this criteria, the class definitions do not contain any such limitation. *Flat Panel, 586 F. Supp. 2d at 1130*. Accordingly, the Court GRANTS defendants' motion for summary judgment as to any purchases that were not "primarily for personal, family or household purposes." The Court will enter an order altering the Rhode Island class definition at the time it rules on defendants' pending motion to amend the class definitions.

E. Missouri

Plaintiffs' **[*33]** TAC also includes a claim under the Missouri Merchandising Practices Act ("MMPA"). The MMPA limits private actions to "[a]ny person who purchases or leases merchandise primarily for personal, family, or household purposes." *Mo. Rev. Stat. § 407.025.1*. As above, defendants argue that the class definitions do not contain any "personal use" limitations. Plaintiffs do not contend that a plaintiff that purchased an LCD product for non-personal use may recover under the MMPA. Accordingly, the Court GRANTS defendants' motion to the extent plaintiffs seek to recover for purchases that were not personal. The Court will enter an order altering the Missouri class definition at the time it rules on defendants' pending motion to amend the class definitions.

II. Unjust Enrichment Claims

Plaintiffs' TAC includes common-law unjust enrichment claims under the laws of twenty-two states, including the District of Columbia. TAC at ¶278. Defendants now seek summary judgment on plaintiffs' claims under the laws of fourteen states: the District of Columbia, Hawaii, Iowa, Kansas, Maine, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, Vermont, West Virginia, and Wisconsin.

Defendants **[*34]** advance three theories in support of their motion. First, they claim that in twelve states plaintiffs did not confer a "direct benefit " on the defendants. Second, they claim that the unjust enrichment claims under the laws of eight states must be dismissed because plaintiffs have an adequate remedy at law. Finally, they argue that unjust enrichment may not be used to circumvent the statutory limitations on antitrust actions in Rhode Island and Missouri.

A. Necessity of "Direct Benefit"

Defendants argue that twelve states require a plaintiff to prove that he conferred a "direct benefit" on the defendant to establish a claim for unjust enrichment. They argue that plaintiffs cannot meet this requirement because the named plaintiffs purchased LCD products from intermediaries - either retailers or manufacturers of televisions, computers, or other LCD products - and not directly from a defendant.

As a general matter, the Court is unconvinced by defendants' argument. The Court recognizes that unjust enrichment law varies from state to state. *See* *True v. Conagra Foods, Inc., 2011 U.S. Dist. LEXIS 6770, 2011 WL 176037, at *9 (W.D. Mo., January 4, 2011)* ("Courts have repeatedly recognized that the law of unjust enrichment **[*35]** varies materially from state to state." (internal quotation marks omitted)). In general, however, unjust enrichment requires a plaintiff to show "the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant." Restatement (Third), Restitution § 1, cmt. a (2011); *see also, e.g.,* *Platz Associates v. Finley, 2009 ME 55, 973 A.2d 743, 750 (Me. 2009)* ("A claim for unjust enrichment requires the complaining party to show that: (1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value.").

Unjust enrichment is an equitable remedy, and thus by its very nature is a flexible doctrine. Restatement (Third), Restitution, § 1, cmt. a (noting the "inherent flexibility of the concept of unjust enrichment"). As a cause of action based in equity, "the requirements of proof of unjust enrichment are neither technical nor complicated." *Owens Corning v. R.J. Reynolds Tobacco Co., 868 So.2d 331, 342 (Miss. 2004)*. *Id.* ("[T]he **[*36]** plaintiff need only allege and show that the defendant holds money which in equity and good conscience belongs to the plaintiff . . . ."). Thus, by their very nature unjust enrichment claims are ill-suited for bright-line rules of the type defendants suggest.

In addition, defendants' focus on the lack of a "direct relation" between plaintiffs and defendants in misplaced. Rather than looking at the relationship between the parties, courts typically focus on the relation between the plaintiffs' injury and the defendants' conduct. *Owens Corning, 868 So.2d at 339* (noting need for a "direct relation between the injury asserted and the injurious conduct alleged."). Thus, those cases in which courts have described unjust enrichment claims as too "indirect" to state claims for relief typically have involved tenuous connections between the plaintiff's injury and the defendant's gain. Frequently the defendant's benefit did not originate with the plaintiff. *See* *Owens Corning, 868 So. 2d at 339*; *Hill v. Stowers, 224 W. Va. 51, 680 S.E.2d 66, 75 (W. Va. 2009)*. In other cases the plaintiff's loss was not responsible for the defendant's gain or the defendant received no gain at all. *See* *Prudential Ins. Co. of America v. Couch, 180 W. Va. 210, 376 S.E.2d 104 (W. Va. 1988)*; **[*37]** *Rivers v. Amato, 2001 WL 1736498 (Me. Super., June 22, 2001)*; *Alessi v. Bowen Court Condo., 2010 R.I. Super. LEXIS 50 (R.I. Super., March 10, 2010)*. In still other cases, courts have found the relationship too "attenuated." *See, e.g.,* *Sperry v. Crompton Corp., 8 N.Y.3d 204, 209, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (N.Y. 2007)* (rejecting indirect purchaser claims based upon price-fixing activities in chemicals used in rubber because the relationship was too "attenuated").

Here, in contrast, there is a direct relationship between the plaintiffs' expenses and the defendants' benefit. Under the theory of the case that plaintiffs have advanced, there are no intervening events that disrupt the flow of money from plaintiffs to defendants. Although termed "indirect," plaintiffs have provided evidence supporting their theory that the money they paid was "passed through" directly to defendants. In the Court's view, this is sufficient to satisfy the general common-law definition of unjust enrichment. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation, 599 F. Supp. 2d 1179, 1189-90 (N.D. Cal. 2009)* ("Whether or not the benefit is directly conferred on the defendant is not the critical inquiry; rather, the plaintiff must show that **[*38]** his detriment and the defendant's benefit are related and flow from the challenged conduct." (internal quotation marks omitted)). Unless a state court has explicitly held otherwise, the Court is inclined to allow plaintiffs' unjust enrichment claims to proceed.

1. Mississippi

In Mississippi, unjust enrichment "applies to situations where there is no legal contract but where the person sought to be charged is in possession of . . . property which in good conscience and justice he should not retain but should deliver to another . . . ." *Joel v. Joel, 43 So. 3d 424, 432 (Miss. 2010)*. Defendants argue that Mississippi law requires a "direct relation between the injury asserted and the injurious conduct alleged." *See Owens Corning, 868 So. 2d at 339* ("[O]ne notion traditionally included in the concept of proximate causation is the requirement that there be some direct relation between the injury asserted and the injurious conduct alleged." (internal quotation marks omitted)). Because the Mississippi class representative testified that she bought a personal computer, including an LCD monitor, from dell.com, defendants assert that summary judgment is appropriate on her unjust enrichment claim. **[*39]** *See* Berger Decl., Exh. G at 72.

Defendants' reliance on *Owens Corning* is misplaced. That case concerned proximate causation and did not establish a bar to all unjust enrichment claims where the plaintiff did not deal directly with the defendant. The plaintiff in *Owens Corning* was an asbestos manufacturer that settled a large number of cases with individuals suffering from lung disease. *Owens Corning, 868 So. 2d at 335*. After reaching these settlements, the plaintiff brought suit against a number of tobacco companies, claiming that they were also responsible for the lung disease. *Id. at 335-337*. Its lawsuit included an unjust enrichment claim, based on the theory that "by effectively shifting liability for smoking related disease to [plaintiff], Tobacco Defendants have been unjustly enriched at [plaintiff's] expense." *Id. at 336-37*. Based on a Mississippi law that "preclude[d] all tobacco cases based on products liability," the Court rejected plaintiff's unjust enrichment claim. *Id. at 340*. It held that plaintiff could not establish proximate cause for its injuries because it could not establish the tobacco companies' liability for the lung disease. *Id. at 342* ("Owens Corning would have **[*40]** to prove that Tobacco Defendants were liable for injuries suffered by the asbestos claimants . . . .").

This case has no such problem with proximate causation. Plaintiffs allege that defendants wrongfully overcharged electronics manufacturers for LCD panels, and that those overcharges were passed through to them when they purchased LCD products. Although plaintiffs and defendants may not have interacted, this amounts to "a direct relation between the injury asserted and the injurious conduct alleged." Accordingly, the Court DENIES defendants' motion for summary judgment on the Mississippi unjust enrichment claim.

2. New York

Defendants also seek summary judgment on plaintiffs' New York unjust enrichment claim. Defendants argue that indirect purchasers may not recover under New York law, relying primarily on a 2007 case from the New York Court of Appeals, *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 831 N.Y.S.2d 760 (N.Y. 2007)*. *Sperry* concerned a purported antitrust class action lawsuit against producers of "rubber-processing chemicals that improve the durability, color control and heat resistance of rubber products, including tires, belts, hoses and footwear." *Id. at 209*. In addition to seeking treble damages, **[*41]** the lawsuit also included an unjust enrichment claim. *Id. at 215*. Acknowledging that "a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment," the court rejected the claim, concluding that "the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim." *Id. at 215-16*; *see also New York v. Daicel Chemical Industries, Ltd., 42 A.D.3d 301, 840 N.Y.S.2d 8, 12 (N.Y. App. 2007)* ("While privity is not required for an unjust enrichment claim, the end-users of the products, in whose interest plaintiff is acting, are too attenuated from the producers of the chemicals which are among the ingredients of those products.").

Although *Sperry* supports defendants' position, even after it was decided courts have continued to allow unjust enrichment claims to proceed on behalf of indirect-purchasers of price-fixed products. *See Chocolate*

Confectionary, 749 F. Supp. 2d at 241 (finding sufficient allegations that "[t]he IEU plaintiffs have averred that a monetary benefit was indirectly conferred on defendants by virtue of their collusive market behavior."); *see also* Burns v. Delaware Charter Guarantee & Trust Co., 805 F. Supp. 2d 12, 2011 U.S. Dist. LEXIS 61375, 2011 WL 2314835, at *2 (S.D.N.Y., June 8, 2011) **[*42]** ("Unjust enrichment does not require a direct relationship between the parties."); In re Canon Cameras Litig., 2006 U.S. Dist. LEXIS 43223, 2006 WL 1751245, at *2 (S.D.N.Y., June 23, 2006) ("The cases on which defendant relies suggest, at most, only that some relationships may be too attenuated to support an unjust enrichment claim."); *Cox v. Microsoft Corp., 8 A.D.3d 39, 778 N.Y.S.2d 147 (N.Y. App. 2004)* (reversing district court's "holding that, as indirect purchasers of Microsoft's software products, plaintiffs only indirectly bestowed a benefit upon Microsoft.").

In light of these cases, the court agrees with plaintiffs that the New York Court of Appeals' decision was based upon the fact that rubber-processing chemicals did not represent a significant portion of the rubber products that the plaintiffs purchased. Here, in contrast, plaintiffs claim that LCD panels are "identifiable, discrete physical objects that do not change form or become an indistinguishable part of the TVs, computer monitors, laptops, or other products in which they are contained," and "[t]hus, LCD panels follow a traceable physical chain from the defendants to the OEMs to the purchasers of the finished products incorporating LCD panels." TAC at ¶¶199-200; **[*43]** *see also* Flat Panel, 586 F. Supp. 2d at 1123. Plaintiffs also allege that "LCD panels make up 60-70% of the cost of an LCD television or computer monitor." TAC at ¶182; Flat Panel, 586 F. Supp. 2d at 1124. In light of these allegations, which defendants have not challenged, the Court finds that the relationship between plaintiffs and defendants is not too attenuated to support plaintiffs' unjust enrichment claim. Accordingly, the Court DENIES defendants' motion as to the New York unjust enrichment claim.

3. Maine

Under Maine law, "[a] claim for unjust enrichment requires the complaining party to show that: (1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." Platz, 973 A.2d at 750. Defendants assert that Maine law precludes recovery by indirect purchasers and that summary judgment should therefore be granted on plaintiffs' Maine unjust enrichment claim. *See* Berger Decl., Exh. J at 29 (testimony of Maine class representative that she purchased television at Best **[*44]** Buy).

Defendants rely primarily on two cases in support of their argument: Platz Associates v. Finley, 2009 ME 55, 973 A.2d 743 (Me. 2009), and Rivers v. Amato, 2001 WL 1736498 (Me. Super., June 22, 2001). Neither of these cases, however, sets forth a general rule that an unjust enrichment plaintiff must directly interact with the defendant. *Platz*, for example, involved an unjust enrichment claim brought by an architecture firm that had created "conceptual architectural drawings for a development project." Platz, 973 A.2d at 746. When the project fell through, the firm sued, claiming that the owner had been unjustly enriched by his receipt of the architectural plans. Id. at 751. The Maine Supreme Court reversed a grant of summary judgment in favor of the plaintiff because the plaintiff had introduced no evidence that the defendant had actually received the plans. Id. at 751 ("[T]he statements of material facts fail to demonstrate that Finley actually received and retained the architectural plans, and thus fail to demonstrate the central element of unjust enrichment, a benefit conferred.").

Similarly, *Rivers* involved a plaintiff who had contracted to purchase a parcel of land sold by the defendants. **[*45]** *Rivers*, 2001 WL 1736498 at *1. After plaintiff consulted with a third-party developer, the developer approached the defendants, offering to purchase the land for more than plaintiff had contracted to purchase it for. *Id.* The defendants took developer's offer, repudiating their contract with the plaintiff. *Id.* The plaintiff sued the sellers for unjust enrichment, claiming that he had generated the developer's interest in the property, which resulted in defendants' receiving the benefit of a higher purchase price. *Id.* at *4. The court held that the plaintiff's benefit theory - that "through [plaintiff's] efforts, [the developer] conferred a benefit on [the seller]" - was too speculative to proceed. *Id.* at *4 ("No authority can be found for this "indirect benefit" theory, which is, in any case, based on speculation.").

Unlike either of these cases, plaintiffs have introduced evidence that defendants received a quantifiable benefit from plaintiffs' purchase of LCD products. Accordingly, defendant's motion is DENIED as to Maine law.

4. Rhode Island

Under Rhode Island law, to prove unjust enrichment a plaintiff must show "(1) that the plaintiff conferred a benefit upon the defendant, (2) that **[*46]** the defendant appreciated such benefit, and (3) that there was acceptance of such benefit in circumstances that it would be inequitable for a defendant to retain the benefit without paying the value thereof. *Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997)*. [1] Again, defendants claim that plaintiffs' status as indirect purchasers is fatal to their unjust enrichment claim. *See* Berger Decl., Exh. F at 20, 22-23, 33.

Although defendants argue that a plaintiff **[*47]** must confer a "direct" benefit on a defendant, none of the cases defendants rely on establish that Rhode Island requires the benefit to be "direct." In *Alessi v. Bowen Court Condo., 2010 R.I. Super. LEXIS 50 (R.I. Super., March 10, 2010)*, for example, the court dismissed the plaintiff's unjust enrichment claim because if found that no benefit had been conferred on the defendants. *Id. at *12-*14* (holding that defendants were not unjustly enriched by plaintiff's purchase of a property because the property had been foreclosed upon and "[d]efendants did not hold a present interest in the property at the time of the Plaintiff's purchase"). Similarly, in *R & B Elec. Co. v. Amco Constr. Co., 471 A.2d 1351 (R.I. 1984)*, the court also found that no benefit had been conferred on the defendants. *Id. at 1356* ("Since they were unable to retain the benefit, we fail to see how defendants are unjustly enriched. And if defendants were enriched by R & B, they have not been enriched under circumstances that dictate that they ought equitably to be required to compensate plaintiff.").

Accordingly, defendant's motion is DENIED as to Rhode Island law.

5. District of Columbia

To state a general claim **[*48]** for unjust enrichment under District of Columbia law, "a plaintiff must show that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *Lozinsky v. Georgia Resources Management, LLC, 734 F. Supp. 2d 150, 155 (D.D.C. 2010)*.

None of the cases defendants rely on establish that indirect purchasers are prohibited from maintaining causes of action for unjust enrichment. Defendants' most compelling case is *True v. Conagra Foods, Inc., 2011 U.S. Dist. LEXIS 6770, 2011 WL 176037 (W.D. Mo., January 4, 2011)*, which involved an unjust enrichment claim brought by a purchaser of tainted pot pies. *2011 U.S. Dist. LEXIS 6770, [WL] at *1-2*. The court rejected the unjust enrichment claim because the plaintiff was an indirect purchaser. *2011 U.S. Dist. LEXIS 6770, [WL] at *9* ("[T]here is no evidence that any Plaintiff purchased a pot pie directly from ConAgra; instead, the Plaintiffs indirectly conferred a benefit on ConAgra by purchasing the pot pies from a retailer."). The plaintiff in that case, however, had not contested this point. *2011 U.S. Dist. LEXIS 6770, [WL] at *9* ("ConAgra argues (without dispute from the Plaintiffs) that at least eleven states and the District of Columbia impose **[*49]** this "direct benefit" requirement.").

Minebea Co., Ltd. v. Papst, 444 F. Supp. 2d 68 (D.D.C. 2006), involved a patent dispute between two companies that had conducted a joint venture together. *Id. at 77-78*. The court concluded that the circumstances of the case did not make the defendant's retention of the patents at issue "unjust." *Id. at 187* ("Under these circumstances, the Court cannot conclude that it would be unjust for Papst Licensing to retain the United States patents at issue.").

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[1] Defendants also argue that "a plaintiff must show that he had a 'reasonable expectation of payment from the defendants' in return for the alleged benefit. " *See* Motion at 22 (quoting ***Scully Signal Co. v. Joyal, 881 F. Supp. 727, 745 (D.R.I. 1995))***. This appears to be a misstatement of the law; the source cited by *Scully Signal* sets forth a different standard. *See Commercial Associates v. Tilcon Gammino, Inc., 998 F.2d 1092, 1100-01 (1st Cir. 1993)* ("To recover on a theory of unjust enrichment under Rhode Island law, the plaintiff must show that it conferred a benefit on the defendant 'in such circumstances that it would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.'").

Defendants cases do not establish that the District of Columbia requires a "direct relationship" between an unjust enrichment plaintiff and the defendant. Accordingly, defendant's motion is DENIED as to District of Columbia law.

6. Kansas

Under Kansas law, to recover for unjust enrichment a plaintiff must prove: "(1) a benefit which they conferred upon defendants; (2) defendants' appreciation or knowledge of the benefit; and (3) defendants' acceptance or retention of the benefit under circumstances which make it inequitable for defendants to retain the benefit without payment of its value."

Defendants rely on an unreported case from the Tenth Circuit to support their argument that Kansas law bars plaintiffs' **[*50]** unjust enrichment claim. *See* *Spires v. Hospital Corp. of America, 289 Fed. Appx. 269, 273 (10th Cir. 2008)* ("Plaintiffs have pointed to nothing in Kansas law that supports an indirect unjust enrichment claim against HCA for payments made to subsidiary hospitals."). The precise grounds for the holding in *Spires*, however, are unclear. *See id.* ("The district court dismissed the claim because Plaintiffs failed to allege that deceased family members had actually conferred a benefit on HCA, and that the unjust enrichment for acts constituting medical malpractice are displaced by Kansas's medical malpractice regime. We agree. "). Other courts, in contrast, have explicitly endorsed indirect-purchaser unjust enrichment claims under Kansas law. *See* *Gonzalez v. Pepsico, Inc., 489 F. Supp. 2d 1233, 1249 (D. Kan. 2007)* ("Defendants argue that plaintiffs do not state a claim for unjust enrichment because they do not allege that they made a purchase directly from defendants, and therefore do not allege that they conferred a benefit upon defendants. A claim for unjust enrichment under Kansas law, however, does not depend on privity.").

Accordingly, defendant's motion is DENIED as to Kansas law.

7. West **[*51]** Virginia

Under West Virginia law, "if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value." *Realmark Devs., Inc. v. Ranson, 208 W. Va. 717, 542 S.E.2d 880, 884-85 (W. Va. 2000)*. Defendants assert that West Virginia does not recognize indirect-purchaser unjust enrichment claims. None of the cases defendants cite, however, stand for the proposition that an indirect purchaser may not recover under an unjust enrichment theory. In *Johnson v. Ross, 419 Fed. Appx. 357 (4th Cir. 2011)*, for example, the court expressly declined to reach the question. *Id. at 362* ("We decline Plaintiffs' invitation to settle this state-law question, not least because doing so is unnecessary to reach our disposition."). In *Hill v. Stowers, 224 W. Va. 51, 680 S.E.2d 66, 75 (W. Va. 2009)*, the court rejected the plaintiff's unjust enrichment claim because the plaintiff had not conferred any benefit on the defendant. *Id. at 75* ("Mr. Hill, however, was not the payor of the salary and benefits that Mr. Stowers received as circuit clerk."). Similarly, **[*52]** in *Prudential Ins. Co. of America v. Couch, 180 W. Va. 210, 376 S.E.2d 104 (W. Va. 1988)*, the court held that the defendant was not the recipient of any benefit originating from the plaintiff. *Id. at 109* ("[Defendant] was not the payee on any of the checks, as they were paid to the health care providers who had rendered services to his injured son.").

Accordingly, defendant's motion is DENIED as to West Virginia law.

8. Hawaii, Missouri, New Mexico, South Dakota, and Wisconsin

Defendants argue that the unjust enrichment claims under the laws of the above states should be dismissed because no case from any of these states has permitted an unjust enrichment claim to proceed based upon an indirect benefit. Motion at 18. Thus, defendants argue that "[i]n the absence of any supporting authority from state courts, the respective plaintiffs cannot expand their states' laws of unjust enrichment . . . ." As discussed above, however, the Court views the plaintiffs' theory of unjust enrichment as relatively straightforward: defendants' wrongful conduct led them to receive a benefit at plaintiffs' expense. In the absence of state law conclusively precluding such claims, the Court is inclined to let them proceed.

B. [*53] Adequate Remedies at Law

Defendants also move for summary judgment as to eight states - Hawaii, Kansas, Maine, New Mexico, Rhode Island, South Dakota, Vermont, and Iowa - claiming that "those states' common laws do not permit recovery in equity when an adequate remedy at law is available." Motion at 20. The Federal Rules of Civil Procedure typically allow a plaintiff to plead claims in the alternative. *See* *Fed. R. Civ. P. 8(d)(2)*, *(3)*. Defendants argue, however, that plaintiffs are prohibited from proceeding on their unjust enrichment claims once becomes clear that those claims are identical to plaintiffs' legal remedies. *See, e.g.,* *Fernandes v. Havkin, 731 F. Supp. 2d 103, 114 (D. Mass. 2010)* (granting summary judgment for defendant on plaintiff's Massachusetts-law unjust enrichment claims because its legal remedies "preclude a claim for unjust enrichment. The disposition of those claims is irrelevant. Their mere availability is a bar to a claim of unjust enrichment."); *Garcia v. Tyson Foods, Inc., 766 F. Supp. 2d 1167, 1188 n.17 (D. Kan. 2011)* (granting summary judgment for defendant because "[t]he pertinent inquiry is whether an adequate remedy is available, not whether that remedy **[*54]** is ultimately obtained").

The Court will allow plaintiffs to proceed on their unjust enrichment claims. Although plaintiffs' claims are not explicitly pled in the alternative, all parties acknowledge that they are brought in the alternative to plaintiffs' antitrust and consumer protection claims. Further, there is no evidence before the Court concerning the degree to which the remedies available under plaintiffs' unjust enrichment claims are identical to the legal remedies plaintiffs seek. *See* *New Motor Vehicles, 350 F. Supp. 2d at 212-13* (refusing to dismiss restitutionary relief as a means of remedying violations of state-law antitrust and consumer-protection statutes); TAC at 102 ¶G (requesting "restitution, including disgorgement of profits"). Plaintiffs, of course, may not recover under both theories.

Accordingly, the Court DENIES defendants' motion to dismiss plaintiffs' unjust enrichment claims under the laws of Hawaii, Kansas, Maine, New Mexico, Rhode Island, South Dakota, Vermont, and Iowa.

C. Missouri and Rhode Island - Bar to Indirect Purchaser Claims

Finally, defendants argue that plaintiffs' unjust enrichment claims under Missouri and Rhode Island law should not be allowed **[*55]** to proceed because they would constitute an "end run" around those states' limitations on indirect-purchaser antitrust actions. [2] One Missouri appellate court has held that indirect purchasers may not bring suit under the that state's antitrust laws. *Duvall v. Silvers, Asher, Sher & McLaren, M.D.'s, 998 S.W.2d 821, 825 (Mo. App. 1999)* ("If the harm to Duvall was only indirect, he does not have standing."). The Rhode Island Supreme Court has also limited antitrust standing to direct purchasers. *See* *Siena v. Microsoft Corp., 796 A.2d 461, 465 (R.I. 2002)* ("We are of the opinion that under federal law and the Antitrust Act, standing to litigate antitrust violations rests with the direct purchaser or the Attorney General as *parens patriae.*"); *see also* *New Motor Vehicles, 350 F. Supp. 2d at 211-212* ("For those states that have maintained the *Illinois Brick* prohibition on indirect purchaser recovery, I conclude that it would subvert the statutory scheme to allow these same indirect purchasers to secure, for the statutory violation, restitutionary relief at common law (or in equity).").

This Court has previously addressed this issue in the context of unjust enrichment claims brought under the laws of other states:

> [P]laintiffs have not cited any authority from Arkansas, Virginia, Montana or Puerto Rico holding that an indirect purchaser plaintiff may bring an unjust enrichment claim when that same claim would be barred under state ***antitrust law***. In the absence of such authority, the Court declines to recognize such a claim because the Court agrees with defendants that permitting such claims would allow plaintiffs to circumvent limitations of state antitrust laws.

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[2] Plaintiffs do not seek to recover under the antitrust laws of Missouri or Rhode Island. Rather, they assert **[*56]** unfair competition and unjust enrichment claims under the laws of those states.

In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1192 (N.D. Cal. 2009). Defendants argue that the Court should follow its prior holding.

This Court's earlier decision, however, is distinguishable. Although indirect purchasers may not bring antitrust claims under Rhode Island or Missouri law, both states permit them to bring unfair competition claims. *See* *Chocolate Confectionary, 602 F. Supp. 2d at 586-87* (finding that UTPCPA claims brought by indirect purchasers of chocolates stated a claim); *Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667, (Mo. 2007)* **[*57]** ("The [MMPA's] plain language does not contemplate a direct contractual relationship between plaintiff and defendant, and Missouri courts have not imposed such a requirement through statutory construction."). In light of the fact that plaintiffs may bring claims under these statutes for the same underlying conduct, the concerns at issue in this Court's prior order are inapplicable. Accordingly, the Court DENIES defendants' request for summary judgment on plaintiffs' Missouri and Rhode Island unjust enrichment claims.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART defendants' joint motion for partial summary judgment on various issues of state law. Docket No. 3205 in 07-1827.

IT IS SO ORDERED.

Dated: September 28, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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Carpenter Tech. Corp. v. Allegheny Techs., Inc.

United States District Court for the Eastern District of Pennsylvania

September 29, 2011, Decided; September 30, 2011, Filed

CIVIL ACTION NO. 08-2907

Reporter

2011 U.S. Dist. LEXIS 112556 *

CARPENTER TECHNOLOGY CORP., Plaintiff v. ALLEGHENY TECHNOLOGIES INC., et al., Defendants

Subsequent History: Motion granted by, in part, Motion denied by, in part *Carpenter Tech. Corp. v. Allegheny Techs., Inc., 2012 U.S. Dist. LEXIS 162456 (E.D. Pa., Nov. 13, 2012)*

Prior History: *Carpenter Tech. Corp. v. Allegheny Techs., 2011 U.S. Dist. LEXIS 112405 (E.D. Pa., Sept. 29, 2011)*

Core Terms

ingots, turbines, Alloy, patents, relevant market, large-diameter, interchangeable, antitrust, summary judgment, diameter, products, monopoly power, land-based, antitrust claim, manufacture, substitutes, prices, profits, inches, nickel, high-efficiency, factors, technological, Partial, damages, costs, pound, direct evidence, material fact, market power

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Judges: LAWRENCE F. STENGEL, J.

Opinion by: LAWRENCE F. STENGEL

Opinion

MEMORANDUM

STENGEL, J.

Carpenter Technologies, Inc. ("Carpenter") **[*2]** and Allegheny Technologies, Inc. and ATI Properties, Inc. (collectively, "ATI") are business competitors in the manufacture and sale of speciality alloys and other materials for use in the energy and aerospace industries. Specifically, both make and sell nickel base 718 Alloy ingots. This opinion addresses Carpenter's antitrust claim. ATI moves for partial summary judgment on Count VII of Carpenter's Second Amended Complaint alleging violations of the Sherman Act, *15 U.S.C. § 2*. For the reasons set forth below, I will grant the motion.

I. BACKGROUND[1]

On July 9, 2002, the United States Patent and Trademark Office ("PTO") issued Patent Number '564 ("the '564 patent"), a "Method for Producing Large Diameter ingots of Nickel Base Alloys." ATI is the owner of the '564 patent. On April 13, 2004, the PTO issued Patent Number '858 patent ("the '858 patent") for "Large Diameter Ingots of Nickel Base Alloys." ATI is the assignee of the '858 patent.

On November 14, 2003, ATI sent a letter to Carpenter notifying it of ATI's rights under the '564 patent and attaching a copy of the patent. [2] On March 9, 2005, ATI **[*3]** sent a second letter to Carpenter restating its ownership of the '564 patent and notifying Carpenter of the issuance of the related '858 patent. This letter specifically articulated ATI's concern that Carpenter "may be manufacturing and selling large diameter triple-melted 718 nickel alloy ingots greater than 30 inches in diameter, including up to 36 inches in diameter." Letter dated Mar. 9, 2005, Ex. D. To Am. Compl. It also requested that Carpenter "review the subject patents and let [ATI] know in what ways the [Carpenter] process differs from our patented process." Id.

On June 23, 2008, Carpenter filed the instant action against ATI, **[*4]** seeking declaratory judgment that it has not infringed the '564 and '858 patents (Am. Compl. Counts I & II), declaratory judgment that the two patents are invalid (Counts III & IV), declaratory judgment that the two patents are unenforceable (Counts V and VI), and antitrust and Lanham Act unfair competition claims (Counts VII and VIII).

Following this Court's resolution of a motion to dismiss the original complaint, Carpenter amended its complaint twice and the same causes of action remain. ATI now moves for partial summary judgment in its favor on Carpenter's antitrust claim.

A. The Market for Large Diameter 718 Alloy Ingots

The demand for large-diameter alloy ingots comes to Carpenter and ATI from forgers such as Aubert et Duval Holdings, which forges the ingot into parts for electricity-generating turbines and sells the forged material directly to the General Electric Power Systems Division ("GE"). See Defs' Concise Statement of Material Facts in Supp. of Mot. For Partial Summ. J. #3 ("ATI SMF") at ¶ 7; Carpenter Resp. to Defs' Concise Statement of Material Facts in Supp. of Mot. For Partial Summ. J. #3 ("Carpenter SMF") ¶ 7. GE is the ultimate and only purchaser of the ingots produced **[*5]** by Carpenter and ATI. See id. In addition to making gas turbines using large-diameter (for the

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[1] The facts are set forth in the light most favorable to Carpenter, the non-moving party.

[2] The letter states in part:

> It has come to our attention that companies involved in the manufacture of ingots, forgings, or gas turbines may be considering either the manufacture, use, or sale of product using large diameter triple-melted 718 nickel alloy ingots greater than 30 inches in diameter, including up to 36 inches in diameter.
>
> You should be aware that [ATI] owns [the '564 patent] and related pending patent applications covering the manufacture, use, and sale of such large diameter nickel-base ingots.

Letter dated Nov. 14, 2003, Ex. C to Am. Compl.

purposes of this motion, greater than 30 inches in diameter) Alloy 718 ingots, GE makes turbines using large-diameter Alloy 706 ingots, smaller-diameter (for the purposes of this motion, less than 30 inches in diameter) Alloy 718 ingots, and steel-based ingots. See ATI SMF ¶ 8; Carpenter SMF ¶ 8. The turbines made using Alloy 706 ingots, smaller-diameter Alloy 718 ingots, and steel-based ingots are of "lower efficiency" than gas turbines utilizing Alloy 718 ingots. Carpenter SMF ¶ 8.

Prior to 2006, and despite the existence of the patents, Carpenter supplied GE with large-diameter Alloy 718 ingots for use in land-based gas turbines. Carpenter SMF ¶ 9. It stopped doing so in 2006 due to the presence of ATI's patents and specifically in response to the letters ATI sent to Carpenter, GE, and forgers regarding ATI's patent rights. Id. at ¶ 10. After 2006, ATI became GE's sole supplier of Alloy 718 ingots. See id. at ¶ 10; ATI SMF at ¶ 10. Ingots made from Alloy 706 or smaller-diameter ingots made from Alloy 718 "are inadequate for the higher-efficiency land-based gas turbines produced by [GE], **[*6]** including the 9FB Turbine." Carpenter SMF ¶ 13 (citing S.V. Thamboo, *et al, Large Diameter 718 Ingots for Land-Based Gas Turbines*, SUPERALLOYS 718, 625, 706 AND VARIOUS DERIVATIVES at 58, 70 (2001) (Carpenter Ex. 7)). [3] Douglas Paul, GE's center of excellence leader for the purchasing of forgings and raw materials, testified that GE has attempted to identify alternative materials that could be used in place of 718 Alloy forgings in the turbines that use Alloy 718. See Paul Dep. 7:20-24; 35:4-22, Dec. 9, 2009 (ATI Ex. 46). GE has not yet identified a substitute product but continues the ongoing process of identifying one. Id. at 35:15-22.

Viewing the evidence in the light most favorable to Carpenter, the GE turbines utilizing 706 Alloy parts are both older and less efficient that those turbines using 718 Alloy parts. According to Carpenter's own assessment of the market for nickel based ingots in 1999, GE had been using Alloy 706 ingots in its turbines for the previous ten years. Carpenter Report, "Alloy 706 and 718 Large Diameter Ingot Products: Development Status and Production Capabilities and Issues," Oct. 12, 2000 (ATI Ex. 35). Carpenter's report concluded that GE's "next generation" of turbines would use 718 Alloy ingots, but it also predicted that GE would continue to produce turbines using 706 ingots. Id. The report grouped the development of 706 and 718 ingots largely together, commenting that the "the GE design is selling very well and the resulting demand for large Triple Melt ingots of 706 and 718 is apparently exceeding the capabilities of GE's present suppliers." Id. The report concluded that "the large ingot 706 / 718 business opens a significant new market to Carpenter." Id.

A 2008 email from Carpenter market specialist Gary DeWald to Carpenter employee **[*8]** Russell Reber contained a report of DeWald's trip to GE to discuss its future supply needs with Chris Giordano, GE's Senior Global Commodity Leader. See ATI Ex. 38. DeWald reported that GE's "biggest jump in demand for next year is expected in the 6FA units . . . and the 9FA (uses 36" 718 ingots)." Id. However, DeWald also reported that GE was shifting away from 7FA and 9FA units "to E class gas turbines" which use "steel parts for rotors, wheels and spacers and although they are not as efficient as the F series[,] the cost is much less." Id.

B. Carpenter's Antitrust Allegations

Carpenter states a claim under *Section 2* of the Sherman Act, [4] alleging that ATI has violated the Act by "monopolizing or attempting to monopolize the market for cast and wrought 718 Alloy VAR ingots greater than 30

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[3] Sam Thamboo is a GE employee. The 2001 Thamboo article explains that GE's "F class turbines," which were designed in the 1980's, utilized turbine wheels made of Alloy 706 ingots. See Thamboo, et al, at 58 It further states GE's "new FB and H machines now employ even higher firing temperatures than the F class machines to achieve even better turbine efficiency. These temperatures exceed the capacity of alloy 706; therefore, alloy 718 has been chosen for the turbine wheels." It stated in conclusion that "the latest turbine designs require larger disks **[*7]** and therefore, larger diameter ingots of alloy 718."

[4] The Sherman Act imposes liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations[.]" *15 U.S.C. § 2*. The Supreme Court has recognized that enforcement of a patent obtained through fraud on the Patent

inches in diameter . . . through the enforcement of the '564 and '858 Patents that were obtained by fraud or fraudulent means." SAC at ¶ 65. Carpenter defines the relevant product market as "cast and wrought 718 Alloy VAR ingots greater than 30 inches in diameter" and the relevant geographic market as "the United States and Europe." See id. at H 66-67. Carpenter further claims that ATI is the sole **[*9]** supplier of the relevant product in the defined market, and that potential entrants to the market face high barriers, namely high capital costs and technological obstacles. Id. at ¶ 68. Carpenter further alleges that due to the unique characteristics of 718 Alloy, "there is no cross-elasticity of demand between the Product and other products" and no "alternative product for use in high-efficiency, land-based gas turbines." Id. at ¶ 69. Finally, Carpenter asserts that ATI has used its monopoly power to restrain or otherwise adversely affect competition in the relevant market by requiring potential customers to incur the costs associated with challenging ATI's patents.

The basis of **[*10]** Carpenter's fraud allegation is that ATI has "engaged in exclusionary conduct through the enforcement, or threatened enforcement, of a patent they know was procured by fraud or fraudulent means on the U.S. Patent and Trademark Office." SAC at ¶ 77. Carpenter accuses ATI of making false representations of material fact and withholding material information from the PTO in connection with prosecution of the '564 and '858 Patents, and of engaging in inequitable conduct by intentionally omitting false information from, or submitting false and misleading information to, the PTO. SAC at ¶¶ 78, 79. [5]

C. McChesney Reports

In support of its antitrust claim, Carpenter relies on the reports of its expert, Dr. Fred McChesney. [6] Dr. McChesney' s initial report contains his opinion that the relevant product market is "cast and wrought 718 Alloy VAR ingots greater than 30 inches in diameter, with the 718 Alloy being a grade satisfactory for use in high-efficiency, land-based gas fired turbines and having properties that reduce **[*11]** segregation tendencies during solidification of the VAR ingot." McChesney Jan. 9, 2010 Report (ATI App. Ex. 36) at ¶ 18. For purposes of his antitrust analysis, he assumes that the ATI patents are invalid, that ATI is currently the sole supplier of the relevant product; that there are significant barriers to entry into the market, including high capital costs and technological obstacles; that the 718 Alloy is the only "technically and economically acceptable superalloy for use in [high efficiency land-based gas turbines] at higher firing temperatures; and that there is no cross-elasticity of demand between the product and other products. Id. at ¶¶ 15, 20(A),(D),(E),(F). He offers no opinions following this lengthy set of assumptions, simply stating in conclusion that "based on the foregoing assumptions I expect I will be able to offer calculations of antitrust damages, upon analysis of the information I have been provided." Id. at ¶ 21.

In his second report, Dr. McChesney provides further support for his definition of the relevant product market, explaining that greater-than 30-inch 718 Alloy ingots, as used in land-based gas turbines, are purchased solely by GE, which has not found an acceptable substitute for the product as defined. McChesney June 15, 2010 Supp. Report (ATI App. Ex. 32) at ¶¶ 7-18. He explains that 718 Alloy is metallurgically unique (for example, in its ability to withstand higher temperatures during long term exposures) and that large-diameter 718 Alloy ingots are functionally unique because they "allow performances in land-based gas turbines not possible with smaller diameter alloys." Id. at ¶¶ 7-18. He explains that 718 Alloy ingots of less than 30 inches in diameter cannot be used in GE's "advanced class of gas turbines." Id. at ¶ 11. He describes the relevant product market as one of "derived demand" — the demand for ingots from Carpenter and ATI comes from forgers, whose demands directly reflect GE's need for forgings to be used in the manufacture of turbines. See id. at ¶¶ 13-14. Citing deposition testimony of GE

Office can form the basis for a claim under the Sherman Act. *Walker Process Equip., Inc. v. FoodMach. and Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*.

[5] Carpenter's fraud allegations continue, but there is no reason to detail them here. ATI does not seek summary judgment on the fraud elements of Carpenter's Walker Process claim.

[6] Dr. McChesney is a Professor at Northwestern University Law School and at the Kellogg School of Management. He has a ID. and a Ph.D. in economics. ATI does not dispute that Dr. McChesney is qualified to render an expert opinion with respect to the antitrust **[*12]** issues in this case.

employees Art Kracke and Sam Thamboo, McChesney further **[*13]** opines that GE has determined that there are "no substitute products" for large-diameter 718 Alloy ingots, because no other product is acceptable for use once GE commits to making certain types of high-efficiency turbines. Id. at ¶¶ 15, 17-18. McChesney explains that the relevant geographic market is the United States and Europe, because GE only purchases relevant products from forgers in the United States and Europe. Id. at ¶¶ 19-23. McChesney further opines that ATI has market power in the relevant product market because it is the sole supplier of 36-inch 718 ingots (giving it 100 percent of market share) and because the highly technical nature of the field and financial costs to entry make any likelihood of a new entrant in the field "remote." Id. at ¶ 29.

Finally, McChesney provides his damages calculation. He explains that Carpenter profited from the production of large-diameter 718 Alloy ingots until it was forced to stop selling them in 2006, as a result of the increasing pressures it faced stemming from ATI's ownership of the relevant patents. Id. at ¶ 31-33. As he explains, Carpenter, the forgers, and GE all knew of ATI's patents. Carpenter was asked to enter into indemnification **[*14]** agreements with its customers, and in turn, attempted to secure indemnification from GE for the materials it sold to the forgers. Id. at ¶ 33. These pressures and "the fear of legal liability" "caused Carpenter to exit the market for large-diameter 718 alloy ingots by 2006. Id. at ¶ 35.

As the benchmark for his damages calculation, McChesney first examines the period from 1999 to 2004 in the market for Alloy 706 ingots. During this time period and in this market, McChesney explains, Carpenter and ATI were competing, and Carpenter held 46.1 percent of the market. Using this as a benchmark, he estimates that without ATI's anticompetitive conduct, Carpenter would have had the same market share in the market for 718 Alloy ingots from 2002 to 2009. During this time period, total production of Alloy 718 ingots was 5,445,737 pounds. [7] McChesney Aug. 15, 2010 Report at ¶ 14. Had this market been competitive, McChesney asserts, it is reasonable to assume that Carpenter would have had 46.1% market share (selling not the 838,000 pounds it actually sold but instead selling 2,510,485 pounds, which represents 46.1% market share). Id. at ¶ 41-42. Assuming Carpenter would have continued making the **[*15]** same profits on Alloy 718 ingots it made before exiting the market ($1.35 per pound), McChesney finds that "[a] conservative estimate of Carpenter's actual damages, based on its lost volume . . . and its previous profits . . . amounts to $2,257,855." Id. at ¶ 18. Treble damages, as mandated by *section 4* of the Clayton Act, would therefore amount to $6,773,564. Id. at ¶ 19.

II. STANDARD OF REVIEW

A. Summary Judgment Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ***Fed. R. Civ**. P. 56(a)*. A factual dispute is "material" only if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. For an issue to be "genuine," a reasonable fact-finder must be able to return a verdict in favor of the non-moving party. Id.

A party seeking summary judgment initially **[*16]** bears responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing relevant portions of the record, including depositions, documents, affidavits, or declarations, or showing that the materials cited do not establish the absence or presence of a genuine dispute, or showing that an adverse party cannot produce admissible evidence to support the fact. *Fed. R. Civ. P. 56(c)*. Summary judgment is therefore appropriate when the

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[7] This number was provided in Dr. McChesney's second supplemental report, in which he revises the damages calculation in his first revised report. This memorandum will refer only to the figures provided in Dr. McChesney's second report, as those numbers present his revised opinion.

non-moving party fails to rebut the moving party's argument that there is no genuine issue of fact by pointing to evidence that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322; Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir.1992).

Despite their factually intensive nature, "the standard of [Rule 56] remains the same" in antitrust cases. Town Sound & Custom Tops v. Chrysler Motors Corp., 959 F.2d 468, 481 (3d Cir. 1992). **[*17]** "To survive a motion for summary judgment, an antitrust plaintiff must produce all economically plausible evidence supporting the elements of its claim." Harrison Aire, Inc. v. Aerostar Int'l, 423 F.3d 374, 380 (3d Cir. 2005) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

B. Elements of a Walker Process Antitrust Claim

It was in Walker Process Equip. that the Supreme Court recognized the validity of monopoly allegations linked to allegedly fraudulently procured patents. "The enforcement of a patent procured by fraud on the Patent Office may be violative of [Section] 2 of the Sherman Act provided the other elements necessary to a [Section] 2 case are present." Walker Process, 382 U.S. at 174. A Walker Process claim is supported with proof that a patent was obtained "by knowingly and willfully misrepresenting facts to the Patent Office[.]" Id. at 177. The elements of a Walker Process fraud claim are: (1) a false representation or deliberate omission of a fact material to patentability, (2) made with the intent to deceive the patent examiner, (3) on which the examiner justifiably relied in granting the patent, and (4) but for which the misrepresentation **[*18]** or deliberate omission the patent would not have been granted. In re Remeron Antitrust Litig., 335 F. Supp. 2d 522, 528 (D.N.J. 2004) (citing C.R. Bard., Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998)). The question of whether there was fraud on the Patent Office is governed by Federal Circuit law. Again, ATI has not moved for summary judgment on the fraud elements of Carpenter's claim.

Once fraud on the Patent Office has been proven with sufficient evidence, a party alleging Walker Process fraud must also "show the basic elements of an antitrust violation defined by the regional circuit's law, including that the patentee's behavior was directed to a relevant product market." Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1348 (Fed. Cir. 2007). Liability under § 2 of the Sherman Act requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) (citing United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S.Ct. 1698, 16 L. Ed. 2d 778 (1966)). **[*19]** The existence of monopoly power can be "proven through direct evidence of supracompetitive prices and restricted output." Id.

Monopoly power can also be "inferred from the structure and composition of the relevant market" by showing that one firm has a dominant share in a relevant market and that other firms are blocked by significant entry barriers. Id. Absent evidence of a dominant share of the relevant market, other factors must be considered. Id.; see also Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 382 (3d Cir. 2005). When proving monopoly power indirectly, the plaintiff has the burden of defining the relevant market. Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997) (citing Pastore v. Bell Tel. Co. of Penn., 24 F.3d 508, 512 (3d Cir. 1994)). A relevant market has two components — the product itself and the geographic area in which it is sold. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Queen City Pizza, 124 F.3d at 436 (internal citations omitted). "Interchangeability implies that one product **[*20]** is roughly equivalent to another for the use to which it is put[.]" Id. at 437. Cross-elasticity of demand is a measure of interchangeability, and occurs when "the rise in the price of a good within a relevant product market [tends] to create a greater demand for other like goods in that market." Id. at 438 & n. 6. It is a measure of "the substitutability of products from the point of view of buyers." Id. at n. 6. This reflects the more general rule that "[t]he test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" Id. at 438 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S.Ct. 994, 100 L. Ed. 1264

(1956); *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991))*. When assessing reasonable interchangeability, factors to be considered include "price, use, and qualities." *Tunis Brothers, 952 F.2d at 722*.

Stated differently,

> A product or group of products constitutes a market when its producers, if united by a hypothetical cartel, could maximize profits by charging significantly supracompetitive prices. The market thus includes . . **[*21]** . other products that buyers regard as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other.

Phillip Areeda & Herbert Hovenkamp, ***ANTITRUST LAW*** § 562 (2nd Ed. 2002). The Third Circuit has stated that "where a plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that does not encompass all interchangeable substitute products. . . . the relevant market is legally insufficient." *Queen City Pizza, 124 F.3d at 436*.

III. DISCUSSION

ATI seeks summary judgment in its favor on Carpenter's antitrust claim, arguing (1) that Carpenter has failed to show that ATI has monopoly power within a relevant market, because its proposed definition of the relevant market is insufficient, and (2) that Carpenter has offered no admissible evidence of antitrust damages.

A. Carpenter Has Failed to Present Sufficient Indirect Evidence in Support of Its Proposed Relevant Market

ATI asserts that Carpenter has failed to define a relevant market because it simply argues, "in conclusory fashion[,] that there are no products **[*22]** reasonably interchangeable with alloy 718 ingots in diameters greater than 30 inches and thus that the relevant product market is coterminous with the scope of certain claims of the ATI patents." ATI Mem. in Supp. Of Mot. For Partial Summ. J. ("ATI Mem.") at 6. Specifically, ATI claims (1) that Carpenter failed to address whether other products were economically substitutable for Alloy 718 ingots; (2) that Carpenter's own expert, Dr. Fred McChesney, admitted that other ingots, specifically Alloy 706 ingots, *are* economic substitutes for Alloy 718 ingots and that Carpenter's internal documents reflect the same conclusion; and (3) that Carpenter's relevant market definition wrongly relies entirely on the fact that Alloy 718 ingots have no technological equivalent.

ATI claims that Carpenter has failed to show that that no reasonably interchangeable substitutes for large-diameter 718 Alloy ingots exist. ATI Mem. at 6. It further claims that Carpenter's *Section 2* allegations are particularly untenable because Carpenter has defined its relevant market as "coterminous with certain claims in the ['564 and '858] patents." Id. at 7. In order to sustain an antitrust claim, an antitrust plaintiff **[*23]** must establish the relevant market for its product. [8] The plaintiff must establish both product and geographic dimensions for the market. Two factors are traditionally emphasized in determining the relevant product market: the extent to which the defendant's product is interchangeable in use with alleged alternative products, or substitutes, and whether there is a cross-elasticity of demand between the defendant's product and supposed substitutes. This is an initial, and necessary inquiry. See *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 26 (3d Cir. 1978)* (noting that as a prelude to examining the extent of a firm's power, courts must "look to the range of 'commodities reasonably interchangeable by consumers for the same purposes.'" (citing *E.I. DuPont & Co., 351 U.S. at 391*)). It involves, at a most basic level, "ascertain[ing] the flow of commercial interactions." Id.

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[8] "Definition of the relevant market identifies that 'part' of commerce within which the defendant has allegedly achieved an illegal monopoly position[.] . .. [P]roof of the relevant market focuses attention upon that area of trade within which the defendant purportedly exercises a monopolist's **[*24]** control over prices and competition." William C. Holmes & Melissa Mangiaracina, ***ANTITRUST LAW*** HANDBOOK § 3:4 (2010-2011 Ed.).

Carpenter, through its expert Dr. McChesney, does not appear to dispute that the relevant market it alleges falls entirely within the scope of the patents, meaning that ingots of other materials and in other sizes are not economically interchangeable with large-diameter, Alloy 718 ingots. [9] This is a serious flaw in Carpenter's claim. By focusing entirely on the technological and functional uniqueness of large-diameter 718 ingots, Carpenter ignores entirely the key question of economic interchangeability. ATI has presented evidence that large-diameter 718 ingots are economically interchangeable with other ingots, including large-diameter Alloy 706 ingots.

In 1999, Carpenter had already experienced success in its sales **[*25]** of 706 ingots for use in land-based gas turbines. Its forecasting report recognized that 718 Alloy turbines represented the next generation of turbines, but did not reflect any belief that use of 718 ingots in certain turbines would result in any significant drop in demand for 706 ingot turbines. The report treats the market for both alloy types as one large market for nickel-based alloy ingots. ATI's evidence also suggests that turbines made of steel parts were or could become a competitor in the same market. GE, the only consumer of such ingots, reported in 2008 that its biggest jump in demand for turbines would be for 9FA turbines using 36-inch 718 Alloy ingots, but simultaneously referenced a shift away from those products to less-efficient turbines using steel parts. Carpenter's Rule 30(b)(6) witness, Russell Reber, testified that GE has a wide breadth of product offerings using various ingot types. See Reber Dep. 81-82, July 27, 2010 (ATI Ex. 34). In fact, during his deposition, Mr. Reber explained the market for turbines offered by GE as follows:

> GE appears to offer their customer base a choice of power plants, [including] ones that are relatively low cost but are nowhere near **[*26]** as efficient, and those are the ones that use [stainless steel], to the 706-bearing power plants, which seem to be extremely popular in the marketplace, to then these very, very high-end power plants that are very efficient and use 718.

Reber Dep. at 82:1-8. Carpenter has not alleged nor offered proof that the only way for GE to manufacture a turbine is using 718 Alloy ingots. This Court will not speculate about a changing market, which at one time cultivated a demand for large-diameter 718 ingots to the exclusion of all other products. In order to survive summary judgment, Carpenter has to present sufficient evidence that large-diameter 718 ingots (and the turbines that require them) do not compete with ingots made of other materials or in smaller sizes. Carpenter does not actually present such evidence, instead resting on its argument that "once [GE] has committed to manufacturing a high-efficiency land-based gas-fired turbine, [large-diameter 718 Alloy ingots] [are] required by [GE]." Carpenter SMF ¶ 11.

Carpenter's focus on the fact that one class of high-efficiency turbines requires the use of large-diameter 718 ingots is overly narrow. The level of efficiency of a product and its **[*27]** supposed attractiveness to consumers is but one factor courts must consider in determining the relevant market in an antitrust case. See *Tunis Brothers, 952 F.2d at 722* (factors to be considered in assessing reasonable interchangeability include "price, use, and qualities."). Carpenter has presented no evidence on other important factors GE takes into account in determining what kind of turbines to manufacture (which accordingly determines the kind of ingots it requires). Carpenter's own 30(b)(6) witness testified that turbines using 706 alloys remain "extremely popular in the marketplace." Reber Dep. 82:1-8. Dr. McChesney, too, admitted that GE makes turbines using 706 ingots, 718 ingots, and other materials. See McChesny Dep. 62:22 - 63:1, Aug. 30, 2010 (ATI Ex. 37). Despite recognizing that GE is the only consumer of the ingots made by Carpenter and ATI, that GE uses those ingots to make turbines, and that GE has the option of making different kinds of turbines, Dr. McChesney refused to acknowledge the impact of this flow of commerce and admitted that he had done no investigation into factors affecting consumer behavior:

> Q: So these producers of turbine generated electricity can **[*28]** choose between GE turbines with 706, GE turbines with 718, and maybe some other turbine; is that correct?
> A: I believe that's correct.
> Q: And they can also choose between turbines that are made by GE and turbines that are made by someone else?
> A: I believe that's also correct.

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[9] See Carpenter Resp. to Defs. Mot. For Summ. J. ("Carpenter Resp.") at 6-7 (arguing that large-diameter 718 Alloy ingots are functionally and technologically unique and further claiming that Carpenter, ATI's only viable competitor in the market for the product, was foreclosed from competing with solely due to ATI's threats of patent enforcement.)

Q: So they might choose to buy a turbine and insist on 718, but they also might buy a turbine and insist on 706?
A: I believe that's correct.
Q: Did you do any investigation into the factors that weigh into those choices?
A: No, there's no relevance to that. That makes no difference to what's going on in the ingot market. That's - -
Q: Well, if nobody's buying GE turbines with 718 and they're all buying 706, how can it make no difference with respect to what's going on in the ingot market?
A: But they are buying 718's.
. . .
Q: Are you aware, sir, that some purchasers of turbines were choosing between 706 ingots, 706-based turbines and turbines that use stainless steel instead of 718 ingots?
A: Yes.
Q: And doesn't that - - don't these decisions have some influence over what's going on in the ingot market?
A: It [affects] the level of demand for 718 ingots, sure.

Q: And do you think that the price of the 718 ingots might [affect] **[*29]** the level of demand for the turbines that use them?
A: If the price of 718 ingots increases, presumably the quantity purchased of 718 ingots will decline, if that's what your question is.
Q: Yeah, because the turbine buyers might choose to use 706 ones, correct?
A: At the margin they might, some might.
Q: Did you do any investigation into where that tradeoff was?
A: No. Once again, it's of no relevance.

McChesney Dep. 62:22 - 64:22. While it is conceivable that a distinct market for large-diameter 718 Alloy ingots exists due to the compositional uniqueness of such ingots, Carpenter has the burden of providing evidence in support of such a claim, including evidence that ingots of other sizes and materials are not feasible economic substitutes. [10] Both Dr. McChesney and Carpenter refuse to confront ATI's evidence that other ingots were reasonable substitutes since GE manufactured many kinds of turbines using ingots of various materials, in a marketplace where these other types of turbines continued to present alternatives to 718 turbines. Notably, when asked whether he was familiar with the phrase "economic substitutability," Dr. McChesney stated that he could only guess what it means, but **[*30]** was not "aware of it in the context of relevant product markets."

Carpenter's argument that large-diameter 718 Alloy ingots constitute the relevant product market because they alone are suitable "once GE has committed to making a high-efficiency land-based gas-fired turbine," is also lacking. Even assuming this fact is true, it is insufficient for antitrust purposes, since the uniqueness of a product is not sufficient to prove a relevant market. See *CCPI Inc. v. American Premier, Inc., 967 F. Supp. 813, 817-18 (D.Del. 1997)* (holding that cases in which a patented product constitutes a relevant market "will at best be a rarity"); *Sheet Metal Duct, Inc. v. Lindab, Inc., No. 99-6299, 2000 U.S. Dist. LEXIS 9928, 2000 WL 987865 at *4 (E.D.Pa. July 18, 2000)* (dismissing *Section 2* antitrust claim where the plaintiff alleged that "there are **[*31]** no products interchangeable with [the patented product] because various projects call out [the patented product] by name" and noting that "such circularity cannot be enough to delineate a relevant market for antitrust claims.").

This argument also seems to ignore the economic reality that, as admitted elsewhere by Carpenter, the demand for a particular type of ingot is "fueled entirely by the demand for turbines made from them." ATI Reply to PL's Resp. to Mot. For Partial Summ. J. at 8. To accept that GE must make an ingot with 718 Alloy once it determines that it is going to make its latest model, highest efficiency turbine does not compel the conclusion that GE previously had no choice in what kind of turbine to manufacture. Carpenter proffers almost no evidence into the factors that affect this

[10] There is a presumption in favor of multibrand markets that may be overcome, but only with evidence that "defendant's own products are so unique or so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed." Areeda & Hovenkamp, ***ANTITRUST LAW*** § 563d.

initial, and relevant decision. Even assuming that high-efficiency turbines are those which customers would most prefer, Carpenter has presented no evidence that, if the price of 718 Alloy ingots, and therefore the price of those high-efficiency turbines, were to increase, customers would not demand, and GE would not manufacture, more of the lower efficiency, 706 ingot turbines. In fact, the **[*32]** evidence submitted by ATI supports the conclusion that both the 706 and the 718 ingot turbines have remained popular in the market and were viewed by Carpenter as competitors.

Carpenter clings to its argument that the relevant market in this case is the market for large-diameter 718 Alloy ingots, despite clear case law establishing that it must address the availability of economic substitutes for this product. Carpenter's expert refused to inquire into the impact of alternatives in the marketplace, insisting that there are none simply because the product is technologically unique. Carpenter has not met its burden on summary judgment. This Court is required to "ascertain the flow of commercial transactions" in order to determine whether Carpenter's product market, as proposed, is one recognized by antitrust laws. ATI has presented evidence that Carpenter itself viewed the market for 706 and 718 ingots as, at the least, related. It has presented evidence from both GE and Carpenter showing that GE manufactures turbines using both 706 and 718 ingots, as well as stainless steel. Carpenter's own expert admitted that purchasers of turbines can choose between 706, 718, and stainless steel, **[*33]** and that an increase in the price of 718 ingots would affect the demand for 706 ingots. He also admitted that he did not investigate the tradeoff between 706 and 718 turbines. Carpenter has responded with evidence that barriers to entry into the ingot market are high, and that 718 Alloy ingots are a unique, patented product. That evidence appears to be insufficient first because a unique, patented product that constitutes a market in itself is a "rarity," *CCPI, Inc., 967 F.Supp. at 817*, and second, because Carpenter has offered no evidence to rebut ATI's evidence showing that Alloy 718 ingots, Alloy 706 ingots, and possibly stainless steel, *are* reasonably interchangeable for use in turbines. In order to show that its relevant market definition is valid, Carpenter has to prove that there are no reasonable substitutes for Alloy 718 ingots. The record evidence undermines Carpenter's limited definition of the relevant market, and Carpenter has not proved a set of facts supporting its own definition.

B. Carpenter Has Failed to Present Sufficient Direct Evidence of Monopoly Power

Carpenter also argues that its antitrust claim should survive summary judgment because it has presented sufficient **[*34]** direct evidence of monopoly power in its proposed relevant market. See Carpenter Resp. at 20-24. As recognized by the Third Circuit in Broadcom, "[b]ecause market share and barriers to entry are merely surrogates for determining the existence of monopoly power . . . direct proof of monopoly power does not require definition of the relevant market." *501 F.3d at 307 n.3*. The Third Circuit relied on numerous other circuit decisions in reaching this conclusion, none of which found that an antitrust plaintiff can prove monopoly power alone *without reference to* a relevant market. These cases instead stand for the proposition that there are two ways to show market power: through direct evidence of a defendant's ability to control prices or exclude competition, or through indirect evidence that, in an area of competition, defendants had a controlling market share. See e.g., *PepsiCo, Inc. v. Coca Cola Co., 315 F.3d 101, 107-08 (2d Cir. 2002)* (explaining the two ways of proving monopoly power but observing that "numerous cases state that defining a relevant market is generally a necessary component of analyzing a monopolization claim. Once a relevant market is determined, the defendant's share **[*35]** in that market can be used as a proxy for market power."); *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783 & 783 n.2 (6th Cir. 2002)* (noting that monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market" but observing initially that defendant "does not challenge that it has monopoly power; nor is there an issue as to the relevant product [] and geographic markets[.]").

Therefore, Carpenter's antitrust claim remains lacking for its failure to proffer sufficient evidence in support of its relevant market definition. Nonetheless, I will briefly address why its direct evidence is insufficient even assuming the relevant market is limited to large-diameter 718 Alloy ingots. Carpenter claims that "ATI limited the output of competitors by threatening patent enforcement, refusing to grant licenses, and thus maintained artificially high prices." Carpenter Resp. at 21. Carpenter supports this argument by citing damages tables prepared by ATI's expert, Phillip Beutel, in support of ATI's patent infringement claims against Carpenter. Carpenter claims that

[*36] a comparison of its own net profit per pound during those times it sold large-diameter 36 inch ingots, with ATI's net profit per pound after Carpenter exited the market in 2006, shows that ATI "is sustaining supracompetitive prices almost 50% higher than Carpenter's last price, with incremental profits nearly twice those Carpenter achieved, and net profit per pound increase three times that realized by Carpenter in 2004." Carpenter Resp. at 23.

The Second Circuit has directly confronted the question of what proof is necessary to show direct evidence of market power. In Geneva Pharms. Tech. Corp. v. Barr Labs, Inc., it ruled that, to support a claim that defendants set supra-competitive prices, antitrust plaintiffs must provide an analysis of the defendant's costs, and show that the defendant had an "abnormally high price-cost margin" and that they "restricted output." *386 F.3d 485, 500 (2d Cir. 2004)*; see also *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 681-82 (D.N.J. 2005)* (granting motion for summary judgment in favor of defendant in a *Section 2* case where plaintiff had proffered no evidence of excessive price-cost margins or restricted output); Areeda & **[*37]** Hovenkamp, ***ANTITRUST LAW*** § 501 ("[T]he substantial market power that concerns ***antitrust law*** arises when a defendant . . . can profitably set prices well above its costs[.]").

Carpenter has offered no evidence that ATI has achieved an abnormally high price-cost margin. As pointed out by ATI and acknowledged by Carpenter, the selling price for large-diameter 718 ingots is driven by the price of nickel. See Rebuttal Expert Report of Phillip Beutel at 19 & n. 56 [11] and Attach. 6a (showing that the price ATI charged for its 718 Alloy ingots generally tracked the price of nickel) (ATI Ex. 30); Reber Dep. 23 (explaining that nickel is 42% of the input of the relevant product and stating that its practice is to base ingot price on the price of nickel). As set forth by Dr. Beutel in the same tables on which Carpenter relies, ATI's annual profit margins ranged from 27.8% to 45.9%, with an average of 36.1%. See Supplemental Report of Phillip Beutel Attach. 3a (Carpenter Ex. 11). Carpenter's profits when it sold the same product ranged from 24.6% to 41.1%, with an average of 33.5%. See id. In other words, the profits Carpenter claims reflect supracompetitive prices were not drastically above its **[*38]** own profits for the same product. I need not even assume that the reasoning offered by ATI to explain its profit margins is correct. It is Carpenter's burden on summary judgment to offer evidence that ATI earned supracompetitive prices, and Carpenter has failed to offer any analysis of ATI's costs relative to its profits, thereby failing to meet this burden. [12] Neither can Carpenter turn to any analysis from its expert: when questioned whether he had calculated the competitive price level in the market for large-diameter 718 ingots, Dr. Chesney stated that he had not. See McChesney Dep. 37:2-19.

With respect to restricted output, Carpenter apparently concedes this argument, as it notes in its own brief that instead of restricting output following Carpenter's exit from the market in 2006, ATI's sales data reflect that "volume sales [of large-diameter 718 Alloy ingots] hit all time highs in 2007 and 2008." Carpenter Resp. at 23.

IV. CONCLUSION

Carpenter has failed to provide sufficient evidence in support of its proposed relevant market definition, and has therefore failed to show that ATI had market power. Thus, there is no need to address Carpenter's damages claims. I will grant ATI's motion for summary judgment and dismiss Count VII of Carpenter's complaint.

An appropriate Order follows.

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[11] In support of this conclusion, Dr. Beutel cites ATI internal documents, a conversation with ATI employee Art Kracke, and deposition testimony of GE employee Douglas Paul, who confirmed that material costs affect the price for large diameter 718 ingots.

[12] Carpenter cites the testimony of its 30(b)(6) witness Russell Reber, who testified that GE (which is not a party to this case) has been injured because it is "paying a price for the product that would - - that is much higher than it otherwise would be if there was more efficient competition in the marketplace" and that the profits for ATI's **[*39]** 718 ingots were double the profits Carpenter earned for 706 ingots. Reber Dep. 12:25-13:3.; 14:17-20. This unsubstantiated opinion testimony is not sufficient to carry Carpenter's burden.

ORDER

AND NOW, this 29 day of September, 2011, upon careful consideration of the defendant's motion for partial summary judgment in its favor on Count VII of the Second Amended Complaint alleging antitrust violations of the Sherman Act (Doc. No. 77), plaintiff's response thereto, and defendant's reply, IT IS HEREBY **[*40]** ORDERED that the motion is **GRANTED.** Count VII of the Second Amended Complaint is **DISMISSED.**

BY THE COURT:

/s/ *Lawrence F. Stengel*

LAWRENCE F. STENGEL, J.

Gulf States Reorganization Group, Inc. v. Nucor Corp.

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

September 29, 2011, Decided; September 29, 2011, Filed

Case No.: 1:02-CV-2600-RDP

Reporter
822 F. Supp. 2d 1201 *; 2011 U.S. Dist. LEXIS 130841 **

GULF STATES REORGANIZATION GROUP, INC., Plaintiff, v. NUCOR CORPORATION, et al., Defendants.

Subsequent History: Motion denied by, Motion granted by Gulf States Reorganization Group, Inc. v. Nucor Corp., 2011 U.S. Dist. LEXIS 130254 (N.D. Ala., Sept. 29, 2011)

Prior History: *Gulf States Reorganization Group, Inc. v. Nucor Corp., 231 Fed. Appx. 945, 2007 U.S. App. LEXIS 22967 (11th Cir., 2007)*

Core Terms

special master, conspiracy, summary judgment, antitrust, recommended, monopolization, relevant market, geographic, steel, restraint of trade, motion to exclude, Sherman Act, coil, rolled, hot, Counts, anti trust law, summary judgment motion, anticompetitive, reasons, conspiracy claim, monopoly power, conspired, reliable, parties, alleged conspiracy, correctly, prices, circumstantial evidence, concerted action

LexisNexis® Headnotes

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

Civil Procedure > Judicial Officers > Masters > General Overview

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

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

A court reviews de novo all objections to legal conclusions recommended by a special master. Fed. R. Civ. P. 53(f)(4). A different standard of review applies to the special master's decisions regarding procedural matters. Those rulings may only be set aside for an abuse of discretion. Rule 53(f)(5).

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that a movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for a non-movant. In making this assessment, a court must view the evidence in the light most favorable to the nonmoving party. But while that is the case, a court need not permit a case to go to a jury when the inferences that are drawn from the evidence, and upon which the non-movant relies, are implausible.

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

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

HN3[] **Burdens of Proof, Nonmovant Persuasion & Proof**

There is no genuine issue of material fact if a nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial. Consequently, a court must view the evidence presented through the prism of a movant's substantive evidentiary burden. To respond, the non-moving party may not rely merely on allegations or denials in its own pleadings; rather, its response must set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party. *Fed. R. Civ. P. 56(e)(2)*. Importantly, the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Antitrust & Trade Law > General Overview

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

HN4[] **Antitrust & Trade Law**

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. This is true even in antitrust cases, where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

To be sure, while the summary judgment standard of *Fed. R. Civ. P. 56* to be applied in an antitrust suit is the same as that for any other action, the application of the rule to antitrust cases is somewhat unique: ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a case under *§ 1* of the Sherman Act. Thus, in the antitrust context, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition. Therefore, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's conduct was consistent with permissible competition as with illegal conduct. Indeed, Matsushita stands for the proposition that summary judgment in the antitrust context is equally as valid as in other types of cases.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN6[] Expert Witnesses, Daubert Standard

Fed. R. Evid. 702 governs the admissibility of expert witness testimony and provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Rule 702. The United States Supreme Court has instructed that Rule 702 compels a district court to act as a gatekeeper in determining the admissibility of expert scientific evidence. This function inherently requires the trial court to conduct an exacting analysis of the foundations of expert opinions to ensure they meet the standards for admissibility under Rule 702.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN7[] Expert Witnesses, Daubert Standard

The Eleventh Circuit employs a rigorous three-part inquiry in assessing whether to admit expert testimony: (1) the expert must be qualified to testify competently regarding the matters he intends to address, (2) the methodology must be reliable under Daubert, and (3) the testimony must assist the trier of fact through the application of scientific, technical, or specialized expertise to understand the evidence or determine a fact in issue. The proponent of the expert testimony bears the burden of proving that the testimony satisfies each prong by a preponderance of the evidence.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN8[] Expert Witnesses, Daubert Standard

In Daubert, the United States Supreme Court provided a list of relevant factors to consider in making a determination that an expert's methodology is reliable: (1) whether the theory or technique can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) in the case of a particular scientific technique, the known or potential rate of error, and (4) whether the theory or technique is generally accepted in the relevant scientific community. Even so, this list is non-exhaustive and district courts have substantial discretion in determining how to test an expert's reliability.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

HN9[] Expert Witnesses, Daubert Standard

Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. This relaxation of the usual requirement of firsthand knowledge is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline. A trial court assessing the reliability of an expert's evidence must therefore perform a gatekeeping function by conducting a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. The United States Court of Appeals for the Eleventh Circuit has offered district courts the following general guidance in determining whether to admit scientific evidence under Daubert: Given time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it. This same analysis applies to expert testimony in the area of economics.

Civil Procedure > Judicial Officers > Masters > General Overview

Evidence > Admissibility > Expert Witnesses

HN10[] **Judicial Officers, Masters**

The admissibility of an expert witness' testimony is undoubtedly a procedural matter governed by federal rules. *Fed. R. Civ. P. 53(f)(5)* provides that unless the appointing order establishes a different standard of review, a court may set aside a master's ruling on a procedural matter only for an abuse of discretion. Further, the subordinate role of a special master means that a trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN11[] **Preclusion of Judgments, Law of the Case**

The law of the case doctrine operates to create efficiency, finality, and obedience within the judicial system. Under the doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal. The law of the case doctrine encompasses issues previously decided by necessary implication as well as those decided explicitly.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] **Sherman Act, Claims**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. Thus, by its own terms, *§ 1* condemns every contract, combination, or conspiracy when these concerted actions are in restraint of trade or commerce. Despite the different terminology, there is no magic unique to each term. Courts use the words "contract," "combination," and "conspiracy" interchangeably, and sometimes simply refer instead to an "agreement." In virtually every case, it is not necessary to distinguish these terms from one another: The courts sometimes speak of "combination," sometimes of "conspiracy," or sometimes simply of the non-statutory term "agreement." They usually use these terms interchangeably, and the use of one term does not imply any distinction between them. When there is sufficient concert of action to implicate the purposes of the Sherman Act, the statute is applied without any need or attempt to classify that concerted action as a contract, a combination, or a conspiracy. This is the consistent course of the decisions, and generally it seems correct.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Sherman Act, Claims

The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by *15 U.S.C.S. § 2* alone and is unlawful only when it threatens actual monopolization. *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination or conspiracy" between separate entities. It does not reach conduct that is wholly unilateral. Accordingly, while different courts have expressed the elements of a *§ 1* claim in different (but not necessarily inconsistent) ways, this much is clear: an essential element of any *§ 1* claim is a showing of concerted action. That is, *§ 1* applies only to agreements between two or more businesses or persons; it does not cover unilateral conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] Sherman Act, Claims

The United States Supreme Court has cautioned lower courts that *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, does not declare every combination between two persons to be illegal, but only those thereby declared to be illegal. Thus, concerted action within the meaning of *§ 1* conspiracy cannot be understood as it might be in ordinary parlance, to reach any and all forms of joint activity by two or more persons, but must be construed in a refined manner and defined consonant with its role in the antitrust analysis. To determine whether a given joint activity is an antitrust conspiracy, the Supreme Court has directed courts to explain the logic underlying Congress' decision to exempt unilateral conduct from *§ 1* scrutiny, and to assess whether that logic similarly excludes the conduct challenged by a plaintiff.

Antitrust & Trade Law > Sherman Act > Claims

HN15[] Sherman Act, Claims

While concerted action must be shown, not every agreement that restrains competition will violate the Sherman Act. *15 U.S.C.S. § 1* prohibits only those agreements that unreasonably restrain competition. Therefore, the unreasonableness of the agreement is the second element of a *§ 1* claim.

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

HN16[] Conspiracy to Monopolize, Sherman Act

The logic underlying the *15 U.S.C.S. § 1* ban on collusion between marketplace competitors is that such combinations deprive the marketplace of the independent centers of decisionmaking that competition assumes and demands. That is why *§ 1* treats concerted activity between multiple actors more strictly than *15 U.S.C.S. § 2* treats single-party conduct in any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. The danger is obvious. When parties combine (i.e., bring into concert) their resources, rights, or economic power in such a way as to counteract naturally competing interests that would otherwise set them at odds, they are able to avoid market choices that would set them at odds in the asserted market to the detriment of competition and consumers. The core concern of *§ 1* thus is when competitors cooperate to substitute common action for competition and thereby effect an anticompetitive restraint that could not otherwise be achieved.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN17[] **Sherman Act, Claims**

The threshold requirement of every conspiracy claim, under *15 U.S.C.S. §§ 1* and *2* is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. It is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators. ***Antitrust law***, however, limits the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy. To make out a conspiracy, and thus survive a motion for summary judgment, the circumstantial evidence must reasonably tend to exclude the possibility that the alleged conspirators acted independently. This means that conduct as consistent with permissible activity as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. For example, the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy. Thus, when the defendant puts forth a plausible, procompetitive explanation for his actions, courts not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred.

Antitrust & Trade Law > Sherman Act > Claims

HN18[] **Sherman Act, Claims**

A key inquiry in any case brought under *15 U.S.C.S. § 1* is whether the challenged conduct consists of concerted action or of the merely unilateral behavior of separate actors. For an agreement to constitute a violation of *§ 1* of the Sherman Act, a conscious commitment to a common scheme designed to achieve an unlawful objective must be established.

Antitrust & Trade Law > Sherman Act > Claims

HN19[] **Sherman Act, Claims**

15 U.S.C.S. § 1 only prohibits activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests by way of profit-maximizing choices.

Antitrust & Trade Law > Sherman Act > Claims

HN20[] Sherman Act, Claims

The Sherman Act does not prohibit unreasonable restraints of trade as such, but only restraints effected by a contract, combination, or conspiracy.

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

HN21[] Conspiracy to Monopolize, Sherman Act

The United States Court of Appeals for the Eleventh Circuit made clear that analyzing concerted action is the starting point in assessing a claim under *15 U.S.C.S. § 1*: The threshold requirement of every conspiracy claim, under both *§ 1* and *15 U.S.C.S. § 2*, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

HN22[] Sherman Act, Claims

Both Supreme Court and Eleventh Circuit case law require a plaintiff relying upon the consequential affects of a contract that does not restrain trade by its own terms to show that the contracting parties shared a common objective to restrain trade in order to establish a violation of *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

HN23[] Sherman Act, Claims

Federal ***antitrust law*** requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately.

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

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

HN24[] Conspiracy to Monopolize, Elements

To establish a conspiracy under *15 U.S.C.S. § 2* to monopolize claim, a plaintiff must show: (1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy. A claim for conspiracy to monopolize does not require a showing of monopoly power.

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

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

HN25[] Conspiracy to Monopolize, Elements

Section 2 of the Sherman Act provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. 15 U.S.C.S. § 2. Thus, § 2 makes it unlawful for a defendant to monopolize, to attempt to monopolize, or to conspire to monopolize any part of interstate or foreign trade. This statutory provision covers behavior by a single business entity as well as coordinated action taken by more than one business.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

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

HN26[] Attempts to Monopolize, Elements

A claim of attempted monopolization involves three distinct elements: (1) a defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Monopoly power is the power to raise prices to supra-competitive levels or the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market. The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success. Furthermore, like the monopolization offense itself, the attempt must happen in a defined relevant market. The relevant market is defined by both a product and a geographic dimension.

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

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

HN27[] Actual Monopolization, Claims

Specific intent to monopolize is a necessary element of an offense under 15 U.S.C.S. § 2 of actual monopolization. Monopoly power is a critical element of a § 2 offense of actual monopolization.

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

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

HN28[] Actual Monopolization, Claims

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN29[] **Scope, Monopolization Offenses**

The first element of the offense of actual monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, monopoly power, requires a showing that a defendant has the power to control prices in or to exclude competition from the relevant market. Monopoly power, defined as the power to control price or exclude competition, is measured with reference to a relevant market.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN30[] **Scope, Monopolization Offenses**

For purposes of determining monopoly power under *15 U.S.C.S. § 2*, in considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal. Factors such as functional interchangeability, responsiveness of the sales of one product to the price changes of the other, and degree of competition from the potential substitute are all relevant to the market inquiry.

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

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

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

HN31[] **Actual Monopolization, Claims**

The second element of the offense of actual monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, requires evidence of predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. A practice is exclusionary if it harms the competitive process and thereby harms consumers. Harm to one or more competitors will not suffice for a *§ 2* violation.

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

HN32[] **Scope, Monopolization Offenses**

A plaintiff bringing a monopolization claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, must define and prove the relevant market.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN33[] **Expert Witnesses, Daubert Standard**

The Daubert inquiry is a flexible one, but the primary focus should be on principles and methodology, not on the conclusions that they generate. A proponent of the testimony does not have the burden of proving that it is scientifically correct, but must establish by a preponderance of the evidence, it is reliable. A court's gatekeeping obligation requires that it evaluate a proposed expert's qualifications and methodology in light of what is necessary to explain a particular subject matter to the jury.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN34[] **Expert Witnesses, Daubert Standard**

The Daubert inquiry requires that a proposed expert's testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. Thus, even if an expert's testimony were admissible under the first two prongs of the Daubert analysis, it may still be insufficient to create an issue of fact to overcome summary judgment.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

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

HN35[] **Actual Monopolization, Claims**

Where there is no market, there is no monopoly. The offense of monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, contains two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success. Furthermore, like the monopolization offense itself, the attempt must happen in a defined relevant market. The relevant market is defined by both a product and a geographic dimension. Proof of a (1) relevant product market and (2) relevant geographic market are each essential elements to the attempted monopolization claim.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN36[] **Regulated Practices, Market Definition**

Eleventh Circuit precedent requires an antitrust plaintiff to proffer expert testimony to establish a relevant product market and a relevant geographic market.

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

HN37[] **Relevant Market, Product Market Definition**

The United States Court of Appeals for the Eleventh Circuit has noted that any economically meaningful relevant product market definition must take into account evidence of virtually complete supply substitution.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN38[] **Sherman Act, Claims**

A geographic market is only relevant for monopoly purposes where the evidence shows that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area. Plaintiff has the burden of showing that its proposed market definition is correct. To state a Sherman Act claim under either *15 U.S.C.S. §§ 1* or *2*, the plaintiff bears the burden of proof on the alleged relevant market. A relevant market consists of both a product market and a geographic market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN39[] **Relevant Market, Geographic Market Definition**

A geographic market is only relevant for monopoly purposes where these factors show that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area. Indeed, some evidence supporting the inference that consumers within the proposed geographic market could not turn to sellers outside the geographic market is necessary to survive summary judgment.

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

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

HN40[] **Attempts to Monopolize, Elements**

For a plaintiff to establish either an attempted monopolization claim and a conspiracy to monopolize claim under *15 U.S.C.S. § 2*, it must establish that there was a dangerous probability that a defendant might have succeeded in its attempt to achieve monopoly power. To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Where the alleged monopolist's market share is less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success as a matter of law. There can be no dangerous probability of success if the defendant was never able to maintain a majority position in the market.

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Judges: R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

[*1205] **MEMORANDUM OPINION**

This matter is presently before the court on the Third Report and Recommendation of the Special Master Regarding Summary Judgment on Counts I and III of Gulf States Reorganization Group's Amended Complaint [1] ("Third Report") (Doc. #249), and the Report and Recommendation of the Special Master Regarding the Admissibility of Expert Testimony and Nucor's Motion for Summary Judgment ("Fourth Report") **[**2]** (Doc. #305).

I. Introduction

A. [**3] Appointment of the Special Master

In light of the novelty of Plaintiff's theories in this case, [2] and with the full consent of the parties (*see Federal Rule of Civil Procedure 53(a)(1)(A)*), the court appointed James F. Rill, Esq. as Special Master and referred certain matters - including the motions addressed herein - to him for report and recommendation. (Doc. #181). The parties had jointly proposed Mr. Rill as the best qualified candidate for Special Master. (Doc. #180). Mr. Rill has served as Assistant Attorney General in charge of the U.S. Department of Justice's Antitrust Division and as the Chairman of the ABA's Antitrust Section. (Doc. #180). He is without question one of the leading antitrust lawyers in the United States. The court is indebted to him for his high quality service and excellent work in this case.

B. Procedural History

In 2002, Gulf States Reorganization Group, Inc. ("GSRG" or "Plaintiff") filed suit against Nucor Corporation ("Nucor"), Casey Equipment Corporation ("Casey"), **[**4]** and Gadsden Industrial Park, LLC ("Park") alleging that

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[1] The Special Master also issued two other reports: (1) a Report and Recommendation of the Special Master Regarding Summary Judgment on Counts I and III of GSRG's Amended Complaint ("First Report") (Doc. #188) in which he recommended that the court grant summary judgment to Defendants Casey Equipment Corporation and Gadsden Industrial Park, LLC ("Casey/Park"); and (2) a Report and Recommendation of the Special Master ("Second Report") in which he recommended that Plaintiff be permitted to supplement the *Rule 56* record in this case but indicated that his recommendation in the First Report would not be changed after consideration of the new evidence. (Doc. #207). However, except to the extent that the recommendations in the Special Master's First and Second Reports affects the court's analysis of the claims against Nucor, those reports are moot. Plaintiff voluntarily dismissed its claims against Casey/Park, leaving Nucor the sole remaining Defendant. (Doc. #209). Accordingly, only those aspects of those Reports that dealt with Nucor's liability are at issue here. And that analysis has been re-adopted by the Special Master in his Third Report. (Doc. #249 at 3).

[2] Although the background and facts of this case are novel, as will be seen below, the elements Plaintiff must establish are well-established and analyzed both in the Special Master's Report and herein.

they conspired to restrain trade and assist Nucor to monopolize the hot rolled coil steel industry. (*See* Doc. #17). This court first dismissed this case upon Defendants' motion to dismiss; however, on appeal, the Eleventh Circuit found that Plaintiff had pled a cognizable antitrust injury and had standing to bring suit. *Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961, 966-68 (11th Cir. 2006)*.

Upon remand, the court permitted Plaintiff to amend its complaint. (*See* Doc. #115). GSRG's Amended Complaint alleges three counts. Count I alleges that Casey/Park and Nucor violated *Section 1* of the Sherman Act by entering a contract or combination in restraint of trade. (Doc. #115 at ¶¶ 39-42). Count II alleges that Nucor violated *Section 2* of the Sherman **[*1206]** Act by an "attempt to monopolize." (Doc. #115 at ¶¶ 43-45). Count III alleges that Nucor and Casey/Park violated *Section 2* of the Sherman Act by a conspiracy to monopolize. (Doc. #115 at ¶¶ 46-48). The First Amended Complaint makes no claim of "actual monopolization" in violation of *Section 2* of the Sherman Act. [3]

The Special Master reviewed the record and the briefs submitted by the parties, and entertained oral argument. Thereafter, the Special Master submitted his Reports and Recommendations. (Docs. #249, 305). After intense motions practice in this case, the court conducted a thorough review of the copious materials submitted in support of, and in opposition to, those motions.

The Special Master issued his First Report on Casey/Park's Motion for Summary Judgment recommending summary judgment in favor of Casey/Park. (Doc. #188). Thereafter, GSRG sought to have **[**8]** the Special Master consider supplemental evidence in connection with Casey/Park's Motion. (Doc. #199). The Special Master then re-considered Casey/Park's motion in light of the supplemental evidence, and issued his Second Report and Recommendation affirming that summary judgment was still appropriate on Counts I and III even in light of the additional evidence. **[*1207]** (Doc. #207). Thereafter, GSRG and Casey/Park resolved all issues between them. (Doc. #208).

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[3] This is the case despite GSRG's previous repeated assertions **[**5]** - to this court, the Eleventh Circuit, and the Supreme Court - that Nucor is a monopolist. *See, e.g.,* Opposition to Defendants' Motion for Summary Judgment at 4, *Gulf States Reorganization Group, Inc. v. Nucor Corp.*, No. 02-2600 (N.D. Ala. 2005) ("propounding . . . well established principals [sic] of ***antitrust law*** which establish liability where a dominant firm protects its *monopoly position* (emphasis added)); *id.* (contending that "end users of hot rolled coil steel [] are being forced to pay a *monopoly price*" (emphasis added)); *id.* at 23 (discussing the "social cost[s]" of "protecting the marketplace from the negative effects of abuse of *monopoly power*" (emphasis added)); Appellant's Corrected Brief at 24, *Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961, 965 (11th Cir. 2006)*, (No. 05-15976) (contending "there is but one producer in the market"); *see* Respondents' Brief in Opposition to the Petition for Writ of Certiorari at 3, *Nucor Corp. v. Gulf States Reorganization Group, Inc., 551 U.S. 1103, 127 S. Ct. 2920, 168 L. Ed. 2d 244 (2007)* (No. 06-1383 (arguing that "this case is about suppression of potential competition by a *monopolist*" (internal quotation marks and brackets omitted) **[**6]** (emphasis added)).

To the contrary, GSRG's original Complaint never asserted any unambiguous claim of actual monopolization under the Sherman Act, *Section 2*. Nevertheless, GSRG repeatedly argued an "actual monopolization" theory at each prior stage of this litigation. Indeed, the court of appeals, in reversing this court's order granting summary judgment to Defendants, appeared to understand (or perhaps misunderstand) that GSRG's case arose from actual monopolization under *Section 2*. *See* *Gulf States Reorganization Group, Inc., 466 F.3d at 965* (understanding GSRG to have "alleged that . . . Nucor violated *Section 2* of the Sherman Act, prohibiting monopolization"); *id.* (stating that GSRG "alleges that Nucor enjoys a monopoly in the relevant market"); *id. at 969* (Cudahy, J., concurring in part and, perhaps, dissenting in part) (discussing GSRG's allegation that Nucor sought "to protect its 85 percent market share and hence its effective monopoly"). Moreover, the panel (or at least the concurring judge) appears to have based its conclusions about causation and antitrust standing on the premise that Nucor enjoyed a monopoly and therefore caused GSRG's antitrust injury by participating in **[**7]** the court-supervised bankruptcy auction to protect that monopoly. *See* *id. at 969* (Cudahy, J., concurring in part and, perhaps, dissenting in part) (describing the case as "about suppression of potential competition by a monopolist"); *id. at 970* (stating that "Nucor and its co-conspirators allegedly took an action having the effect of excluding [GSRG] from the market and maintaining Nucor's monopoly, which injured [GSRG] and is the source of its damages"). In its First Amended Complaint, filed five years after this litigation began, GSRG has now unambiguously abandoned any claim of actual monopolization under the Sherman Act, *Section 2*.

Remaining to be decided, however, was Nucor's motion for summary judgment (or, rather, Nucor's joinder in Casey/Park's motion). (Docs. #124, 210). On September 29, 2009, the Special Master issued his Third Report and Recommendation recommending that Nucor be awarded summary judgment on Counts I and III, the *Section 1* and *Section 2* conspiracy claims. (Doc. #249).

The Special Master then considered the following motions: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261); Nucor's motion to exclude the testimony of Michael Locker (Doc. #172); Nucor's motion to exclude the testimony of John Correnti (Doc. #175); GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235); GSRG's Motion to exclude the testimony of Dr. **[**9]** Seth Kaplan (Doc. #237); and Nucor's motion for summary judgment on all claims (Doc. #269). In his Fourth Report, the Special Master recommended the following: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261) be denied; Nucor's motion to exclude the testimony of Michael Locker (Doc. #172) be granted; Nucor's motion to exclude the testimony of John Correnti (Doc. #175) be granted; GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235) be granted; GSRG's Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237) be denied; and that Nucor's Motion for Summary Judgment (Doc. #269) be granted. (Doc. #305).

Having now carefully reviewed and considered *de novo* all of the materials in the court file, including the Third Report and the Fourth Report, the objections, responses, and replies thereto, and oral argument by the parties on the objections to the Third Report, [4] the court has made its own independent determination that the Third and Fourth Reports of the Special Master are due to be adopted and accepted. The court writes further to address some of Plaintiff's objections.

II. Standard of Review

This case is before the court on objections filed by GSRG as to the Reports filed by the Special Master. ***HN1***[] The court reviews *de novo* all objections to legal conclusions recommended by the Special Master. *See Fed. R. Civ. P. 53(f)(4)*. A different standard of review applies to the Special Master's decisions regarding procedural matters. Those rulings may only be set aside for an abuse of discretion. *See Fed. R. Civ. P. 53(f)(5)*.

The principal legal issues presented here are the propriety of summary judgment and the admissibility and effect of certain expert witnesses proffered by GSRG.

A. Summary Judgment Standard

HN2[] Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. [5] "Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict **[*1208]** for the non-movant." *Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996)* **[**11]** (quoting *Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 918 (11th Cir. 1993))*. In making this assessment, the court must view the evidence "in the light most favorable to the nonmoving party."

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[4] GSRG also requested oral argument on its objections to the Special Master's Fourth **[**10]** Report, but the court deems further argument unnecessary. Therefore, GSRG's Requests (Docs. #318, 319) are due to be denied.

[5] "As of December 1, 2010, *Federal Rule of Civil Procedure 56(a)* now contains the summary judgment standard. It reads, in pertinent part, '[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Gortemoller v. Int'l Furniture Mktg., Inc., 434 Fed. Appx. 861, 2011 U.S. App. LEXIS 14976, 2011 WL 2899338 at *2 n.2 (11th Cir. July 20, 2011)*. Because the motions for summary judgment were filed, and the Special Master's Reports and Recommendations were issued, prior **[**12]** to December 2010, we apply the version of the rule effective during that time. *See Gortemoller, 2011 U.S. App. LEXIS 14976, 2011 WL 2899338, at *2 n.2*; *see also Siggers v. Campbell, 652 F.3d 681, 2011 WL 3134354 n.6 (6th Cir. 2011)*.

Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007) (citing Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1357 (11th Cir. 1999)). But while that is the case, "[a] court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the non-movant relies, are 'implausible.'" Mize, 93 F.3d at 743 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 592-94, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

Alternatively, **HN3**[] there is no genuine issue of material fact if "the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial." Jones v. Gerwens, 874 F.2d 1534, 1538 (11th Cir. 1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Consequently, the court "must view the evidence presented through the prism of the [movant's] substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

To respond, the non-moving party "may not rely merely on allegations or denials in its own pleadings; rather, its response must . . . set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. P. 56(e)(2). Importantly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; **[**13]** there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 250.

Contrary to GSRG's suggestion, [6] Rule 56 is no longer a disfavored procedural shortcut. Celotex Corp., 477 U.S. at 327 (**HN4**[] "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'") (quoting Fed. R. Civ. P. 1). This is true even in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962). *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984).

The court candidly acknowledges that, historically, summary judgment was disfavored **[*1209]** in antitrust litigation. For example, in *Poller*, the Supreme Court concluded that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Id. at 473. However, the cases which indicated that summary judgment is disfavored in antitrust cases have been disavowed.

In 1986, the Supreme Court reversed the denial of summary judgment in a major predatory pricing decision, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "The Supreme Court's reversal was based on its conclusions: 1) that the predatory pricing conspiracy was so economically implausible that the defendants had no motive to engage in it; and 2) that the evidence **[**15]** of an agreement to enter into this conspiracy was indirect and ambiguous." Instructional Systems Development Corp. v. Aetna Casualty & Surety Co., 817 F.2d 639, 646 (10th Cir. 1987). Although *Matsushita* upheld the traditional view that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, the opinion is important because it held that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita, 475 U.S. at 588. Also it held that to survive a motion for summary judgment the plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting Monsanto Co., 465 U.S. at 764).

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[6] GSRG has flatly misstated the law in suggesting that antitrust conspiracy cases "are [still] particularly ill-suited to disposition on motions for summary judgment." (Doc. #251 at 28). The Supreme Court's subsequent decisions in *Monsanto* and *Matsushita* effectively disavowed the broad language **[**14]** from its 1962 opinion in Poller v. Columbia Broad Sys., Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962), on which GSRG relies. *See e.g.,* Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997) ("In ***antitrust law*** . . . early decisions pronouncing it a field inapt for summary judgment were later repudiated.").

HN5[] To be sure, while the summary judgment standard of *Rule 56* to be applied in an antitrust suit is the same as that for any other action, the application of the rule to antitrust cases is somewhat unique: "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, **[**16]** support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 587* (citing *Monsanto Co., 465 U.S. at 764*); *see also* *Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1323 (4th Cir. 1995)* ("[I]nferences which may be drawn vary from one substantive area of the law to another. . . ."). Thus, in the antitrust context, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*).

"[S]ummary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition." *McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1493 (11th Cir. 1988)*, *cert. denied*, *490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1989)* (citing *Matsushita, 475 U.S. at 595*). Therefore, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's conduct was consistent with permissible competition as with illegal conduct. *Id.* Indeed, *Matsushita* stands for the proposition that summary judgment in the antitrust **[**17]** context is equally as valid as in other types of cases.

B. Admissibility of Expert Testimony Standard

HN6[] *Federal Rule of Evidence 702* governs the admissibility of expert witness testimony and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified **[*1210]** as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The Supreme Court has instructed that *Rule 702* compels the district court to act as a "gatekeeper" in determining the admissibility of expert scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 n.7, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*; *United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004)* (en banc). "This function 'inherently require[s] the trial court to conduct an exacting analysis' of the *foundations* of expert opinions to ensure they meet the **[**18]** standards for admissibility under *Rule 702*." *Frazier, 387 F.3d at 1260* (quoting *McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1257 (11th Cir. 2002))*.

HN7[] The Eleventh Circuit employs a "rigorous three-part inquiry" in assessing whether to admit expert testimony: (1) the expert must be qualified to testify competently regarding the matters he intends to address, (2) the methodology must be reliable under Daubert, and (3) the testimony must assist the trier of fact through the application of scientific, technical, or specialized expertise to understand the evidence or determine a fact in issue. *Hendrix ex rel. G.P. v. Evenflo Co., 609 F.3d 1183, 1194 (11th Cir. 2010)*; *accord* *Frazier, 387 F.3d at 1260*. The proponent of the expert testimony bears the burden of proving that the testimony satisfies each prong by a preponderance of the evidence. *Hendrix, 609 F.3d at 1194*; *Frazier, 387 F.3d at 1274*.

HN8[] In *Daubert* the Supreme Court provided a list of relevant factors to consider in making a determination that an expert's methodology was reliable: (1) whether the theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," **[**19]** (3) "in the case of a particular scientific technique, . . . the known or potential rate of error," and (4) whether the theory or technique is generally accepted in the relevant scientific community. *Daubert, 509 U.S. at 592-94*; *accord* *Frazier, 387 F.3d at*

1262. Even so, this list is non-exhaustive and district courts have "substantial discretion" in determining how to test an expert's reliability. Hendrix, 609 F.3d at 1194 (quotation marks omitted). [7]

HN10[] The admissibility of an expert witness' testimony is undoubtedly a procedural **[*1211]** matter governed by federal rules. Heath v. Suzuki Motor Corp., 126 F.3d 1391, 1396 (11th Cir. 1997); Wood v. Morbark Indus., Inc., 70 F.3d 1201, 1207 (11th Cir. 1995). Rule 53(f)(5) provides that "[u]nless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion." Fed. R. Civ. P. 53(f)(5). United States v. Douglas, 489 F.3d 1117, 1124 (11th Cir. 2007) **[**21]** (when reviewing a district court's ruling on the admissibility of expert testimony for an abuse of discretion and the circuit court will "defer to the district court's ruling unless it is manifestly erroneous."). Further, "[t]he subordinate role of the [special] master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court." Fed. R. Civ. P. 53 Advisory Committee's Note, 2003 amendments; Me. People's Alliance v. Holtrachem Mfg. Co., LLC, 2009 U.S. Dist. LEXIS 53908, 2009 WL 1844990, at *2 (D. Me. June 25, 2009).

III. Background

Plaintiff's allegations in this case have previously been set forth by this court (Doc. #96) and summarized by the Eleventh Circuit. Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961 (11th Cir. 2006). "This is a Sherman Act antitrust case, alleging a contract and combination in restraint of trade and an attempt and conspiracy to monopolize the market for hot-rolled coil steel in the Southeastern United States." (Doc. #115). Specifically, GSRG maintains the following claims against Defendant Nucor Corporation in this case: (1) a claim that Nucor violated Section 1 of the Sherman Act **[**22]** by entering into a contract or combination in restraint of trade (Count I); (2) a conspiracy to monopolize claim under Section 2 of the Sherman Act (Count II); and (3) an attempted monopolization claim under Section 2 (Count III).

In his Third Report, the Special Master addressed Nucor's potential liability on Counts I and III, despite Casey/Park's dismissal from the case. (Doc. #249). In that Third Report, the Special Master recommended that summary judgment be granted in favor of Nucor on Counts I and III of the Complaint. (Doc. #249 at 3). The Special Master based this recommendation on his conclusion that the record was devoid of evidence that Casey/Park shared with Nucor a common objective to restrain trade, and that Casey/Park was neither aware of, nor acquiesced in, Nucor's alleged anticompetitive intent. (Doc. #249 at 12). [8]

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[7] **HN9**[] "Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." Daubert, 509 U.S. at 592. "[T]his relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* A trial court assessing the reliability of an expert's evidence must therefore perform a "gatekeeping" function by conducting "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93. **[**20]** The Eleventh Circuit has offered district courts the following general guidance in determining whether to admit scientific evidence under *Daubert*:

> Given time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. "The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it."

Rider v. Sandoz Pharms. Corp., 295 F.3d 1194, 1202 (11th Cir. 2002) (*quoting* Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996)). This same analysis applies to expert testimony in the area of economics.

[8] On June 1, 2010, GSRG moved for leave to submit a supplemental filing addressing a new Supreme Court antitrust case, American Needle, Inc. v. National Football League, 130 S.Ct. 2201, 176 L. Ed. 2d 947 (2010). GSRG asserts that *American Needle* is "directly relevant to the issues raised in the pending Motion for Summary Judgment filed by Nucor." (Doc. #297 at 2). Nucor responded **[**23]** to GSRG's Supplemental Brief by stating that although it had no objection to *American Needle* being

[*1212] In his Fourth Report, the Special Master considered various motions to exclude expert testimony and Nucor's Motion for Summary Judgment on all of Plaintiff's claims. (Doc. #305). The Special Master recommended: (1) that the testimony of Dr. Robert Crandall, GSRG's expert, be allowed; (2) that the testimony of John Correnti and Michael Locker, GSRG's experts, be excluded; (3) that the testimony of Andrew Dick, Nucor's expert, **[**25]** be excluded; (4) testimony of Dr. Seth Kaplan, Nucor's expert should be allowed. (Doc. #305 at 29). Thereafter, considering only the expert testimony he believed properly admitted, including that of GSRG's primary expert, the Special Master recommended that summary judgment be granted in favor of Nucor on all claims. (Doc. #305 at 38-45). The reasons for this recommendation set forth in the Fourth Report are *in addition to* the grounds that he previously recommended granting summary judgment on Counts I and III in his Third Report. (Doc. #305 at 45).

IV. The Court's Review of the Special Master's Third Report

On December 12, 2007, Casey/Park moved for summary judgment on Counts I and III of GSRG's First Amended Complaint, the *Section 1* and *Section 2* Conspiracy Claims. (Doc. #118). Before considering the motion, the Special Master afforded the parties the opportunity to present any additional evidence and argument that they wished the Special Master to consider in issuing his report and recommendation. (Doc. #249 at 2). The parties presented oral argument to the Special Master on the motion on November 19, 2008. (*Id.*) The Special Master issued his First Report and Recommendation on Casey/Park's **[**26]** motion on January 5, 2009 recommending summary judgment on Counts I and III. [9] (Doc. #188).

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considered as supplemental authority, GSRG's supplemental brief "misrepresents the issue decided in *American Needle.*" (Doc. #299 at 1). The court agrees with Nucor. The sole question addressed by *American Needle* was whether the defendants in that case were "*capable* of engaging in a 'contract, combination . . ., or conspiracy' as defined by Section 1 of the Sherman Act, *15 U.S.C. § 1* . . . ." *American Needle, 130 S.Ct. at 2208* (emphasis added). There is no question that Nucor and Casey/Park are separate entities which would be *legally capable* of conspiring under *Section 1*. Thus, the holding of *American Needle* really has no application here.

Nonetheless, some of the analysis employed by the Supreme Court in *American Needle* reiterates legal principles which support the Special Master's conclusions in this case. For example, "[n]ot every instance of cooperation between two people is a potential 'contract, combination . . ., or conspiracy, in restraint of trade'" and "therefore, an arrangement must embody concerted action in order to be a 'contract, combination . . . or conspiracy' under *§ 1*." **[**24]** *Id. at 2208-09* (emphasizing the distinction between an agreement and whether it embodies concerted action). These principles are consistent with and, in fact, support the Special Master's conclusion that the "contract" between Nucor and Casey/Park does not, in and of itself, establish a "contract, combination . . ., or conspiracy, in restraint of trade" under *Section 1*. "[T]here is not necessarily concerted action simply because more than one legally distinct entity is involved." *American Needle, 130 S.Ct. at 2209*. As explained at the outset of the opinion in *American Needle*, "[t]he question [of] whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Id. at 2206*.

[9] That is, even before he issued his Third Report, the Special Master considered Casey/Park's motion for summary judgment in this case. (Doc. #118). After affording the parties the opportunity to present additional evidence or arguments, and after conducting an in-person meeting (Doc. #188 at 2), the Special Master issued his Report and Recommendation. (Doc. #188). In his Report, the Special Master recommended that summary judgment be granted in favor of Casey/Park both as to GSRG's Section 1 claim (*id.* at 16-20) and *Section 2* conspiracy claim (*id.* at 20-21). GSRG filed objections and also moved to supplement the *Rule 56* record. (Doc. #199). The motion to supplement the record was referred to the Special Master (Doc. #205), and thereafter the Special Master filed another Report and Recommendation. In that Report, the Special Master recommended that GSRG be permitted to supplement the *Rule 56* record with a contract between Casey and Zibo Wanji Section Co., Inc. of Shandog, China. (Doc. #207 at 2). Casey/Park objected to the supplementation, and also proffered a different contract, this one between **[**27]** Casey and ACS International. (*Id.*). GSRG did not challenge that supplementation. (*Id.*). After permitting supplementation of the record, the Special Master concluded that such supplementation of the record did not alter his recommendation that Casey/Park be granted summary judgment. (*Id.* at 3-4) ("the Chinese contract does not show that Casey/Park joined with or surrendered its 'resources, rights, or economic power' to Nucor as required for Section 1 claims [*Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277 (4 th Cir. 2002)]*, nor does the Chinese contract demonstrate that Casey/Park and Nucor had formed 'a conscious commitment to a common scheme designed to achieve an unlawful objective.'" [*Monsanto, 465 U.S. at 764*.]. Although GSRG argues that the Chinese contract shows that Casey/Park

[*1213] After the Special Master's Second Report and Recommendation, GSRG and Casey/Park resolved all issues between them. (Doc. #208). Remaining to be decided however was Nucor's Motion for Summary Judgment (or, rather, Nucor's joinder in Casey/Park's motion). (Docs # 124 and 210). GSRG briefed the issue of Nucor's potential liability under Counts I and III despite Casey/Park's dismissal, and the parties were afforded the opportunity to argue the issue to the Special Master on July 30, 2009. (Doc. #249 at 3). GSRG argued that Nucor could be held liable under Counts I and III despite Casey/Park's dismissal. GSRG further presented a new theory of liability, *i.e.,* that Nucor could be held liable for Section 1 conspiracy based upon agreements with parties other than Casey/Park. (Doc. #249 at 3). On September 29, 2009, the Special Master issued his Third Report and Recommendation recommending that Nucor be awarded summary judgment on Counts I and III, the *Section 1* and *Section 2* conspiracy claims.

A. GSRG's Argument That Summary Judgment is Precluded [29] by the Law of the Case Doctrine is Meritless**

One of GSRG's objections to the Special Master's Reports on summary judgment is that his recommendations are foreclosed by the law of the case doctrine. In particular, GSRG argues that the Eleventh Circuit's opinion issued prior to remand, *Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961 (11th Cir. 2006)*, *cert denied*, *551 U.S. 1103, 127 S. Ct. 2920, 168 L. Ed. 2d 244 (2007)*, previously decided, on the merits, the issues which the Special Master addressed in his Reports. The argument is frivolous.

HN11[] The law of the case doctrine "operates to create efficiency, finality, and obedience within the judicial system." *Allapattah Servs., Inc. v. Exxon Corp., 372 F. Supp. 2d 1344, 1363 (S.D. Fla. 2005)* (quoting *Litman v. Mass. Mut. Life Ins. Co., 825 F.2d 1506, 1511 (11th Cir. 1987))*. Under the doctrine, "the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." *This That & the Other Gift & Tobacco, Inc. v. Cobb County, 439 F.3d 1275, 1283 (11th Cir. 2006)* (quoting *Heathcoat v. Potts, 905 F.2d 367, 370 (11th Cir. 1990))*.

The law of the case doctrine encompasses **[**30]** issues previously "*decided by necessary implication* as well as those decided explicitly." *Wheeler v. City of Pleasant, 746 F.2d 1437, 1440 (11th Cir. 1984)* (quoting *Dickinson v. Auto Center Mfg. Co., 733 F.2d 1092, 1098 (5th Cir. 1983))* [10]; **[*1214]** *see also* *Schiavo v. Schiavo, 403 F.3d 1289, 1291 (11th Cir. 2005)* ("The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal.").

The issue addressed by the Eleventh Circuit panel prior to remand was whether GSRG had satisfied the requirement of demonstrating antitrust standing, *Gulf States, 466 F.3d at 968*, not whether Nucor and Casey/Park engaged in concerted activity that could violate *Section 1*, conspired to monopolize, or attempted to monopolize. *Id. at 967-68*. This court's decision, which was reversed by the Eleventh Circuit, concluded that: "(1) The Group lacked Article III standing because it did not show that **[**31]** the defendants had caused its injury; (2) the Group lacked 'antitrust standing' because it failed to demonstrate 'antitrust injury,' that is to say injury of the sort that the antitrust laws are meant to redress; and (3) the defendants' actions could not constitute a violation of the antitrust laws because they increased competition in the bankruptcy auction." *Id. at 965*. What is abundantly clear, however, is that this court's decision, which was reversed by the Eleventh Circuit, was based on the fact that GSRG's injury was essentially self-inflicted. GSRG had the available cash to make a conforming cash bid to purchase the steel mill assets ("Assets") at issue and chose to make a non-conforming bid, despite knowledge that such a bid would be

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reaped "supranormal profits" on the deal [Doc. #199 at 3], the agreement cannot reasonably be read to prove that Casey/Park had a stake in whether Nucor would be successful in achieving or maintaining monopoly power in the hot rolled coil market."). [7 P. Areeda & H. Hovenkamp, ***Antitrust Law***, ¶ 1474(a) (2007)]. The court fully agrees with both components of the Special Master's **[**28]** recommendation: (1) it is appropriate to supplement the record, but (2) that supplemented *Rule 56* evidence does not preclude summary judgment in this case.

[10] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

rejected. The bankruptcy trustee even gave GSRG additional time to make a conforming bid. This court's prior decision was issued at an early stage in the litigation after only limited discovery as to most of the factual issues that were eventually presented to the Special Master to consider.

The Eleventh Circuit panel considered only the issues of causality and antitrust injury. The issues addressed by the Special Master were not before the Eleventh **[**32]** Circuit - directly or indirectly. Indeed, as the Eleventh Circuit opinion made absolutely clear: "Our intention is to express no opinion at all with respect to the merits . . . ." *Id. at 969, n.7*; *id. at 967* ("We decline to address the merits"). Notably, the Eleventh Circuit states that its opinion is based on "assertions" made by GSRG that "if it can prove" might establish that the effect of its conduct lessened competition. *Id. at 967*. Specifically, the Eleventh Circuit's opinion [11] states as follows:

> *The Group asserts the following*: (1) Nucor is by far the dominant producer in the relevant market, enjoying a market share of 85%; (2) the Group wanted to and had the ability both to purchase the Assets and to compete with Nucor in the relevant market; (3) the Assets would constitute substantially all of the assets necessary for a potential entrant into the market to begin operations and compete; (4) Nucor was thus obliged not to bid against the Group, the preferred purchaser for the Assets; (5) Appellees violated the merger laws by having Nucor participate in the bidding by funding Park's bid; and (6) Appellees' conduct was a proximate cause of the Group's failure to purchase the assets **[**33]** and its exclusion from the relevant market.
>
> ...
>
> *The Group contends that, if it can prove these assertions*, this would mean that Nucor maintained its purported near-monopoly and denied consumers in the relevant market the benefit of the pressure to lower prices that would likely come about if the Group became a viable competitor, thus substantially lessening **[*1215]** competition and violating the antitrust laws.
>
> *We decline to address the merits; that is, we decline to address whether the foregoing contentions of the Group would in fact substantially lessen competition in the relevant market and violate the antitrust laws.* However, we conclude that the district court erred in concluding that the Group had failed to show antitrust standing.

Id. at 967 (emphasis added and footnote omitted). [12]

And just to drive the point home, the Eleventh Circuit's opinion included footnote 4 which states:

> We decline to address the merits *because the district court has not addressed this issue* as it is properly framed, *and because resolution of the issue will require further development of the record and further fact-finding* with respect to whether the challenged acquisition had the effect of substantially lessening competition in the relevant market. Thus, we vacate the district court's holding on the merits.

Id. at 968, n. 4 (emphasis added). [13]

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[11] Throughout its opinion, the panel referred to GSRG as "the Group."

[12] Legally and logically, the court of appeals did not - and could not - hold that an exclusion of GSRG, standing alone, was "in restraint of trade." As the Special Master pointed out in his First Report (Doc. #188 at 12), the exact same "exclusion" could have arisen if Casey/Park and anyone other than Nucor had purchased the assets, but such purchase **[**34]** by anyone other than an alleged monopolist would not have caused the injury to competition necessary for an antitrust violation.

[13] As the panel also stated:

> *Our intention is to express no opinion at all with respect to the merits-i.e., whether the actions of appellees substantially lessened competition in the relevant market and violated the antitrust laws.* See note 4, supra. Thus, we express no opinion with respect to the remarks in Judge Cudahy's separate opinion, except to say that we agree with Judge Cudahy that if the Group proves on remand that "Nucor substantially lessened competition in the relevant market" for hot rolled coil, the Group will **[**35]** have proved a violation of the antitrust laws. However, we express no opinion on that issue; *we prefer for the district court to conduct the appropriate analysis in the first instance and on a more fully developed record. Nor do we*

GSRG's "law of the case" argument assumes that the Eleventh Circuit's decision implicitly decided issues which the Court of Appeals, specifically and by the very terms of its opinion, did not address. Therefore, GSRG's "law of the case" argument is off base.

B. Count I - GSRG's Sherman Act Section 1 Claim

1. Legal Standards

HN12[] *Section 1* of the Sherman Act provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. Thus, by its own terms, *Section 1* condemns every contract, combination, or conspiracy when these concerted actions are "in **[**36]** restraint of trade or commerce." GSRG frequently uses the words "contract" and "combination" instead of "conspiracy." However, as the Eleventh Circuit has noted that "[d]espite the different terminology, there is no magic unique to each term. Courts use the words 'contract,' 'combination,' and 'conspiracy' interchangeably, and sometimes simply refer instead to an 'agreement.'" *Tidmore Oil Co. v. BP Oil Co./Gulf Products Div., 932 F.2d 1384, 1388* ***[*1216]*** *(11th Cir. 1991)* (citing 6P. Areeda, ***ANTITRUST LAW*** ¶ 1403 (1978)). Moreover, in his treatise, Professor Areeda notes that in virtually every case, it is not necessary to distinguish these terms from one another:

> The courts sometimes speak of "combination," sometimes of "conspiracy," or sometimes simply of the nontstatutory term "agreement." They **[**37]** usually use these terms interchangeably, and the use of one term does not imply any distinction between them. When there is sufficient concert of action to implicate the purposes of the Sherman Act, the statute is applied without any need or attempt to classify that concerted action as a contract, a combination, or a conspiracy. This is the consistent course of the decisions, and generally it seems correct.

6 P Areeda & H. Hovenkamp, ***Antitrust Law***, ("Areeda") ¶1403 at 20 (3d ed. 2010) (*citing* *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445 (3d Cir. 1997)*, *cert. emph typestyle="it">denied*, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)* ("We perceive no distinction between the terms combination and conspiracy. . . .")).

To be sure, the Sherman Act distinguishes unilateral from concerted action. [14] ***HN13***[] The Sherman Act contains a "basic distinction between concerted and independent action . . . The conduct of a single firm is governed by *§ 2* alone and is unlawful only when it threatens actual monopolization . . . *Section 1* of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly **[**38]** unilateral.'" *Copperweld Corp., 467 U.S. at 767-68* (citations and footnote omitted). Accordingly, while different courts have expressed the elements of a Section 1 claim in different (but not necessarily inconsistent) ways, [15] this much is clear: an essential element of any Section 1 claim

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> *intend to express an opinion on or preempt the district court's discretion with respect to the nature of the appropriate course of action on remand, e.g., immediate trial or further summary judgment proceedings. See* *Fed. R. Civ. P. 56(d)*.

Id. at 969, n. 7 (emphasis added).

[14] 7 **[**40]** Areeda at ¶ 1474 at 307. Unilateral action is "unlawful under the Sherman Act when anti competitive conduct is accompanied by monopoly power or its prospect." *Id.* at 307-08.

[15] For example, the Special Master defined the elements as follows:

> Thus, the elements of a Section 1 claim are widely recognized to be (i) the existence of a contract, combination, or conspiracy among two or more separate entities that (ii) unreasonably restrains trade and (iii) affects interstate or foreign commerce.

is a showing of concerted action. That is, *Section 1* applies only to agreements between two or more businesses or persons; it does not cover unilateral conduct. *Fisher v. City of Berkeley, 475 U.S. 260, 266, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)* ("Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of agreement."). [16] *See also Monsanto Co., 465 U.S. at 761* (noting that it is fundamental that a plaintiff establish an agreement between two or more persons to restrain trade; unilateral conduct is not prohibited by *§ 1*); *American Key Corp. v. Cole, 762 F.2d 1569, 1579 n. 8 (11th Cir. 1985)* ("conspiracy is an essential element of all Section 1 violations"); *Todorov v. DCH* **[*1217]** *Healthcare Authority, 921 F.2d 1438, 1455 (11th Cir. 1991)* ("Liability will only attach to *agreements* designed unreasonably to restrain trade **[**39]** in, or affecting, interstate commerce; thus, before analyzing the reasonableness of any alleged restraint on trade, courts must first ensure that an agreement to restrain trade exists."). To be sure, ***HN14***[] the Supreme Court has cautioned lower courts that *Section 1* "does not declare every combination between two 'persons' to be illegal," but only those "'hereby declared to be illegal.'" *Copperweld Corp., 467 U.S. at 769 n.15*. Thus, concerted action within the meaning of Section 1 conspiracy "cannot be understood as it might be in ordinary parlance, to reach any and all forms of joint activity by two or more persons," *Virginia Vermiculite, Ltd. v. Historic Green Springs, 307 F.3d 277 (4th Cir. 2002)*, *cert. denied*, *538 U.S. 998, 123 S. Ct. 1900, 155 L. Ed. 2d 824 (2003)*, but "must be construed in a [] refined manner" and "defined consonant with its role in the antitrust analysis." *Id. at 281-82*. To determine whether a given joint activity is an antitrust conspiracy, the Supreme Court has directed courts to "explain the logic underlying Congress' decision to exempt unilateral conduct from [Section] 1 scrutiny, and to assess whether that logic similarly excludes the conduct" challenged by the plaintiff. *Copperweld, 467 U.S. at 776*.

HN16[] The "logic" underlying the Section 1 ban on collusion between marketplace competitors is that such combinations "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id. at 768-69*. That is why Section 1 treats concerted **[**41]** activity between multiple actors "more strictly" than *Section 2* treats single-party conduct - "[i]n any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." *Id. at 768-69*. The danger is obvious. When "parties combine (*i.e.*, bring into concert) their resources, rights, or economic power in such a way as to counteract naturally competing interests that would otherwise set them at odds," *Virginia Vermiculite, 307 F.3d at 282*, they are able "to avoid . . . market choices that would set them at odds" in the asserted market, *id. at 283* n.*, to the detriment of competition and consumers. The "core concern" of *Section 1* thus is when "competitors cooperate to substitute common action for competition and thereby effect an anticompetitive restraint that could not otherwise be achieved." Areeda, ¶ 1402a3, at 10.

Thus, for example, in *Virginia Vermiculite*, a non-profit historic preservation entity, which was the donee of a gift deed of land containing valuable **[**42]** vermiculite deposits, was the second party that allegedly "conspired" with another defendant that operated in the vermiculite market. *307 F.3d at 279-80*. Judge Luttig, writing for the Fourth Circuit, held that such joint action did not satisfy the "concerted activity" requirement under *Section 1*, because, "[f]irst and foremost, [the donee's] receipt of the gift did not reflect a merging of the two defendants' rights, resources, or economic power." *Id. at 283*. The court concluded that the mere act of accepting the donation did not create the concerted action required to support a Section1 claim, because no evidence was presented that the organization - as opposed to the monopolist - had "exercised any form of right, resource, or economic power" of its own to implement the monopolist's allegedly anticompetitive scheme. In so holding, the court "reaffirm[ed] what was made clear by *Copperweld*, that concerted activity susceptible to sanction by *section 1* is activity in which multiple parties join **[*1218]** their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing **[**43]** choices)."

(Doc. #188 at 3 (footnote omitted)).

[16] However, ***HN15***[] while concerted action must be shown, not every agreement that restrains competition will violate the Sherman Act. The Supreme Court long ago determined that Section 1 prohibits only those agreements that unreasonably restrain competition, *Standard Oil Co. v. United States, 221 U.S. 1, 58-64, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*; therefore, the unreasonableness of the agreement is the second element of a Section 1 claim.

Id. at 282; *see* *Copperweld, 467 U.S. at 769*. In such circumstances there is no basis for antitrust conspiracy liability. *Id.*; *see also* *Golden v. Kentile Floors, Inc., 475 F.2d 288, 290-91 (5th Cir. 1973)* ("Supreme Court precedents make clear that participation in a combination is illegal only when, at the minimum, it manifestly results from the family of procompetitive or anticompetitive objectives related to the relevant market."). Here, just as in *Virginia Vermiculite, Ltd.,* there is simply no showing that "the parties combine[d] (*i.e.*, [brought] into concert) their resources, rights, or economic power in such a way as to counteract naturally competing interests that would otherwise set them at odds . . . ." *Virginia Vermiculite, Ltd., 307 F. 3d at 282*.

The clear prerequisites to avoiding summary judgment in antitrust conspiracy cases have been established by the Supreme Court and consistently applied by our circuit court. *See* *Matsushita, 475 U.S. at 588* ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"); *Monsanto, 465 U.S. at 764* ("the antitrust plaintiff should present **[**44]** direct or circumstantial evidence that reasonably tends to prove that [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'") (quoting *Edward J. Sweeney, 637 F.2d at 111*).

These standards were summarized by the Eleventh Circuit in *Seagood Trading Corp.*:

> ***HN17***[] The threshold requirement of every conspiracy claim, under both *Section 1* and *Section 2*, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. We recognize that it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators. *DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1515 (11th Cir. 1989)*, *cert. denied*, *494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990)*. ***Antitrust law***, however, limits the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[**45]** To make out a conspiracy, and thus survive a motion for summary judgment, the circumstantial evidence must reasonably "tend[ ] to exclude the possibility" that the alleged conspirators acted independently. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. This means that "conduct as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588*. For example, the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy. *Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 827 (11th Cir. 1990)*, *cert. denied*, *495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*. Thus, when the defendant puts forth a plausible, procompetitive **[*1219]** explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 (11th Cir. 1991)*.

Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573-74 (11th Cir. 1991) (parallel citations omitted). *See also* *U.S. Anchor, 7 F.3d at 1002* ("Federal ***antitrust law*** requires a plaintiff to introduce evidence **[**46]** that tends to exclude the possibility that the defendants acted independently or legitimately."); *Todorov, 921 F.2d at 1456* ("Thus, when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated."); *Bolt, 891 F. 2d at 819* ("When relying on circumstantial evidence to prove the existence of a conspiracy, a plaintiff must first show a non-legitimate motive for entering into such a conspiracy.") These are precisely the evidentiary standards applied by the Special Master here. (*See* Doc. #188 at 4-5, 16-19). Thus, the first element of a Section 1 claim is proof of an agreement to restrain trade, and significant probative evidence of a conspiracy is an essential element of all Section 1 violations. *First National Bank v. Cities Service Co., 391 U.S. at 290*.

2. Analysis of GSRG's Conspiracy Claim

As noted above, **HN18**[] "[a] key inquiry in any case brought under *Section 1* is whether the challenged conduct consists of concerted action or of the merely unilateral behavior of separate actors **[**47]** . . ." William C. Holmes, ***Antitrust Law*** *Handbook* § 2:2 *(2008-2009 Edition).* "For an agreement to constitute a violation of *Section 1* of the Sherman Act, a 'conscious commitment to a common scheme designed to achieve an unlawful objective' must be established." *Toscano v. Professional Golfers Association, 258 F.3d 978, 983 (9th Cir. 2001)* (quoting *Monsanto, 465 U.S. at 764*). As the Special Master aptly noted "[t]he facts of this case present the infrequent, but not unprecedented, question of whether a company's agent [here, Casey/Park] [17] should be held liable for Section 1 conspiracy where the agent had some role in facilitating the restraint." [18] (Doc. #188 at 5). The Areeda treatise draws a distinction between "pawns" and "principal actors" due to the pawn's "subordinate role in performing a discrete, designated task at the direction of [its] principal." 7 Areeda ¶ 1474 at 308. As is the case here with Casey/Park, "[t]he pawn is not a competitor whose rivalry is being coordinated. Nor is the pawn a marketplace actor whose . . . behavior is being constrained. Rather, the pawn is relevant **[*1220]** to antitrust policy only because it assists the principal actor's marketplace behavior." *Id.* The **[**48]** Areeda treatise also explains why findings of pawn liability under *Section 1* are rare.

> In our economy sales through brokers or other intermediaries are ubiquitous, and they are not complicity in vertical restraints simply because they were employed in a transaction later challenged as anticompetitive.

Id. at ¶ 1474(c), p. 317. [19]

Simply put, GSRG's claim that Casey/Park conspired with Nucor does not trigger the "core concern" addressed by Sherman Act *Section 1*. That is the case because Casey/Park and Nucor do not compete with each other and Casey/Park lacks any economic interest in the state of competition in the relevant market. The Special Master correctly determined that **HN19**[] *Section 1* only prohibits "activity in which **[**50]** multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)." [20] (Doc. #188 at 7, quoting *Virginia Vermiculite Ltd., 307 F.3d at 282*). GSRG has expressly admitted that neither Casey nor Park have ever had an economic interest in any market for the sale of hot rolled coil steel or in the state of competition in any

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[17] Again, although Casey/Park have resolved their differences with GSRG, the question of whether they can be liable under *Section 1* is still at the forefront. This is the case because Plaintiff's theory for holding Nucor liable under *Section 1* is the claim that Nucor and Casey/Park conspired with one another.SE

[18] Contrary to GSRG's assertion, the Special Master's legal analysis is plainly not misdirected advocacy expounding on "why . . . 'pawns' are not liable for their conduct." (*See* Doc. #190 at 23-24). What GSRG misunderstands (or perhaps fails to acknowledge) is that the Special Master's "pawn liability" analysis is simply another way to analyze the courts' respective decisions in *Copperweld* and *Virginia Vermiculite.* (Doc. #188 at 5-6) (citing 7 P. Areeda, ***ANTITRUST LAW***, ¶1474 (2007)). The key point is this - if GSRG's analysis is correct, Section 1 liability **[**49]** would potentially attach to a broad range of ancillary service providers - bankers, lenders, lawyers, and accountants to mention a few - who lack the requisite competitive interest and stake in the relevant market and who do not have any conscious commitment to achieve the alleged restraint of trade in that market.

[19] To be clear, while Areeda considers that an essential element of proving pawn liability is a showing that the pawn intended to restrain trade, *id.* at ¶ 1474, p. 308, the Special Master recognized that this requirement is inconsistent with Eleventh Circuit precedent. (Doc. #188 at 6, n.31). If this court were writing on a clean slate, it would conclude Areeda has the better reasoned position. However, the Eleventh Circuit's case law is clear and the Special Master applied it faithfully.

[20] GSRG's **[**52]** objections do not challenge the Special Master's determination that GSRG failed to provide substantial evidence that Nucor and Casey/Park ever "join[ed] their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)." (Doc. #249 at 12, quoting *Virginia Vermiculite Ltd., 307 F.3d at 282*). This requisite combination of rights, resources or economic power can only occur when the combination "diminshe[s] competing interests of the two entities." (Doc. #188 at 8, quoting *Virginia Vermiculite Ltd., 307 F.3d at 283*). The Special Master restated this principle somewhat differently: concerted activity is unlawful under *Section 1* if it "deprives the marketplace of the independent centers of decision-making that competition assumes and demands." First Report at 6 (quoting *Copperweld Corp., 467 U.S. at 769*).

such market. [21] (Doc. #120 ¶¶ 3-15). And notwithstanding GSRG's strained arguments [22] that Casey contributed "resources" in the transaction with Nucor (Doc. #190 at 6, 16), there is no evidence that Casey or Park ever acted in a way that was inconsistent with their respective usual business activities or contributed resources that reflected any economic power or other interest in the purported relevant market. ***HN20***[] "[T]he Sherman Act does not prohibit unreasonable **[*1221]** restraints of trade as such — but only restraints effected by a contract, combination, or conspiracy . . . ." *Copperweld Corp., 467 U.S. at 775*. The Special Master properly held that part of the proof of the "contract, combination, or conspiracy" requires **[**51]** proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co., 465 U.S. at 764*. Under the circumstances of this case, the Special Master properly concluded that this required some showing of Casey/Park's objective, separate and apart from the fact of entering into the facially neutral contract with Nucor. Eleventh Circuit precedent is in agreement, despite GSRG's attempts to distinguish the relevant cases. *See U.S. Anchor Mfg.,7 F.3d at 1002*; *Seagood Trading Corp., 924 F.2d at 1573-74*. In both of these cases, evidence of written agreements between the alleged conspirators was insufficient to obviate the need for some proof of an objective to restrain trade on the part of the alleged pawn or subordinate. The same is true here as to Casey/Park's objective. As the Third Circuit explained in *Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 212 (3d Cir. 1992)*, "the emphasis is upon the participant's '*commitment to [the] scheme* [which is] designed to achieve an unlawful purpose' which is crucial." Thus, the Special Master properly recommended summary judgment based on the lack of proof of Casey/Park's "commitment to the scheme."

The court concludes that the Special Master applied the proper standards in assessing summary judgment, requirements that are firmly established by controlling Supreme Court and Eleventh Circuit precedent, and which call upon GSRG to present evidence (1) that tends to exclude the possibility that the alleged unlawful conduct of Casey and Park was the result of legitimate business activity rather than an unlawful conspiracy and (2) that demonstrates that those companies made a conscious commitment to a common scheme designed to achieve an unlawful objective. *See, e.g., Matsushita, 475 U.S. at 588*; **[**54]** *Seagood Trading, 924 F.2d at 1573-74*.

Perhaps sensing the difficulty it would have in meeting the requirements of *Monsanto* and *Matsushita*, GSRG makes the astounding argument that the written contract between Nucor and Casey/Park is itself direct evidence of concerted conduct causing anticompetitive harm. [23] (*See* Doc. #255 at 4-5). The Special Master rejected that

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[21] The claim that Nucor exploited its otherwise routine business arrangement with Casey/Park to effect an anticompetitive result - in a market in which Casey did not participate - simply does not transform that ordinary business arrangement into an antitrust **[**53]** conspiracy.

[22] It is not surprising, therefore, that GSRG has not cited to a single case upholding a Section 1 claim based on an agreement between an agent (*i.e.*, a pawn) who does not participate in or have any economic interest in the state of competition in the relevant market and a single principal that operates in that market. Extending *Section 1* under circumstances like this to parties outside the relevant market would dramatically alter the scope of the antitrust laws by "presag[ing] liability for a host of servicing agents only fortuitously connected with Sherman Act defendants." *Golden, 475 F.2d at 290*.

[23] The former Fifth Circuit noted over thirty years ago the infrequency of an antitrust case with direct evidence:

> [A] major factual question in this case is whether there was a conspiracy. Even a successful antitrust plaintiff will seldom be able to offer a direct evidence of a conspiracy and such evidence is not a requirement. *See, e.g., Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 703-04, 89 S. Ct. 1391, 22 L. Ed. 2d 658 (1969)*. However, to survive a motion for summary judgment the evidence must suggest reasonable inferences of conspiracy. *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 266-70, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *American Telephone & Telegraph Co. v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir. 1979)*, **[**55]** *cert. denied*, *444 U.S. 926, 100 S. Ct. 265, 62 L. Ed. 2d 182 (1979)*. "Rarely, if ever, can a plaintiff point to a 'smoking gun' in (conspiracy) cases such as this. Yet, a plaintiff must convince the court that it is reasonable to infer the existence of the gun from the facts shown." *Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1117 (5th Cir. 1979)*.

General Chemicals, Inc. v. Exxon Chemical, 625 F.2d 1231, 1233 (5th Cir. 1980).

argument and this court similarly finds that it is off the mark. [24] That is, the **[*1222]** court concludes that the contract at issue does not in itself restrain trade.

Again, in *Seagood Trading*, ***HN21***[] the Eleventh Circuit made clear that analyzing concerted action is the starting point in assessing a Section 1 claim:

> The threshold requirement of every conspiracy claim, under both *Section 1* and *Section 2*, *is an agreement to restrain trade.* To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."

924 F.2d at 1573 (emphasis added) (quoting *American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946))*.

As GSRG has indicated in its briefing, "[t]he primary legal issue in this case . . . concerns how the requirement **[**57]** of proof of a common 'objective' should be applied" in the context of this case. [25] (Doc. #251 at 8). Plaintiff argues that the *objective* of the contract [26] between Nucor and Casey/Park was anticompetitive, *i.e.*, to exclude GSRG from the hot rolled steel coil market. (*Id.* at 8, 9). More specifically, GSRG argues that "the apparent objective of the Nucor-Casey contract was dismantling and export **[*1223]** of the former Gulf States Steel plant. Where the objective of a contract is the elimination of nascent competition in the relevant market, *Section 1* is properly invoked." (*Id.* at 10). And it is that passage from GSRG's written argument that demonstrates the critical flaw in its argument on this point. That is, GSRG has made a leap in logic that is simply not supported by the record because the contract's purpose is to purchase goods, not eliminate competition or restrain trade.

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[24] Not only is the contract between Casey/Park not direct evidence of a Section 1 violation, for the reasons already explained, it does not provide "circumstantial" evidence of Casey's conscious commitment to monopolize the alleged relevant hot rolled coil steel market. GSRG's contention otherwise cannot withstand analysis under the well-established antitrust summary judgment standard that circumstantial evidence "must be strong in order to survive summary judgment, because '***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case,'" *Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc., 496 F.3d 403, 409 (5th Cir. 2007)* (quoting *Matsushita, 475 U.S. at 588* (emphasis added)). The key point here is that "conduct as consistent **[**56]** with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*). Imposing Section 1 liability on the basis of conduct that is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy," *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, would "often [] deter procompetitive conduct," *Matsushita, 475 U.S. at 593*.

[25] Plaintiff argues that the context of this case involves an "anticompetitive acquisition which is accomplished by means of an express, written contract with a third party." (Doc. #251 at 8). Plaintiff's argument is off the mark. And not surprisingly, GSRG has offered no precedent or authority whatsoever to support its **[**58]** position that Section 1 criminal and treble damages liability may be automatically imposed on ancillary service providers that have no knowledge, stake or interest regarding another party's alleged anticompetitive objective.

[26] GSRG's lengthy analysis (Doc. #251 at 11-13) of the Third Circuit's decision in *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)*, misstates both the holding and the facts of that case. As the Special Master correctly noted in his First Report, *Fineman* stands for the proposition that, in order to be liable under *Section 1*, "co-conspirators need not share the same *motive* for the restraint of trade so long as they both share the *objective* to restrain trade." (Doc. #188 at 14 (original emphasis); *accord* Doc. #249 at 9). Indeed, *Fineman* expressly confirms the Special Master's discussion of "objective" - as opposed to motive and intent. *See Fineman, 980 F.2d at 212* (although motives may differ, a Section 1 claim requires proof that alleged conspirators must share a "conscious commitment to a common scheme designed to achieve an unlawful objective."). In this manner, the Special Master's analysis is wholly consistent with Eleventh Circuit law, and **[**59]** contrary to GSRG's assertions, the *Fineman* opinion also confirms the Special Master's ruling that: "At a minimum, a determination of a common objective to restrain trade would require the Court to find that the subordinate party *has knowledge* of the principal party's anticompetitive goal and *acquiesce* in its realization." (Doc. #249 at 10 (emphasis added)).

In other words, the contract's purpose was to define the relationship between Nucor and Casey regarding the acquisition of the steel mill assets, and the terms under which that asset acquisition would take place. *That* was the objective of the contract - the purchase of the steel mill assets. Nucor may well have had an ulterior objective in entering the contract - to exclude GSRG from the market. But there is nothing in the contract, its terms, or the circumstances of its agreement that indicates (much less presents substantial evidence that) *Casey's* objective was anything other than the acquisition of steel assets for resale. [27]

Obviously there is no requirement that GSRG establish "an intent on the part of the co-conspirators to restrain trade or to build a monopoly" for a Section 1 conspiracy claim. *Bolt, 891 F.2d at 819-20* (internal citation omitted). To avoid the swing of the summary judgment axe, however, GSRG is required to present "evidence that reasonably tends to prove" that Casey/Park and Nucor "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co., 465 U.S. at 764*. And while GSRG is certainly permitted to rely upon circumstantial evidence to support its Section 1 claim, Supreme Court precedent has limited the "range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy." *Seagood, 924 F.2d at 1574*.

It bears repeating that "[c]onduct as **[**61]** consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588*. [28] Indeed, "the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy." *Seagood, 924 F.2d at 1574*. As the Eleventh Circuit has also warned, "when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred." *Id.* GSRG has not presented the **[*1224]** required evidence that "tend[s] to exclude the possibility that the alleged conspirators acted independently." *Id.* (quoting *Monsanto, 465 U.S. at 764*).

The Special Master succinctly articulated the essence of (and the flaw in) Plaintiff's argument regarding the contract [29] between Nucor and Casey:

> Plaintiff incorrectly adumbrates that somehow "contract, combination, and conspiracy" and "restraint of trade" are independent elements such that once an agreement regarding the economic event is shown, all that is needed for liability is evidence of one party's illegal act affecting the economic event. The correct interpretation is that the joint meeting of the minds must incorporate the illegal restraint and, thus, those elements are inextricably intertwined.

(Doc. #188 at 4). In this case, the only joint action agreed to by Casey/Park on the one hand, and Nucor on the other was an ordinary commercial brokerage arrangement. GSRG's assertion that any "concerted activity" can be deemed a Section 1 violation without evidence of a conscious commitment to an unlawful objective is, quite simply, not just off the mark - it's **[**63]** not the law. [30] One need look no further than the Eleventh Circuit's *Seagood*

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[27] GSRG takes issue with the Special Master's statement that "[t]he written agreement between Casey/Park and Nucor . . . appears neutral on its face." (Doc. #190 at 20; *see also id.* at 12-14). Each provision **[**60]** of that agreement questioned by GSRG, however, readily can be explained as part of an entirely reasonable and appropriate business deal, and accordingly provides no evidence that tends to exclude the possibility that the agreement derived from legitimate business conduct, which resulted in multi-million-dollar profits for Casey/Park upon resale of the key Gulf States Steel assets.

[28] Citing its earlier decision in *First National Bank v. Cities Service Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*, the Court in *Matsushita* identified two separate inquiries that are relevant to this issue: (1) whether the defendant had "any rational motive" to join the alleged conspiracy, and (2) whether the defendant's conduct was consistent with the defendant's independent interest," *Matsushita, 475 U.S. at 587*, citing *391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*, the Court **[**62]** stated that "if [the defendants] had no rational motive to conspire, and if [their] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id. at 596-97*.

[29] *Albrecht* emphasized that *Section 1* "covers combinations in addition to contracts and conspiracies." *390 U.S. at 149*. But again, neither there nor anywhere else has the Court defined "contract" as a different concept. As the lower courts have consistently held, this statutory concept of contract, combination, or conspiracy is a unity rather than a trinity.

decision to understand this point. In *Seagood*, the alleged conspirators, Long John Silver's ("LJS") and Martin-Brower ("M-B"), had entered into contracts for M-B to provide services to LJS. *924 F.2d at 1558-60*. Nevertheless, applying the standards established in *Matsushita* and *Monsanto*, the court of appeals affirmed the grant of summary judgment for M-B, concluding that there was no direct evidence of the alleged conspiratorial conduct and that the inferences drawn by the plaintiff from circumstantial evidence were not sufficient to implicate M-B in the alleged unlawful conspiracy. *Id. at 1573-76*.

In *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, one of the cases cited by GSRG, [31] the Eleventh Circuit held that there was "insufficient evidence linking [the pawn] with Rule's scheme to **[**65]** constitute a conspiracy under the substantive proof requirements of federal ***antitrust*** **[*1225]** ***law***" *despite* the existence of a contract between which was related to the alleged restraint of trade. *7 F.3d 986, 1002 (11th Cir. 1993)*. Notwithstanding GCRG's citation to it, *U.S. Anchor* simply does not support its argument. In *U.S. Anchor*, the plaintiff alleged that the principal defendant, Rule, allegedly had conspired with one of its suppliers, Tie Down, to drive Rule's competitor out of the relevant market by predatory pricing. The focus of the conspiracy claim was a report from Tie Down to Rule regarding the plaintiff's costs of production, which allegedly was used by Rule to carry out its anticompetitive, below-costs pricing tactic. *7 F.3d at 989-90, 1002*. Again, therefore, "joint action . . . was a given." The Eleventh Circuit, however, concluded that Tie Down was entitled to judgment as a matter of law, holding that there was insufficient evidence of the alleged conspiracy involving that company. *Id. at 1001-02*. As in *Seagood*, the court stated that "a section 1 claim and a *section 2* conspiracy to monopolize claim require the same threshold showing - the existence of an agreement to restrain **[**66]** trade." *Id. at 1002* (quoting *Seagood, 924 F.2d at 1576*).

3. Analysis of the Contract

The contract at issue in this case does not, by its own terms, link the "pawn" with Nucor's alleged scheme in order to establish a conspiracy. Accordingly, as the Special Master correctly noted, it is incumbent upon GSRG to present evidence *in addition to the contract* that tends to link Casey/Park to Nucor's scheme to survive summary judgment. (Doc. #249 at 11). Proof that Nucor alone may have had an intent to monopolize or restrain trade is not enough to establish the contract, combination or conspiracy in unreasonable restraint of trade. *U.S. Anchor Mfg., Inc. 7 F.3d at 1002* (although there was sufficient evidence to show an intent to achieve an unlawful objective on Rule's part, there was insufficient evidence linking the pawn to Rule's efforts to support a finding of conspiracy between them).

In *U.S. Anchor*, the Eleventh Circuit further stated that ***HN23***[] "[f]ederal ***antitrust*** **[**67]** ***law*** requires a plaintiff to introduce evidence that *tends to exclude the possibility* that the defendants acted independently or legitimately." *U.S. Anchor Mfg., Inc., 7 F.3d at 1002* (citing *Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 820 (11th Cir. 1990)*, *cert. denied*, *495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*, *appeal after remand*, *980 F.2d 1381 (11th Cir. 1993)* and *Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))* (emphasis added). There are a myriad of undisputed legitimate reasons for Casey/Park to enter into the agreement in question with Nucor. Don Casey has testified about his extensive involvement in evaluating the Gulf States Steel

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[30] ***HN22***[] Both Supreme Court and Eleventh Circuit case law require a plaintiff relying upon the consequential affects of a contract that does not restrain trade by its **[**64]** own terms to show that the contracting parties "shared a common objective to restrain trade" in order to establish a Section 1 violation. *Monsanto, 465 U.S. at 764* (Section 1 claim requires proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective"), quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)*; *Seagood Trading, 924 F.2d at 1573-74* (in order to establish an agreement to restrain trade, plaintiff must show a meeting of the minds to accomplish anticompetitive objective); *U.S. Anchor, 7 F.3d at 1002* (no evidence that defendants shared a mutual objective to restrain trade in the relevant market). Indeed, in both *Seagood* and *U.S. Anchor*, there was evidence of a competitively neutral written agreement between the allegedly conspiring defendants, but that did not dispense with the requirement that the antitrust plaintiff establish a shared "common objective" to restrain trade in the relevant market. (*See* Doc. #249 at 7-8).

[31] GSRG cites *U.S. Anchor Mfg.* for the proposition that evidence of the contract between Nucor and Casey/Park eliminates the need to show a common objective to restrain trade. As will be explained below, that argument is far wide of the mark.

assets long before he had any contact with Nucor about those assets, and that he initially contacted Nucor about the possible purchase of those assets before he was later contacted by Nucor's Vice President, Mr. Rutkowski. Mr. Casey also described Casey's purchase of various assets from the Gulf States Steel plant and his company's efforts to be involved in some manner in the liquidation of those assets. (Doc. #12 at ¶¶ 23-30, 36-38, 40-41).

Moreover, the mere fact that Casey/Park entered into an agreement to perform its usual business, even if it was **[**68]** at a higher profit than usual, does not show that it conspired to do anything other than make money. GSRG argues that the profit margin should have alerted it to the fact that Nucor had ulterior motives in hiring Casey/Park, but that is not enough and there is no evidence that Casey/Park entered into the agreement with a shared objective to achieve those alleged unlawful ends.

[*1226] Casey's business is buying and selling used steel manufacturing equipment. It not only had prior dealings with Nucor, but also did business with most steel manufacturers in the United States. Casey's business was in no way dependent on Nucor and, in fact, Casey had made its own independent efforts to be appointed by the Bankruptcy Judge and Bankruptcy Trustee to be the liquidator for the Gulf States equipment. Moreover, for approximately two years prior to the September 2002 bankruptcy auction, Casey had tried repeatedly to get a contract with Gulf States Steel and the Trustee to liquidate the Gulf States Steel property and equipment. (Doc. #96 at 11). Casey inspected the Gulf States Steel property and equipment on a number of occasions in 2000 and 2001 and was very familiar with those assets. Mr. Casey attended **[**69]** the May 2001 auction on Casey's behalf, bid on several items at the auction, and successfully purchased some of the Gulf States Steel assets that were auctioned. Casey also purchased additional assets from the Gulf States Steel bankruptcy estate before the May 2001 auction. (Doc. #96). Here, there is no evidence at all (direct or otherwise) that Casey/Park knew of any objective of Nucor other than to participate in the purchase and resale of the Gulf States Steel assets in order to make a profit. And as GSRG admits, the two sides ultimately made a profit. [32]

Furthermore, Casey/Park had an independent reason for wishing to sell off Gulf States's assets: it would provide the financing to purchase the property and develop it into an industrial park, something that the record indicates Casey/Park is currently doing on a profitable basis. In light of these facts, GSRG simply has fallen short of the required showing that Casey/Park's reasons for entering into the agreement with Nucor were anything other than legitimate. Here, Casey/Park's "conduct [is] as consistent with permissible [activity] **[**71]** as with illegal conspiracy [and therefore] does not, standing alone, permit the inference of conspiracy." *Seagood Trading, 924 F.2d at 1574* (citations omitted). In its response to GSRG's objections to the Special Master's Third Report, Nucor outlines the reasons that Plaintiff's objections to the *Rule 56* determinations made in the Report are without merit. (Doc. #253 at 14-17). Nucor's response is right on target. Moreover, in each instance, this is the critical failure in GSRG's objections: Whether they are taken individually or together, Casey/Park's acceptance of the contract provisions complained of by GSRG is explained just as much by its normal business practice as by GSRG's **[*1227]** assertions of anticompetitive objective. In this case, and in light of GSRG's shotgun arguments, the legal point cannot be overstated: Where the evidence supporting a conspiracy claim is this equivocal, the Supreme Court has determined that it is insufficient to avoid summary judgment. *Matsushita, 475 U.S. at 588* (citing *Monsanto* and

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[32] Inexplicably, GSRG has questioned the Special Master's "factual finding" that "[t]here is also evidence within the record that there existed at least some opportunity to resell the assets in the international market for a profit." (Doc #190 at 18-19; *see also id.* at 10). The Special Master simply made a *Rule 56* finding based upon undisputed facts. GSRG acknowledges, as it must, that this "finding" is supported by the "fact that (ultimately) Casey did in fact sell the assets for a profit." *Id.* at 19. *See also* Doc. #120 at ¶ 82) (assets were resold to customers in Asia for approximately three times the purchase price). GSRG's suggestion **[**70]** that there supposedly are "contrary facts in the record" about the state of the Asian used equipment market in 2001 and 2002 not only is incorrect but also irrelevant. The key question is whether Casey recognized an opportunity to resell the Gulf States Steel assets in an overseas market, and the evidence is undisputed that Casey did. (*See* Doc. #120 at ¶¶ 36-37, 39-41). Moreover, given that there was a three-year window of time for resale of the assets under the Casey/Nucor agreement, the fact that the assets were resold at a substantial profit in about half that time (Doc. #120 at ¶¶ 81-82) certainly suggests that Casey's market perception was spot on.

holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"). [33]

Finally, GSRG's repeated contention that Casey/Park "should have known" or "suspected" Nucor's "apparent" objective (*e.g.*, Doc. #190 at 8, 11-12, 14-15, 20) is not only speculative [34] but also invokes a negligence standard that is simply foreign to any requirement under the antitrust laws. To survive a *Rule 56* challenge, GSRG must present evidence that Casey knew of and "consciously committed" to Nucor's allegedly anticompetitive objective to monopolize a relevant antitrust market. There is simply no such evidence in the record.

C. To Whatever Extent It Has Attempted To Do So, GSRG May Not Assert a Brand New Theory of Section 1 Liability

The Special Master also recommended that the court find untimely any attempt **[**73]** by GSRG to assert a new theory of liability - namely, that GSRG can avoid summary judgment here by asserting that Nucor conspired with other actors besides Casey/Park. [35] The court agrees with the Special Master that "[a]t this stage of the case, it would be manifestly un[fair] to entertain GSRG's argument that Section 1 conspiracies could be found to exist with other actors." (Doc. #249 at 4; Doc. #305 at 4) (footnotes omitted). GSRG did not put forward its new theory until July 30, 2009, almost seven years after it filed this case. (*Compare* Doc. #1, *and* Doc. #115, *with* Doc. #305, p. 4). There was never a single mention by GSRG of any additional conspirators or other contracts anywhere in the Complaint or Amended Complaint (*see* Docs. #1, 115), nor in any of the summary judgment papers (*see e.g.*, Docs. #129, 216). Indeed, it was not until the July 30, 2009 oral argument before the Special Master that GSRG first advanced this contention. At that point GSRG was a day late and a dollar short; it is too late in the game for it to hatch a new theory of liability. [36]

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[33] Certainly, **[**72]** there is no evidence that Casey/Park's stated legitimate reasons for entering into the agreement were either fabricated or contrived. *See* *Boczar v. Manatee Hosps. & Health Sys., Inc., 993 F.2d 1514, 1518-19 (11th Cir. 1993)* (finding sufficient evidence to support conspiracy claim when defendant's supposed legitimate reasons for acting were shown to be fabricated and contrived).

[34] Evidence that is "speculative or ambiguous" does not require a trial. *Matsushita 475 U.S. at 595*.

[35] As the Special Maser noted, "GSRG has pled only one 'contract and combination' in restraint of trade. In order to protect **[**74]** and extend its near-monopoly dominance in the relevant market, Nucor contracted and combined with Casey to cause the creation of Gadsden Industrial Park, LLC [. . .] [Doc. #115 at ¶ 35]. Nucor contracted and combined with Casey Equipment Corporation and Gadsden Industrial Park, LLC to purchase the Gulf States Steel Plant with the common intention and objective of blocking a perceived competitive threat to Nucor. [Doc. #115 at ¶ 40]." (Doc. #249 at 3). There is no mention of any additional conspirator in GSRG's pleadings, nor is there any reference to other contracts or combinations.

[36] Similarly, the court fully agrees with the Special Master's recommendation that, to the extent GSRG has attempted to assert a claim under *Section 7* (or quasi-Section 7 claim), that assertion is untimely. As an initial matter, the court notes that in its objections to the Special Master's Third Report (Doc. #251), GSRG plainly states it is *not* asserting that Nucor is liable under that section. (*Id.* at 11). Nevertheless, for completeness of the analysis, the court will address the arguments. The Amended Complaint contained no such allegation even though GSRG was told in no uncertain terms that any claim **[**75]** under *Section 7* of the Clayton Act must be expressly asserted in the Amended Complaint:

> Unless a claim under *Section 7* of the Clayton Act, *15 U.S.C. § 18*, is expressly asserted in Plaintiff's amended complaint, discovery on matters unique to Section 7 shall not be permitted. This shall not preclude discovery on matters common to *Section 7* and *Sections 1* and *2* of the Sherman Act.

(Doc. #109 at ¶ 3). To be clear, this language was inserted into the court's August 14, 2007 Case Management Order because, in its decision remanding this case, the Eleventh Circuit panel (somewhat curiously) opined that Plaintiff's claims under *Sections 1* and *2* of the Sherman Act "implicated" *Section 7*, *Gulf States Reorganization Group, 466 F.3d at 966-67*, despite the fact that no such claim was asserted in the pleadings. As with the multiple actors theory, any Section 7 claim is too late.

[*1228] For these reasons, the court agrees with the Special Master's conclusion that GSRG failed to meet its burden of establishing that Casey/Park shared Nucor's alleged objective to restrain trade. Therefore, GSRG's Section 1 claim fails as a matter of law.

D. Count III - Sherman Act *Section 2* Conspiracy Claim

In Count III, GSRG alleges **[**76]** a *conspiracy* to monopolize the market for hot rolled coil in the Southeast. ***HN24***[] To establish a *Section 2* conspiracy to monopolize claim, a plaintiff must show: "(1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy." *Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1556 (11th Cir. 1996)* (citing *Todorov v. DCH Healthcare Auth., 921 F.2d 1438,1460 n. 35 (11th Cir. 1991))*. A claim for conspiracy to monopolize does not require a showing of monopoly power.

In Section IV of the Third Report, the Special Master reaffirmed his ruling in the First Report that "GSRG simply has not adduced sufficient evidence to enable a rational fact-finder to find in favor of GSRG on its *Section 2* Conspiracy [Count III] claims." (Doc. # 249 at 15). Accordingly, the Special Master recommended that the court grant summary judgment on GSRG's conspiracy-to-monopolize claim under *Section 2* of the Sherman Act. (*Id.*). That recommendation is due to be adopted for two reasons: (1) GSRG has not challenged the recommendation in its objections (Doc. # 251); and (2) the recommendation **[**77]** is correct on the merits.

First, GSRG has not asserted any objection to Section IV of the Special Master's Third Report. Nor has GSRG even attempted to argue that the Special Master misstated the law or improperly analyzed the record evidence with regard to the "specific intent" element of its *Section 2* conspiracy-to-monopolize claim in Count III of the Amended Complaint. Accordingly, any such objections have been waived - twice over. [37] Therefore, Section IV of the Third Report (Doc. # 249) is due to be summarily affirmed and adopted.

Second, to prevail on a *Section 2* conspiracy claim, GSRG had to present some evidence that Casey/Park - or, for that matter, any other actor - had a "*specific intent* to help Nucor monopolize the hot rolled steel coil industry." (Doc. #188 at 20). (emphasis added). After **[**78]** the Special Master issued his Third Report, GSRG **[*1229]** failed to present any new evidence or argument regarding "specific intent" in support of Count III. The record is devoid of any evidence that Casey/Park had any interest in whether Nucor monopolized the market for hot rolled coil in the Southeast. Casey/Park had its own legitimate reasons for entering into the agreement with Nucor. Therefore, even if GSRG's objections to the Special Master's Report related to its *Section 2* claim was not waived (and to be clear, it was), the court agrees on the merits with the Special Master's conclusion that GSRG's Count III conspiracy claim fails - for essentially the same reasons that its Section 1 claim fails.

V. The Court's Review of the Special Master's Fourth Report

Following the issuance of the Special Master's Third Report and Recommendation recommending that Nucor be awarded summary judgment on Counts I and III, the *Section 1* and *Section 2* conspiracy claims, the court referred the following motions to the Special Master: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261); Nucor's motion to exclude the testimony of Michael Locker (Doc. #172); Nucor's motion to exclude the testimony **[**79]** of John Correnti (Doc. #175); GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235); GSRG's Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237); and Nucor's Motion for Summary Judgment on all claims (Doc. #269).

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[37] *See also* Response of Casey Equipment Corporation and Gadsden Industrial Park, LLC, to Plaintiff's Objections to Report and Recommendation of Special Master (Doc. #191 at 24-25) (noting that none of GSRG's objections to the First Report challenged the Special Master's original recommendation that GSRG's conspiracy-to-monopolize claim under Sherman Act *§ 2* in Count III must be dismissed).

In his Fourth Report, the Special Master recommended the following: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261) be denied; Nucor's motion to exclude the testimony of Michael Locker (Doc. #172) be granted; Nucor's motion to exclude the testimony of John Correnti (Doc. #175) be granted; GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235) be granted; GSRG's Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237) be denied; and that Nucor's Motion for Summary Judgment (Doc. #269) be granted. (Doc. #305). The Special Master recommended that Correnti and Locker's testimony be excluded because they would offer opinions for which they are not qualified. He recommended that Dick's testimony be precluded because he cannot testify as to any decisions made by the DOJ and the probative value of his testimony is outweighed by its unfair prejudice. The Special Master also recommended that Crandall's and Kaplan's testimony **[**80]** be allowed despite certain omissions and/or problems associated with such.

In evaluating Nucor's motion for summary judgment, the Special Master evaluated all three of the claims in Plaintiff's Amended Complaint. The Special Master recommended that summary judgement be entered in favor of Nucor on Count II, which he had not previously addressed, as well as counts I and III. The grounds on which the Special Master recommended summary judgment on Counts I and III in his Fourth Report and Recommendation are in addition to the reasons he recommended summary judgment on those claims in his Third Report and Recommendation. (Doc. #305).

A. The Law of Attempted Monopolization

HN25[] *Section 2* of the Sherman Act provides:

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

15 U.S.C. § 2. Thus, *Section 2* makes it unlawful for a Defendant to monopolize, to attempt to monopolize, or to conspire to monopolize any part of interstate or foreign **[*1230]** trade. This statutory provision covers behavior by a single business **[**81]** entity as well as coordinated action taken by more than one business.

HN26[] A claim of attempted monopolization involves three distinct elements: "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spanish Broadcasting System of Fla., Inc. v. Clear Channel, 376 F.3d 1065, (11th Cir. 2004)* (quoting *Spectrum Sports, 506 U.S. at 456*).

> To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Monopoly power is "the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market."

U.S. Anchor Mfg., Inc., 7 F.3d at 994, quoting *American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1581 (11th Cir. 1985)*.

The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success. [38] *Quality Foods v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 996 (11th Cir. 1983)*. Furthermore, like **[**82]** the monopolization offense itself, the attempt must happen in a defined relevant market. *Id.* The relevant market is defined by both a product and a geographic dimension. *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979)*; *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 980 (5th Cir. 1977)*.

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[38] ***HN27***[] Specific intent to monopolize is a necessary element of a *Section 2* offense of actual monopolization. Von Kalinowski at § 9.01(1). Monopoly power is a critical element of a *Section 2* offense of actual monopolization, *Id.* at § 8.02(1)

HN28[] "The offense of [actual] monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. [39]

HN29[] The first element, monopoly power, requires a showing that the Defendant has the power to control prices in or to exclude competition from the relevant market. [40] *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Monopoly power, defined **[*1231]** as "the power to control price or exclude competition," is measured with reference to a relevant market.

HN31[] The **[**84]** second element requires evidence of predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. *See* *United States v. Microsoft, 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. A practice is exclusionary if it "harm[s] the competitive *process* and thereby harm[s] consumers." *Id.* "[H]arm to one or more competitors will not suffice" for a *Section 2* violation. *Id.*; *see also* *Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1562 (11th Cir. 1983)* ("The relevant inquiry is not whether [a company's] present attempt to exclude adversely impacts competition but rather whether its acquisition of the power to exclude competitors had a sufficiently adverse impact on competition to constitute a [Sherman Act] violation.").

HN32[] A plaintiff bringing a monopolization claim under *Section 2* of the Sherman Act must define and prove the relevant market. *See* *U.S. Anchor Mfg., Inc., 7 F.3d at 994* ("Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization or attempt case arising under *section 2*").

B. The [85] Special Master's Expert Witness Recommendation**

1. GSRG's Expert Crandall

The Special Master correctly applied the appropriate legal standards relating to the admissibility of expert testimony under *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Specifically, the Special Master evaluated Crandall's proposed testimony under appropriate Eleventh Circuit analysis: "whether (i) an expert is qualified to testify regarding the matters he intends to address, (ii) the expert's methodology is sufficiently reliable under *Daubert,* and (iii) the expert's testimony assists the trier of fact to understand the evidence or to determine a fact in issue." (Doc. #305 at 3 (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003))*. Under these standards, the Special Master correctly determined that, although Crandall's proposed testimony was subject to certain deficiencies, those issues went to the weight of his testimony, not its admissibility. (Doc. #305 at 24). Therefore, the Special Master correctly determined that Crandall's testimony should be admitted.

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[39] *See also* *T. Harris Young, 931 F.2d at 823*; *Austin v. Blue Cross & Blue Shield, 903 F.2d 1385, 1391 (11th Cir. 1990)*. "Monopoly power under *[Section] 2* requires, of course, something greater than market power **[**83]** under *§ 1*." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

[40] In *United States v. E. I. du Pont de Nemours & Co.*, the Supreme Court stated the classic test for determining the relevant market: ***HN30***[] "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." *351 U.S. at 395*. Factors such as functional interchangeability, responsiveness of the sales of one product to the price changes of the other, and degree of competition from the potential substitute are all relevant to the market inquiry. *See, e.g.,* *Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976)*.

2. GSRG's Experts Correnti and Locker

To evaluate the admission **[**86]** of expert testimony, courts engage in a *three part* inquiry to determine the admissibility of expert testimony under Federal Rule of Evidence 702. Specifically, courts consider whether:

> (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993))*.

In his Fourth Report, the Special Master concluded that the testimony of GSRG's proposed experts, Locker and Correnti, should be excluded under Rule 702 and *Daubert* and its progeny. Specifically, **[*1232]** the Special Master found that although both proposed experts opine on how relevant antitrust markets should be defined and whether Nucor possessed market power, neither individual has any relevant training or experience in antitrust **[**87]** economics. Thus, the Special Master concluded that neither individual is qualified under the first prong of the inquiry. Furthermore, the Special Master concluded that even if they had appropriate qualifications, neither person's testimony is based on reliable methodology and thus fails the second prong of the inquiry as well.

The Special Master applied the proper analysis under Rule 702 and *Daubert* in holding that these proposed experts are not qualified. Further, and in any event, even if one were to assume their status as industry experts qualified them to opine on relevant antitrust market issues, GSRG failed to establish that their opinions were based on reliable methodology. ***HN33***[] The *Daubert* inquiry is "a flexible one," but the primary focus should be "on principles and methodology, not on the conclusions that they generate." *Daubert, 509 U.S. at 594-95*.

"[T]he proponent of the testimony does not have the burden of proving that it is scientifically correct," but must establish "by a preponderance of the evidence, it is reliable." *Allison v. McGhan Medical Corp., 184 F.3d 1300, 1312 (11th Cir. 1999)* (citing *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994))*. The court's **[**88]** gatekeeping obligation requires that it evaluate a proposed expert's qualifications and methodology in light of what is necessary to explain a particular subject matter to the jury. Interestingly, GSRG's objections to the Special Master's recommendation that the court exclude Correnti and Locker focus solely on the first prong of the inquiry, their alleged qualification to testify as to antitrust market matters based on their status as industry experts; GSRG does not even attempt to argue that Correnti and Locker applied proper and reliable methodologies in reaching their opinions. (*See generally* Doc. #313). Thus, even if the court were to conclude that the Special Master was incorrect in his conclusion that Correnti and Locker did not possess appropriate qualifications to opine on the relevant antitrust market, their proposed testimony is still due to be excluded due to GSRG's failure to establishing that their methodology is sufficiently reliable under Daubert. *Daubert, 509 U.S. at 594-95*; *see also* *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003)*.

Furthermore, there is yet a third prong of the inquiry which these experts' proffered testimony **[**89]** fails to satisfy. ***HN34***[] The *Daubert* inquiry also requires that the proposed expert's testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Daubert, 509 U.S. at 589*. Thus, even if an expert's testimony were admissible under the first two prongs of the *Daubert* analysis, it may still be insufficient to create an issue of fact to overcome summary judgment. 11BAreeda at ¶ 309; *see also* *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 146 F.3d 1088, 1097 (9th Cir. 1998)*. In this case, the court finds that Correnti and Locker's proposed testimony not only fails the first two *Daubert* prongs, but also that it is too conclusory to satisfy the third prong, and even if considered, would be insufficient to create an issue of fact precluding summary judgment for Nucor.

3. Nucor's Expert Andrew Dick

Nucor proffered the testimony of Andrew Dick, who had previously served as a staff economist, and later Assistant Chief and Acting Chief of the United States **[*1233]** Department of Justice's Antitrust Division, Competition Policy Section. (Doc. #305 at 24). In particular, he oversaw the Steel Industry Task **[**90]** Force established in 2001 to address consolidation in the steel industry. (*Id.*). Nucor sought to have Dick testify, based upon his experience with the DOJ, about a decision in which he had no involvement. The Special Master correctly concluded that Dick was neither qualified, nor in possession of sufficient data or facts, to offer an opinion on the basis for a particular decision in which he did not participate.

4. Nucor's Expert Kaplan

Kaplan's testimony was proffered by Nucor as an expert of antitrust economic issues and in rebuttal to GSRG's expert Crandall. GSRG's objection to Kaplan's testimony centers on its allegation that Nucor's counsel prepared Kaplan's report for him, rather than on the report's substance. However, the Special Master correctly determined that the communications at issue merely reflected appropriate communication and consultation between attorneys and their expert. Therefore, the Special Master correctly determined that Kaplan's testimony was admissible.

C. The Special Master's Summary Judgment Recommendation

After ruling on the various motions to exclude experts, the Special Master considered Nucor's Motion for Summary Judgment on all claims in GSRG's Amended **[**91]** Complaint. (Doc. #305 at 30). The Special Master recommended that summary judgment be granted in favor of Nucor on all claims, for reasons *in addition to* those in his Third Report. (Doc. #305 at 45). The court has carefully reviewed the Special Master's Report regarding GSRG's *Section 2* attempt to monopolize claim. Mr. Rill's analysis is right on target. Moreover, a review of Nucor's response to GSRG's objections (Docs. #314, 315) shows the flaws and shortcomings of GSRG's arguments. In light of these observations, the court need not devote much time to addressing the parties' arguments, but writes briefly to make a few points.

Nucor raised the following additional arguments in support of its motion for summary judgment: (1) GSRG failed to produce sufficient evidence to prove a relevant product market, an essential element of each of GSRG's claims; (2) GSRG cannot prove its alleged geographic market, also another essential element of each claim; and (3) GSRG cannot establish that Nucor possessed a dangerous probability of achieving monopoly power, an essential element of Counts II and III. (Doc. #305 at 30-31).

As the Eleventh Circuit stated so succinctly in *T. Harris Young*, ***HN35***[] "Where there **[**92]** is no Market, there is no Monopoly." *931 F.2d at 823*. There, the Eleventh Circuit compared an attempt claim with an actual monopolization claim:

> The offense of monopolization under *Section 2* of the Sherman Act contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966)*. The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success. *Quality Foods v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 996 (11th Cir. 1983)*. Furthermore, like the monopolization offense itself, the attempt must happen *in a defined relevant market. Id. The relevant market is defined by* ***[*1234]*** *both a product and a geographic dimension. Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979)*; [*Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 980 (5th Cir. 1977)]*.

T. Harris Young & Assoc., 931 F.2d at 823 **[**93]** (emphasis added). [41] Proof of a (1) relevant product market and (2) relevant geographic market are each essential elements to the "attempted monopolization" claim. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) ("Demonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market"); T. Harris Young, 931 F.2d at 823 (attempt to monopolize "must happen in a defined relevant market" that is "defined by both a product and a geographic dimension"); American Key, 762 F.2d 1569, 1579 ("proof of the relevant product and geographic market is absolutely essential" to plaintiff's attempt to monopolize claims under Sherman Act § 2); U.S. Anchor Mfg., 7 F.3d at 994 (defining the market is a "necessary step" in any "monopolization or attempt case arising under Section 2").

Moreover, **HN36**[] Eleventh Circuit precedent requires an antitrust plaintiff to proffer expert testimony to establish a relevant product market and a relevant geographic market. *E.g.,* American Key, 762 F.2d at 1579 (construction of a relevant economic market cannot be based upon lay testimony); Colsa Corp. v. Martin Marietta Servs., Inc., 133 F.3d 853, 855 n. 4 (11th Cir. 1998); Bailey v. Allgas, 284 F.3d at 1237, 1246 (11th Cir. 2002).

If GSRG fails to proffer such testimony or if GSRG's proffered economic expert testimony is unreliable, legally unsound or unsupported by sufficient facts and data, summary judgment must be granted in Nucor's favor as matter of law under Sherman Act Sections 1 and 2. *E.g.,* Levine, 72 F.3d at 1553; Gulfstream Park, 479 F.3d at 1313; Bailey v. Allgas, 284 F.3d at 1247, 1249 (affirming summary judgment where economic expert's evidence was insufficient to establish either relevant product market or **[*1235]** relevant geographic **[**96]** market); American Key, 762 F.2d at 1581 (affirming summary judgment where plaintiff failed to establish relevant geographic market); T. Harris Young, 931 F.2d at 823-25 (affirming grant of JNOV because of plaintiff's failure to define either the geographic dimension or the product dimension of the relevant market). For the reasons explained by the Special Master (and as discussed briefly below), Plaintiff's failure to provide the necessary proof regarding either an appropriate product market or geographic market is fatal to its claims here.

1. The Relevant Product Market

The Special Master recommended that summary judgment be entered against GSRG because its expert, Dr. Crandall, failed to present sufficient evidence regarding the relevant product market. (Doc. #305 at 43-45). GSRG insists that the relevant product market is black hot rolled coil. Nucor contends that it is necessary to examine both the product at issue, black hot rolled coil, and all reasonable substitutes available to consumers. Specifically, Nucor contends that GSRG's evidence on the relevant product market was insufficient because it failed to consider pickled and oiled hot rolled coil as a substitute for hot rolled **[**97]** coil. The Special Master agreed, as does the court. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); T. Harris Young & Assoc., 931 F.2d at 824; Heatransfer, 553 F.2d at 980.

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[41] Proof of these same elements - relevant product market and geographic market - is also required with respect to a Section 1 rule of reason claim such as that asserted by GSRG in Count I of the First Amended Complaint. *E.g.,* Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996) (in Sherman Section 1 case, **[**94]** in order to prove that the alleged conspiracy or agreement had a "potential for genuine adverse effects on competition," the plaintiff must define the relevant market and establish that defendants possessed power in that market). Thus, while the Special Master previously recommended summary judgment dismissing GSRG's Section 1 claims based on GSRG's failure to provide significant probative evidence of a conspiracy/agreement to restrain trade, (Docs. #188, 207, 249; *accord* American Key Corp., 762 F.2d at 1579 n.8 ("significant probative evidence of a conspiracy is an essential element of all Section 1 violations and of a conspiracy to monopolize in violation of Section 2 ")), GSRG's failure to establish either relevant product market or relevant geographic market is a separate and independent alternative ground for dismissing its Section 1 claims. *E.g.,* Levine, 72 F.3d at 1553; Gulfstream Park Racing Ass'n, 479 F.3d at 1313 (affirming summary judgment dismissing § 1 claim because expert testimony regarding relevant market was legally insufficient). That is because the relevant market is also an element of a Sherman Act Section 1 claim. *See* Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, 588 F.3d 908, 919 (6th Cir. 2009) **[**95]** (quoting Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 962 (6th Cir. 2005) (listing the requisite elements for a claim under Section 1 of the Sherman Act, the second being unreasonable restraint of trade "in the relevant market ")).

The factors governing definition of relevant product market are discussed in the Eleventh Circuit's opinions in *U.S. Anchor* and *Bailey*. ***HN37***[] The Eleventh Circuit has noted that any economically meaningful relevant product market definition must take into account evidence of virtually complete "supply substitution." *See U.S. Anchor Mfg., 7 F.3d at 995* ("cross-elasticity of production facilities may also be an important factor in defining a product market"); *Bailey v. Allgas, Inc., 284 F.3d at 1247* (affirming failure of proof on relevant product market where plaintiff's expert failed to consider costs of switching); *Rebel Oil v. Atlantic Richfield Co., 51 F.3d 1421,1436 (9th Cir. 1995)* (citing Areeda treatise for proposition: "If producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market."). Whether the relevant product market in this case can be limited solely to "black" HRC, or whether it must also include pickled **[**98]** and oiled HRC and other standard finishes, requires examination of a number of factors, including: (a) demand substitution; (b) supply substitution; (c) price sensitivity; (d) specialized distribution channels; and (e) industry recognition. *See U.S. Anchor, 7 F.3d at 995*; *Bailey, 284 F.3d at 1246-47*.

Dr. Crandall's evidence concerning relevant product market is purely conclusory, [42] not supported by actual data (or evidence) in the record, and does not take into account demand-side or supply-side substitution. For example, the *Rule 56* evidence is undisputed that producers can readily increase their black HRC output by simply not pickling and oiling or performing other standard finishing processes. [43] Pickled **[*1236]** and oiled hot rolled coil is essentially hot rolled coil that is subjected to one additional process. When pickled and oiled HRC is sold, the price increase is small and based upon a fixed cost-based price differential (as compared to black HRC). Accordingly, if there were a black HRC price increase in the market, producers could (and would) immediately increase their black HRC output.

GSRG argues that because one cannot use both products as substitutes, the pickled and oiled should be ignored. However, this argument ignores the realities of the marketplace. Producers of pickled and oiled hot rolled coil already have the appropriate substitute product by simply foregoing the one additional process required to produce the pickled and oiled product. In light of GSRG's expert's failure to consider the cross-elasticity of supply between these two products, the report is fundamentally flawed and fails to consider the relevant product market. For this reason, GSRG failed to present evidence that Nucor would possess market power **[**100]** in the relevant product market. The court agrees with the Special Master's conclusion that, GSRG's proposed product market definition fails as a matter of law and for this reason Nucor is entitled to summary judgment on all of GSRG claims.

2. The Relevant Geographic Market

Contrary to GSRG's assertions otherwise, the Special Master faithfully applied the controlling test for geographic market definition in the Eleventh Circuit: [44]

[42] For this reason the Special Master correctly determined that even if Dr. Crandall's assertions **[**99]** regarding product market were to be considered, given the overwhelming and undisputed record evidence to the contrary, no reasonable trier of fact could find that the relevant product market in this case is limited solely to black HRC. (Doc. #305 at 44-45).

[43] As the Special Master found based upon the undisputed evidence, "producers of 'pickled and oiled' hot rolled coil need only refrain from running black hot rolled coil through the additional process to change production in response to a price increase for black hot rolled coil." (Doc. #305 at 44).

[44] In one of its objections, GSRG asserts that the Special Master "compounds his error" by applying the Elzinga-Hogarty **[**102]** LIFO test rather than utilizing an applicable analysis. (Doc. #312 at 8). However, the Special Master referenced the Elzinga-Hogarty test, but only to illustrate a point. (Doc. #305 at 37). The Special Master applied and conducted his analysis under applicable Eleventh Circuit precedent pronounced in *T. Harris Young, 931 F.2d at 823*. (Doc. #305 at 33-36). GSRG is in error on one other point (albeit a moot one here). Courts, including the one cited by GSRG, have utilized the Elzinga-Hogarty as part of an appropriate analysis. *See, e.g., California v. Sutter Health System, 130 F. Supp. 2d 1109, 1120-21 (N.D. Cal. 2001)*; *see also U.S. v. Oracle Corp., 331 F. Supp. 2d 1098, 1161 (N.D. Cal. 2004)*.

> ***HN38***[] A geographic market is only relevant for monopoly purposes where [the evidence] show[s] that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area.

T. Harris Young, 931 F.2d at 823; (Doc. #305 at 34). GSRG has the burden of showing that its proposed market definition is correct. To state a Sherman Act claim under either *section 1* or *section 2*, the plaintiff bears the burden of proof on the alleged relevant market. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories, 849 F.2d 1336, 1341 (11th Cir. 1987)*; *see also* *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998)*. "A relevant market consists of both a product market and a geographic market." *Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 596 (8th Cir. 2009)*; **[**101]** *see also* *Ad-Vantage Tel. Dir. Consult., 849 F.2d at 1341*; *Community Hosp. of Andalusia, Inc. v. Tomberlin, 712 F. Supp. 170, 172 (M.D. Ala. 1989)*. The Special Master correctly applied the test formulated by our court of appeals. In doing so he found that there were at least four independent reasons that GSRG's proposed geographic market does not pass muster. GSRG proposes that the relevant geographic market in this case consists of 10 states in the Southeast (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Texas), without consideration of any sources which could ship hot rolled coil into the Southeast Region. **[*1237]** (Doc. #305 at 33). However, GSRG's expert report indicates that several steel mills outside the Southeast shipped large quantities of hot rolled coil into the Southeast during the relevant time period. In fact, GSRG's expert has also indicated that at least some foreign-produced hot rolled coil enters these Southeast states. (Doc. #305 at 34-36). Therefore, GSRG's 10-state Southeast market is unrealistic.

The undisputed evidence of shipments hot rolled coil into the proposed market suggests that the mills that previously made these shipments, and others - including domestic and foreign suppliers - could expand production capacity and/or divert hot rolled coil into the Southeast region. As noted by the Special Master, ***HN39***[] a "geographic market is only relevant for monopoly purposes where these factors show that consumers within the geographic area cannot realistically turn to outside sellers should prices **[**103]** rise within the defined area." (Doc. #305 at 34) (quoting *T. Harris Young & Assoc., 931 F.2d at 823*). Indeed, some evidence supporting the inference that consumers within the proposed geographic market *could not* turn to sellers outside the geographic market is necessary to survive summary judgment. *See* *T. Harris Young & Assoc., 931 F.2d at 824*. GSRG provided no such evidence. To the contrary, the record is replete with evidence that sellers outside GSRG's proposed geographic market could, and did, ship significant quantities of hot rolled coil into GSRG's proposed geographic market. Applying the Eleventh Circuit's teaching in *T. Harris Young* here to the undisputed evidence, it is clear "that consumers within [GSRG's proposed] geographic area can[] realistically turn to outside sellers should prices rise within the defined area." *931 F.2d at 823*. Therefore, the court agrees with the Special Master's conclusion that GSRG has failed to establish that the relevant geographic market should be limited to the region proposed by GSRG.

3. No Dangerous Probability of Achieving Monopoly Power

HN40[] For GSRG to establish Counts II and III, the *Section 2* attempted monopolization claim and the conspiracy **[**104]** to monopolize claim, GSRG must establish that there was a "dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power." *U.S. Anchor Mfg., 7 F.3d at 993* (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. "To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power." *U.S. Anchor Mfg., Inc., 7 F.3d at 994*. Where the alleged monopolist's market share is "less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success . . . as a matter of law." *U.S. Anchor Mfg., Inc., 7 F.3d at 1001*. There can be no "dangerous probability of success" if the defendant "was never able to maintain a majority position in the market." *U.S. Anchor Mfg., 7 F.3d at 1001*.

> [B]ecause [defendant] possessed less than 50% of the market at the time alleged predation began and throughout the time it was alleged to have continued, there was no dangerous probability of success. . . as a matter of law.

Id.; *see* Fourth Report at 41 & n. 196 (quoting *U.S. Anchor*).

Applying *U.S. Anchor* to the *Rule 56* **[**105]** facts in this case, the Special Master correctly found that:

> Like the plaintiffs in *U.S. Anchor*, GSRG cannot prove that Nucor's market share ever surpassed 50% during the relevant time period, even on the basis of current shipments into GSRG's postulated 10-State market. GSRG concedes that it cannot show Nucor's market **[*1238]** share at the inception of the alleged anticompetitive activity in 2002, or in 2003, and that Nucor's market share had only reached 42.7% by 2004 - *two years after the alleged anticompetitive activity began [and was completed].* Thus, GSRG cannot demonstrate that Nucor ever held a majority position in the market and, like the plaintiff's claim in *U.S. Anchor*, its attempted monopolization claim fails as a matter of law.

Id. at 41 (footnote omitted) (emphasis added).

Second, the Special Master also held that GSRG could not establish a "dangerous probability" of successful monopolization in its proposed "10 Southeast state" hot rolled coil market because it failed to prove that firms located outside that area could not expand or divert capacity to serve the 10-state area in the event of a Nucor-instigated price increase. *Id.* at 42; *see also* *Bailey, 284 F.3d at 1256*; *Rebel Oil Co., 51 F.3d at 1443*. **[**106]** For those reasons, the Special Master correctly concluded that GSRG has failed to show that Nucor *ever* surpassed the 50% threshold during the relevant time period following the alleged anticompetitive conduct. Therefore, the court agrees with the Special Master's recommendation that GSRG has failed as a matter of law to show that Nucor had a dangerous probability of achieving monopoly power.

VI. Conclusion

For all the foregoing reasons, the court finds no error in the Reports of the Special Master and each Report is due to be adopted and the recommendations accepted. A separate order in accordance with this memorandum opinion will be entered.

DONE and **ORDERED** this 29th day of September, 2011.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

Tese-Milner v. Diamond Trading Co., Ltd.

United States District Court for the Southern District of New York

September 29, 2011, Decided; September 29, 2011, Filed

04 Civ. 5203 (KMW)

Reporter

2011 U.S. Dist. LEXIS 111514 *; 2011 WL 4501336

ANGELA TESE-MILNER as CHAPTER 7 TRUSTEE OF THE ESTATE OF W.B. DAVID & CO., INC., Plaintiff, -against- DIAMOND TRADING COMPANY, LTD., Defendant.

Subsequent History: Affirmed in part and vacated in part by, Remanded by *W.B. David & Co. v. De Beers Centenary AG, 2013 U.S. App. LEXIS 591 (2d Cir. N.Y., Jan. 10, 2013)*

Prior History: *Tese-Milner v. Diamond Trading Co., 2010 U.S. Dist. LEXIS 143934 (S.D.N.Y., May 14, 2010)*

Core Terms

Diamond, Sherman Act, Sightholder, conspiracy, relates back, advertising and marketing, abandoned, allegations, settlement, purchases, motion to dismiss, antitrust, asserts, rough, amended complaint, notice, restraint of trade, statute of limitations, operative fact, monopolize, parties, factual allegations, original complaint, three year, relevant market, terminated, Campaign, Donnelly Act, contends, entities

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Judges: Kimba M. Wood, United States District Judge.

Opinion by: Kimba M. Wood

Opinion

OPINION & ORDER

Wood, U.S.D.J.:

On April 13, 2010, Plaintiff Angela Tese-Milner ("Plaintiff"), as Chapter 7 Trustee of the Estate of W.B. David & Co., Inc. ("W.B. David"), filed a Second Amended Complaint ("SAC") in the above-captioned action, alleging, inter alia, violations of various federal and state antitrust laws. (Dkt. No. 262.) Defendant Diamond Trading Company, Ltd. ("Diamond Trading" **[*4]** or "Defendant") moves to dismiss the SAC for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)* ("*Rule 12(b)(6)*"). (Dkt. No. 276)

For the reasons stated below, the Court grants Defendant's motion to dismiss.

I. Factual and Procedural Background[1]

W.B. David was a corporation located in New York, New York. Diamond Trading is incorporated in the United Kingdom. (SAC ¶ 6.) Diamond Trading is a member of a group of companies affiliated with the De Beers Group ("De Beers" or "De Beers Group"). De Beers is a group of related companies involved in the production, purchase, and sale of rough diamonds, which are diamonds that have not been cut or polished. (SAC ¶¶ 7-10.) From 1969 to

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[1] A court considering a 12(b)(6) motion must "accept[] all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor." *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt., LLC, 595 F.3d 86, 91 (2d Cir. 2010)*.

2003, W.B. David was a De Beers' Sightholder—a company selected by De Beers to purchase and sell De Beers' rough diamonds. (SAC ¶ 3.)

A. Original Complaint

On July 1, 2004, W.B. David filed a 140-page Original Complaint ("OC") **[*5]** in this action, asserting 36 claims against over 100 defendants, including Diamond Trading. (Dkt. No. 1.) The OC alleged that De Beers controlled the world diamond market and was engaged in anticompetitive conduct affecting the United States markets for rough and polished diamonds. The OC's allegations focused on two categories of conduct.

First, the OC focused on the Supplier of Choice program, a program that De Beers introduced in 2003 to select its Sightholders. The OC stated that, on June 3, 2003, Diamond Trading had informed W.B. David by letter that it did not qualify as a Sightholder under Supplier of Choice, and that it would lose its Sightholder status after a transitional six-month period (i.e., after December 2003). The OC alleged that De Beers terminated W.B. David as a Sightholder after De Beers used the Supplier of Choice program to reduce the number of Sightholders, thereby restricting the supply of diamonds to the market and raising diamond prices. Second, the OC stated that De Beers had stolen from W.B. David a proprietary diamond marketing campaign titled "Leading Jewelers of the World" ("LJW"). The OC alleged that these two categories of conduct by De Beers—the Supplier **[*6]** of Choice Program and the LJW campaign—violated: (1) federal and state antitrust laws, including *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*; (2) Racketeering Influenced and Corrupt Organizations Act; and (3) state common law.

On January 25, 2006, unsecured creditors filed an involuntary Chapter 7 bankruptcy petition against W.B. David in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The Bankruptcy Court entered an order of relief on February 8, 2006, and appointed Angela Tese-Miner (Plaintiff) as Trustee of the W.B. David Estate. (SAC ¶¶ 4-5.)

B. Amended Complaint

On July 11, 2007, Plaintiff filed an 11-page Amended Complaint ("AC"), omitting all but seven of the original defendants. (Dkt. No. 151.) In the AC, Plaintiff brought claims against Diamond Trading and six other companies allegedly related to De Beers. Plaintiff abandoned all of the OC's specific allegations regarding the Supplier of Choice program and the LJW campaign. Instead, the AC alleged that De Beers is involved in "an amorphous, world-wide conspiracy with unnamed co-conspirators to control the global diamond market." See Tese-Milner v. Diamond Trading Co., No. 04 cv. 05203, at 27 (S.D.N.Y. Feb. 24, 2010) **[*7]** . The AC alleged that De Beers' monopolistic conduct has anticompetitive effects in the diamond market and violates *Sections 1* and *2* of the Sherman Act and *Section 340* of the Donnelly Act. (Id.)

In September 2007, certain defendants filed a motion to dismiss the AC for failure to state a claim, pursuant to *Rule 12(b)(6)*. Other defendants (the "Jurisdictional Defendants") moved to dismiss the AC for lack of personal jurisdiction, pursuant to *Federal Rule of Civil Procedure 12(b)(2)*, and for insufficient service of process pursuant to *Federal Rule of Civil Procedure 12(b)(5)*. (Dkt. Nos. 154 & 162.)

On January 23, 2009, this Court issued an order addressing the Jurisdictional Defendants' motion to dismiss. See *Tese-Milner v. De Beers Centenary A.G., et al. ("Tese-Milner I"), 613 F. Supp. 2d 404 (S.D.N.Y. 2009)*. The Court found, inter alia, that Plaintiff had made a sufficient start toward a showing of jurisdiction, and allowed jurisdictional discovery.

On August 31, 2009, after the completion of jurisdictional discovery, Plaintiff moved for leave to file a Second Amended Complaint pursuant to *Federal Rule of Civil Procedure 15(a)*. (Dkt. **[*8]** No. 235.) Defendants opposed that motion and cross-moved to dismiss the AC pursuant to *Rule 12(b)(6)*. The Jurisdictional Defendants also renewed their motion to dismiss. (Dkt. Nos. 238 & 240.)

On February 24, 2010, the Court issued an opinion and order, inter alia, (1) granting the Jurisdictional Defendants' motion to dismiss the AC; (2) denying Plaintiff's motion for leave to amend; and (3) granting defendants' motion to dismiss the AC pursuant to *Rule 12(b)(6)*. See Tese-Milner v. Diamond Trading Co. (Tese-Milner II), No. 04 cv.

05203 (S.D.N.Y. Feb. 24, 2010); see also Dkt. Nos. 259 & 267.[2] The Court held that, because the AC omitted "almost all of the OC's factual allegations," and instead introduced a new set of operative facts, the AC did not relate back to the OC for statute of limitations purposes. Tese-Milner II at 27. The Court noted that there was "not a single reference in the AC to the Supplier [of] Choice Program or De Beers' U.S. marketing, advertising, or retail claims." Id. The Court thus found that the AC's claims were limited to conduct that occurred on or after February 8, 2002—which is four years prior to the filing of the AC and an additional two years from the order **[*9]** of relief in the bankruptcy proceeding, which was entered on February 8, 2006.[3] The Court also found that the Plaintiff had failed to: (1) identify specific conduct by Diamond Trading that violated antitrust laws; (2) allege an agreement between Diamond Trading and a non-De Beers Group organization; and (3) allege a relevant market in which the conduct had occurred. Finally, the Court held that Plaintiff could replead her claims against Diamond Trading. See Tese-Milner II at 36 ("If Plaintiff can make out more specific, factual allegations about the role of Diamond Trading in De Beers' alleged monopoly, however, then Plaintiff may be able to state a claim against the company.").

C. **[*10]** Second Amended Complaint

On April 13, 2010, Plaintiff filed the instant SAC, asserting the following: (1) combination and conspiracy to restrain trade in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*; (3) attempt to monopolize in violation of *Section 2* of the Sherman Act; (4) conspiracy to monopolize under *Section 2* of the Sherman Act; (5) combination and conspiracy to restrain trade in violation of the Wilson Tariff Act, *15 U.S.C. § 8 et. seq.* (the "Wilson Act"); and (6) combination and conspiracy to monopolize and restrain trade in violation of the Donnelly Antitrust Act, *N.Y. Gen. Bus. Law § 340* (the "Donnelly Act"). (SAC ¶¶ 123-161.)

The SAC challenges four categories of alleged conduct by Defendant. First, Plaintiff asserts that Defendant horizontally restrained the supply in the U.S. rough diamond market, in violation of *Section 1* of the Sherman Act, when members of the De Beers Group entered into agreements with ALROSA, a Russian diamond mining company and a competitor of the De Beers Group. (SAC ¶¶ 35-47.) Second, Plaintiff asserts that Defendant vertically restrained trade, in violation **[*11]** of *Section 1* of the Sherman Act, by entering into curtailment agreements with De Beers Consolidated Mines, Ltd. ("DBCM"), a member of the De Beers Group, and by entering into sales agreements with the Government of Botswana. (SAC ¶¶ 48-62.) Third, Plaintiff challenges various elements of Defendant's advertising and marketing campaigns, including its U.S. Carat Club, and its De Beers Limited Edition of Millennium Diamonds Campaign ("Millennium Campaign"), as violations of *Section 2* of the Sherman Act. (SAC ¶¶ 68-94.) Finally, Plaintiff resurrects her claims related to Defendant's Supplier of Choice program that were included in the OC, but not in the AC. Plaintiff alleges that the program violated *Section 2* of the Sherman Act. (SAC ¶¶ 95-122.)

On May 7, 2010, Defendant moved to dismiss the SAC pursuant to *Rule 12(b)(6)*. (Dkt. No. 264.) Defendant asserts that the SAC fails to allege any specific, actionable conduct by Defendant. Defendant also asserts that the conduct alleged by Plaintiff as unlawful falls outside of the applicable limitations period. Specifically, Defendant contends that Plaintiff must allege wrongful conduct by Defendant that took place between February 8, 2002, the **[*12]** limitations period identified in the Court's February 24, 2010 opinion dismissing the AC, and December 2003, when W.B. David ceased to be a Sightholder. With respect to that latter date, Defendant contends that Plaintiff may assert only those claims that are based on purchases that it made as a Sightholder, because Plaintiff's non-Sightholder claims (all claims arising after 2003, when Plaintiff's Sightholder status was terminated) are covered by a class action settlement release in a related case, Sullivan v. DB Inv., No. 04 cv. 2819 (D.N.J. June 14, 2004) (the "Sullivan release").

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[2] The original Opinion and Order was filed under seal on March 1, 2010. (Dkt. No. 259.) A redacted version of the Opinion and Order was filed publicly on May 14, 2010. (Dkt. No. 267.)

[3] The statute of limitations for Sherman Act claims is four years, accruing when the defendant commits an act that injures the plaintiff. *15 U.S.C. § 15b*. When a plaintiff files for bankruptcy, the statute of limitations is tolled for two years from the date that the bankruptcy court files the order for relief. *11 U.S.C. § 108(a)*.

The Sullivan release covers two settlement classes: the Direct Purchaser Class and the Indirect Purchaser Class. The Direct Purchaser Class includes all persons who purchased a rough or polished diamond directly from a defendant, including any affiliate of a defendant, or a defendant's competitor. The Indirect Purchaser Class includes persons who purchased a rough or polished diamond from someone other than a defendant, an affiliate of a defendant, or a defendant's competitors.[4] Plaintiff admits to being a member of both settlement classes. See Letter for John A. Wait, August 12, 2010.

The Release contains an exception for direct purchaser claims of Sightholders. See Am. Settlement Agreement § V(A) ("Nothing in the Settlement is intended to release any direct purchaser claim of any Sightholder."). A "sightholder" is defined as "a customer . . . entitled to purchase Rough Diamonds from **[*14]** [De Beers Defendants] as a regularly scheduled Sight or Sights," and, "Sightholder status terminates when [this right] . . . terminates." Id. at §I(PP).

The parties agree that, should the Sullivan settlement remain in effect,[5] the Sullivan release covers all of Plaintiff's claims against Defendant except any claims arising out of W.B. David's purchases as a Sightholder. See John A. Wait Letter, Aug. 12, 2010; see also *Tese-Milner I, 613 F. Supp. 2d at 409* ("The parties agree that the settlement limits Plaintiff's claims in the instant case to those based on W.B. David's purchases as a Sightholder . . . .").

On September 14, 2010, the Court issued an order denying Defendant's **[*15]** motion to dismiss the SAC without prejudice, on the basis that the parties had insufficiently briefed several issues. (Dkt. No. 275.) The Court granted Defendant leave to refile its motion and ordered that the parties submit supplemental briefing on the following three issues: (1) whether any specific factual allegations in the SAC relate back to the OC; (2) whether Plaintiff's Supplier of Choice claims are covered by the Sullivan release; and (3) whether Plaintiff's Supplier of Choice claims are barred by the statute of limitations or, alternatively, whether they relate back to the OC, notwithstanding the fact that they were dropped from the AC. (Id.)

On October 22, 2010, Defendant refiled its motion to dismiss. The parties have filed supplemental briefs responding to the Court's September 14, 2010 order. (Dkt. No. 276.)

II. Legal Standard: Motion to Dismiss

In order to survive a *Rule 12(b)(6)* motion, a plaintiff must have pleaded sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable **[*16]** inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. Where a plaintiff has not "nudged [his or her] claims

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[4] The Sullivan release **[*13]** provides that:

> Upon the Effective Date, the Released Parties shall be released and forever discharged from any and all claims, causes of action, demands, rights, actions, suits and requests for equitable, legal and administrative relief of any kind or nature whatsoever . . . that any member of the Settlement Classes who has not timely excluded himself, herself or itself from the action, ever had, could have had, now has, or can, shall or may have in the future . . . concerning the exploration, mining, processing, treatment, sorting, distribution, marketing, advertising, sale or pricing of any Diamond Product, including but not limited to . . (iii) methods of distribution or distribution programs of any Diamond Product (including but not limited to the Supplier of Choice program) including all means of selling or distributing any Diamond Product. . . ."

Am. Settlement Agreement § V(A).

[5] On July 13, 2010, a three-judge panel from the Third Circuit Court of Appeals vacated the settlement approval on grounds relating to class certification. *Sullivan v. DB Invs., 613 F.3d 134 (3d Cir. 2010)*. On August 27, 2010, the Third Circuit granted a petition by the class-action plaintiffs for a rehearing en banc, and vacated the Third Circuit's July 13, 2010 opinion. *Sullivan v. DB Invs., 619 F.3d 287 (3d Cir. 2010)*. Oral argument was held on February 23, 2011, but the en banc court has not yet issued a decision.

across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly, 550 U.S. at 570*. The Court must accept as true all well-pleaded factual allegations in the complaint, and "draw[ ] all inferences in the plaintiff's favor." *Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006)* (internal quotations omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, 129 S. Ct. at 1949*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

There is no heightened pleading requirement in antitrust cases. See *Twombly v. Bell Atl. Corp., 425 F.3d 99, 108-09 (2d Cir. 2005)*, rev'd on other grounds, *550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("We have consistently rejected the argument . . . that antitrust complaints merit a more rigorous pleading standard.").

III. Legal Standard: Sherman Act Claims

Plaintiff brings claims under *Sections 1* and *2* of the **[*17]** Sherman Act.

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act makes it illegal to enter into a "contract, combination . . . or conspiracy" to restrain trade or commerce. *15 U.S.C. § 1*. To properly plead a violation of *Section 1*, a plaintiff must allege that (1) defendants were involved in a contract, combination or conspiracy that (2) operated unreasonably to restrain interstate trade. *In re Elevator Antitrust Litig., No. 04 cv. 1178, 2006 U.S. Dist. LEXIS 34517, 2006 WL 1470994, at *7 (S.D.N.Y. May 30, 2006)* (Greisa, J.). The bare assertion of a conspiracy is not enough to survive a *Rule 12(b)(6)* motion to dismiss; the complaint must contain "enough factual matter (taken as true) to suggest that an agreement [to restrain trade] was made." *Twombly, 550 U.S. at 556*. A well-pleaded complaint should include specific, factual allegations as to "the identities of the co-conspirators, the nature of their conspiracy, how the participants attempted to accomplish their objectives, and what overt acts . . . they performed . . . ." *Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 484 (S.D.N.Y. 2001)* (Marrero, J.). "[U]nspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects **[*18]** does not meet the minimum standards of pleading a conspiracy in violation of the Sherman Act." *Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987)*.

Section 1 does not cover wholly unilateral action. See *Gordon v. Lewistown Hosp.., 423 F.3d 184, 207 (3d Cir. 2005)* ("Unilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.") (internal quotations and citations omitted). To state a claim pursuant to the section a plaintiff must allege concerted action by two or more "legally distinct economic entities." *Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 103 (2d Cir. 2000)*.

B. *Section 2* of the Sherman Act

Section 2 of the Sherman Act makes it illegal for an individual to monopolize a market. *15 U.S.C. § 2*. To state a claim of monopolization pursuant to *Section 2*, a plaintiff must allege that the defendant (1) possesses monopoly power in a relevant market; (2) willfully acquired or maintained that power; and (3) engaged in anti-competitive behavior. *Invamed, Inc. v. Barr Labs., Inc., 22 F. Supp. 2d 210, 218 (S.D.N.Y. 1998)* (Sweet, J.).

A relevant **[*19]** market is comprised of the product market and geographic market in which the defendant allegedly exercises monopoly power. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997)*. A product market includes all products that are reasonably interchangeable, which requires consideration of the cross-elasticity of demand (that is, the extent to which a change in the price of one product will alter the demand for another product). *Id. at 436*. A geographic market is the geographic area in which competition occurs. *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227-31 (2d Cir. 2006)*. The allegation of a relevant market is a "prerequisite" to a *Section 2* claim. *Polargrid LLC v. Videsh Sanchar Nigam, Ltd., No. 04 cv. 9578, 2006 U.S. Dist. LEXIS 54434, 2006 WL 2266351, at *6 (S.D.N.Y. Aug. 7, 2006)* (Greisa, J.). Determining a relevant market can be a fact-intensive inquiry, and thus courts often hesitate to dismiss a claim for failing to adequately plead a relevant market. *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*. "There is, however, no absolute rule against [ ] dismissal" on such a ground. *Id. at 200*.

Section 2 also prohibits conspiracies between two or more persons to monopolize. **[*20]** To plead that a defendant was involved in a conspiracy to monopolize, a plaintiff must sufficiently allege (1) that the defendant entered into concerted action with the specific intent of achieving a monopoly, and (2) the commission of overt acts in furtherance of the conspiracy. See *Int'l Distib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 795-96 (2d Cir. 1987)*; *Invamed, Inc., 22 F. Supp. 2d at 220*. To survive a motion to dismiss, an antitrust plaintiff must allege facts "that reasonably tend[ ] to prove that the [defendant] . . . 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (citations omitted).

IV. Analysis

For the reasons that follow, the Court grants Defendant's motion to dismiss.

A. Claims Related to the Supplier of Choice Program

Plaintiff brings claims arising out of Defendant's Supplier of Choice program, through which W.B. David was terminated as a Sightholder. (SAC ¶¶ 95-122.) Plaintiff alleges that the program violated *Section 2* of the Sherman Act because its purpose "was to increase market demand for diamonds in general and to increase market demand for De Beers' **[*21]** diamonds in particular." (Id. ¶ 96.)

The Court dismisses Plaintiff's claims that relate to the Supplier of Choice program, because those claims have been abandoned and fall outside the applicable statute of limitations for actions under the Sherman Act.

1. Legal Standard: Statute of Limitations for Sherman Act Claims

The statute of limitations for Sherman Act claims (as well as Donnelly Act and Wilson Act claims) is four years, accruing when the defendant commits an act that injures the plaintiff. *15 U.S.C. § 15b*; see also *N.Y. Gen. Bus. Law § 340(5)*. In the case of a continuing antitrust conspiracy, the statute of limitations restarts at the time of each overt act that is part of the violation and that injures the plaintiff. *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*. Although for some antitrust cases, a continuing course of conduct can give rise to continually accruing causes of action, there is no continuing violation when the initial refusal to deal is final. *David Orgell, Inc. v. Geary's Stores, Inc., 640 F.2d 936, 938 (9th Cir. 1981)* (statute of limitations starts to run at the initial refusal to sell); see also Phillip E. Areeda and Herbert Hovenkamp, ***Antitrust Law*** ¶ 320c3 **[*22]** (3d. ed. 2007) ("More than almost any other plaintiff, the victim of a direct refusal to deal knows immediately that it has occurred. . . .").

An amended complaint relates back to the filing of the original complaint for statute of limitations purposes where "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading." *Fed. R. Civ. P. 15(c)(1)(B)*. To determine whether relation back is appropriate, courts consider whether the original complaint gave the defendant adequate notice of the matters raised in the amended pleading. *Schiavone v. Fortune, 477 U.S. 21, 31, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)*. An amended complaint relates back if it renders previous allegations more definite and precise, but not if it introduces a new set of operative facts. *Slayton v. Am. Express Co., 460 F.3d 215, 228 (2d Cir. 2006)*. Even where an amended complaint tracks the legal theory of the original complaint, claims based on an entirely distinct set of factual allegations do not relate back for purposes of *Rule 15*. *Bank of Brussels Lambert v. Chase Manhattan Bank, No. 93 Civ. 5298, 1999 U.S. Dist. LEXIS 13235, 1999 WL 672302, at *2 (S.D.N.Y. Aug. 27, 1999)* (McKenna, **[*23]** J.) (stating that there is no relation back if the amendment sets forth a "separate set of operative facts").

When an amended pleading relates back to an earlier pleading, it will be deemed to have been filed on the date of the earlier pleading. When an amended pleading does not relate back to an original pleading, it will be deemed to be filed on its actual filing date. *In re Noah Educ. Holdings, Ltd. Sec. Litig., No. 08 Civ. 9203, 2010 WL 1372709, at *9-10 (S.D.N.Y. Mar. 31, 2010)* (Sullivan, J.).

2. Analysis

The Court finds that Plaintiff, having abandoned her Supplier of Choice program claims in her AC, is not permitted to resurrect those claims by filing her SAC.

The OC, filed on July 1, 2004, asserted claims under the Sherman Act based on an alleged plot by the De Beers Group to increase its control over the U.S. diamond market through the Supplier of Choice program, resulting in W.B. David's termination as a Sightholder.

Over three years later, on July 11, 2007, Plaintiff filed her AC, in which she omitted the factual allegations involving the Supplier of Choice program, and instead asserted claims based an alleged broad-based conspiracy to control the diamond industry. Because there **[*24]** was not a single reference to the Supplier of Choice Program in the AC, the Court, in its opinion dismissing the AC, found that the AC introduced a new set of operative facts, and therefore, did not relate back to the OC. See Tese-Milner II at 27-28. The Court permitted Plaintiff to replead only the claims against Defendant Diamond Trading, in order to allege with greater particularity her conspiracy claim against Diamond Trading. See id. (identifying Plaintiff's fundamental flaws in her AC, including her failure to (1) identify specific conduct by Diamond Trading that violated ***antitrust law***; (2) allege an agreement between Diamond Trading and a non-De Beers Group Entity; and (3) allege a relevant market).

Another three years later, on April 13, 2010, Plaintiff filed her SAC. In the SAC, Plaintiff did not allege with greater particularity the broad-based conspiracy claims that she had alleged in her AC. Rather, she resurrected her Supplier of Choice claims, claims that she had abandoned three years earlier, and claims with which Defendant had not been presented for nearly six years.

There is nothing in the Federal Rules of Civil Procedure that allows a plaintiff to resurrect once-abandoned **[*25]** claims by (1) filing another complaint; (2) including those abandoned claims in that new complaint; and (3) contending that the new complaint relates back to the original complaint. Plaintiff nevertheless asks the Court to find that she did not abandon her Supplier of Choice claims, because those claims contained in the SAC relate back to the OC, notwithstanding the fact that those claims were dropped entirely from the AC.[6] Here, Plaintiff alleged a set of facts in her original complaint, did not include those facts in an amended complaint filed three years later, and then, almost another three years later, attempted to resurrect the original set of facts in her second amended complaint. Plaintiff is thus asking the Court to find that the Supplier of Choice claims in the third complaint relate back to the first complaint, even though they were omitted from the second complaint.

The Court rejects this argument. Relation-back cannot be used as a mechanism to revive abandoned claims.[7] Cf. *Vogel v. Am. Kiosk Mgmt., 371 F. Supp. 2d 122, 129-30 (D. Conn. 2005)* ("In many instances the procedure for,

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[6] Plaintiff does not dispute that, absent relation back, her Supplier of Choice claims are barred by the statute of limitations. In the SAC, Plaintiff states that, on or about July 12, 2000, the De Beers group launched the Supplier of Choice program, which altered the way in which its Sightholders were selected. **[*26]** (SAC ¶ 95.) On June 3, 2003, W.B. David was notified that it failed to qualify as a Sightholder under the Supplier of Choice program. (Id. ¶ 109). After a six-month transition period (i.e., after December 2003), W.B. David ceased being a Sightholder, and was no longer able to able to purchase rough diamonds from Defendant. (Id.) At that point, W.B. David's termination was final; Plaintiff does not allege any attempt by W.B. David to regain its Sightholder status. Thus, based on a straightforward application of the statute of limitations, Plaintiff should have brought claims related to the Supplier of Choice program within four years after W.B. David learned that it would no longer be a Sightholder, i.e., by June 2007, and certainly no later than four years after its actual termination as a Sightholder, i.e., by December 2007. The SAC was not filed until April 2010.

[7] If the Court were to take Plaintiff's argument to its extreme conclusion, a plaintiff would be permitted, for example, to file a complaint alleging a breach of contract claim based on one set of facts, file dozens of amended complaints alleging breach of contact claims based on entirely different sets of facts, and then, twenty-years later, file a complaint alleging a breach of contact claim based on the original set of facts, asserting that the newest complaint relates back to the original complaint, simply

and effect of, an amendment will be the same as a voluntary dismissal under *41(a)(1)* because of the similarities **[*27]** between the governing rules.");[8] *Hollenberg v. AT&T Corp., No. 95 Civ. 9515, 2001 U.S. Dist. LEXIS 19447, 2001 WL 1518271, at *2 (S.D.N.Y. Nov. 28, 2001)* (McKenna, J.) ("[D]iscontinuance does not toll the statute of limitations.") (citations omitted).

Plaintiff asserts that she never expressly withdrew any claims, but rather, amended her pleadings. Plaintiff characterizes her amendments as changes "in legal theory." (Pl. Supp. Br. at 2, 5 n.1.) In the AC, however, Plaintiff did not simply change her legal theory. Rather, she pleaded an entirely different set of operative facts to support her claim for antitrust injury. The OC's allegations concerning the Supplier of Choice program focused on the harm suffered by W.B. David as a result of it being deprived of its Sightholder status. The OC sought damages for a period of time following W.B. David's termination as a Sightholder in 2003. The AC, in contrast, focused on an alleged conspiracy between the De Beers Group and unidentified coconspirators. The AC sought damages from a period of time prior to 2003, during which W.B. David was a Sightholder and was allegedly being forced to overpay for diamonds.

The Federal Rules of Civil Procedure allow for the relation back of claims only when the court is confident that the defendant has notice of those claims. See *Bridgeway Corp. v. Citibank, N.A., 132 F. Supp. 2d 297, 301 (S.D.N.Y. 2001)* **[*29]** (Chin, J.) ("Under *Rule 15(c)*, the essential inquiry in determining whether the new allegations relate back is whether the defendant was given adequate notice that such claims might be made upon examining the facts alleged in the original pleading.") (quotations and citations omitted). Plaintiff contends that the OC put Defendant on notice of her Supplier of Choice claims. Plaintiff is correct that the Defendant was on notice of the Supplier of Choice claims while the OC was pending. However, by not including the Supplier of Choice claims in her AC, Defendant was no longer on notice of those claims. When Plaintiff chose not to include her Supplier of Choice claims in her AC, it was reasonable for Defendant to believe that Plaintiff no longer wished to pursue a cause of action for antitrust injury based on the operative facts surrounding the Supplier of Choice program. As a result, for nearly three years between the filing of the AC and the filing of the SAC, Defendant was likely preparing to defend against claims arising out of a different set of operative facts. (See Def. Supp. Reply Mem. at 10.) The intervening complaint—the AC—essentially resulted in there being a lack of notice **[*30]** to Defendant with respect to Plaintiff's Supplier of Choice claims. Accordingly, it would be highly prejudicial to allow Plaintiff to relate back those claims that she abandoned nearly three years earlier.[9]

In sum, Plaintiff could have pled in the alternative, or kept her Supplier of Choice claims alive in **[*31]** some other manner in her AC, but she did not do so. Rather, she abandoned those claims, letting them lie dormant until the statute of limitations had run. For these reasons, the Court finds that Plaintiff's claims arising out of the Supplier of Choice Program have been abandoned, and cannot relate back to the OC.

3. The Supplier of Choice Claims and the Sullivan Release

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because the original complaint contained those same facts. That result is clearly not envisaged by the Federal Rules of Civil Procedure.

[8] Vogel is distinguishable from the instant facts, because, in Vogel, the plaintiff expressed intent to withdraw certain claims in an opposition to a motion to dismiss, rather than amend her complaint. Nevertheless, the Vogel decision makes clear that when a plaintiff makes an affirmative decision to no longer pursue certain claims, **[*28]** that decision is akin to a voluntary dismissal of those claims.

[9] It is true that courts have found that a second amended complaint can relate back to an original complaint. See *Prescott v. Annetts, No. 09 Civ. 4435, 2010 U.S. Dist. LEXIS 75025, 2010 WL 3020023, at *6 (S.D.N.Y. July 22, 2010)* (McMahon, J.) (finding that the Section 1983 claims in plaintiff's first and second amended complaints are not time-barred because they relate back to the original complaint); *DeLong v. Soufiane, No. 05 cv. 5529, 2010 U.S. Dist. LEXIS 2944, 2010 WL 234781, at *3 (E.D.N.Y. Jan. 14, 2010)* ("[T]he Court finds that all but two causes of action alleged in the Second Amended Complaint are timely because they relate back to the filing of the original Complaint."). However, in those decisions, there was no suggestion that the plaintiff had abandoned any set of claims in an intervening complaint, or that the plaintiff's original complaint contained a different operative set of facts than the subsequent amended complaints.

In addition to dismissing Plaintiff's Supplier of Choice claims on the basis that they have been abandoned and fall outside the applicable statute of limitations period, the Court may not consider Plaintiff's Supplier of Choice claims because they are barred by the Sullivan release, should the settlement remain in effect.[10] The Sullivan release states that the "Released Parties shall be released and forever discharged from any and all claims . . . concerning . . . (iii) methods of distribution or distribution programs of any Diamond Product (including but not limited to the Supplier of Choice program) including all means of selling or distributing any Diamond Product. . . ." Am. Settlement Agreement § V(A) (emphasis added). Notwithstanding the Release's explicit reference to "distribution programs of any Diamond Product **[*32]** (including but not limited to the Supplier of Choice program)," Plaintiff contends that her Supplier of Choice claims fall within the exception to the Release for direct purchaser claims of Sightholders. See id. § V(A) ("Nothing in the Settlement is intended to release any direct purchaser claim of any Sightholder.").[11]

Plaintiff's own characterization of her Supplier of Choice claims makes clear that her claims do not fall within the exception for "any direct purchaser claims of any Sightholder." According to Plaintiff, the Supplier of Choice program "resulted in closing most of the U.S. Rough Diamond Market to plaintiff." (SAC ¶ 120.) Plaintiff's Supplier of Choice claims are thus not based on any injury that W.B. David suffered as a result of purchasing diamonds from Defendant as a Sightholder; rather, they are based on the injury W.B. David suffered as a result of no longer being able to make direct purchases from Defendant. Through her Supplier **[*33]** of Choice claims, therefore, Plaintiff is alleging antitrust injury based on the fact that she is no longer a Sightholder. Because those claims do not arise out of direct purchases made as a Sightholder, they are precluded by the Sullivan release.

4. Conclusion

The Court dismisses Plaintiff's Supplier of Choice claims, finding that they have been abandoned, fall outside the applicable limitations period, and are barred by the Sullivan release.[12]

B. Claims Related to Defendant's Advertising and Marketing

Plaintiff challenges Defendant's advertising and marketing activity in the United States, including Defendant's U.S. Carat Club and Defendant's Millennium Diamonds Campaign (hereinafter, collectively "advertising and marketing" **[*34]** claims or activity),[13] as violations of *Section 2* of the Sherman Act. (SAC ¶¶ 68-94.) The Court dismisses those claims because they fall outside the applicable limitations period.

The parties dispute whether Plaintiff's advertising and marketing claims relate back to the OC.[14] Plaintiff asserts that relation back is permissible because the OC contained allegations regarding Defendant's advertising and marketing activity and Defendant therefore had adequate notice of those claims. Plaintiff cites several paragraphs throughout the OC referencing those activities.[15] Defendant contends that there was nothing in the OC to suggest

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[10] See supra note 4.

[11] As noted above, the parties agree that the Sullivan release covers all of Plaintiff's claims against Defendant except any claims arising out of W.B. David's status as a Sightholder. See *Tese-Milner I, 613 F. Supp. 2d at 409*.

[12] Defendant also argues that Plaintiff's Supplier of Choice claims must be dismissed because Plaintiff has (1) failed to allege monopoly power in a relevant market; and (2) failed to allege the willful acquisition or maintenance of monopoly power, both of which are prerequisites for a *Section 2* Sherman Act claim. The Court need not address those agreements because it has dismissed Plaintiff's Supplier of Choice claims under *Section 2* of the Sherman Act for other reasons.

[13] The De Beers Group used the U.S. Carat Club as a way to meet with U.S. Sightholders, as well as other large U.S. manufacturers and retailers. (SAC ¶ 69.) The De Beers Group launched the Millennium Campaign to sell limited edition diamonds inscribed with the De Beers name. (SAC ¶ 80.)

[14] Plaintiff **[*35]** appears to acknowledge that her advertising and marketing claims must relate back to an earlier complaint in order for them to be timely. Plaintiff filed her SAC on April 13, 2010. Four years prior to that date, Plaintiff was admittedly no longer a Sightholder, and so any claims accruing after that date would be barred by the Sullivan Release. Any claims accruing before that date would have had to have been brought earlier than April 13, 2010.

that W.B. David was challenging Defendant's advertising and marketing activity as a basis for an antitrust claim because the paragraphs cited by Plaintiff do not challenge that conduct, but rather, tout W.B. David's involvement in those advertising and marketing activities.

Even assuming that the SAC's allegations regarding Defendant's advertising and marketing activity arise from the same operative facts as allegations contained in the OC, Plaintiff's advertising and marketing claims do not relate back to the OC for the same reasons that Plaintiff's Supplier of Choice claims do not relate back to the OC: they were abandoned in the AC.

The AC contains no reference to any facts surrounding Defendant's marketing and advertising activities. Nor can allegations about an amorphous, world-wide conspiracy with unidentified entities be read to encompass Plaintiff's advertising and marketing claims. By not including these advertising and marketing claims in her AC, Plaintiff conveyed to **[*36]** Defendant that she had abandoned those claims and made an affirmative litigation decision to no longer pursue a cause of action for antitrust injury based on those operative facts. The intervening complaint (the AC) deprived Defendant of notice with respect to Plaintiff's advertising and marketing claims. The Court thus finds that these claims do not relate back to the OC, and dismisses them as falling outside the statute of limitations period.[16][17]

C. Claims Related to Agreements between Defendant and Others

Plaintiff asserts that Defendant horizontally restrained supply in the U.S. Rough Diamond Market, in violation of *Section 1* of the Sherman Act, by entering into agreements with ALROSA, a Russian diamond mining company and a competitor of the De Beers Group. (SAC ¶¶ 35-47.) Plaintiff also asserts that Defendant vertically restrained trade, in violation of *Section 1* of the Sherman Act, by (1) entering into curtailment agreements with DCBM, a member of the De Beers Group; and (2) entering into sales agreements with the Government of Botswana. (SAC ¶¶ 48-62.) For the reasons that follow, these claims are dismissed.

1. DBCM

Plaintiff's claims regarding a conspiracy between Defendant and DBCM—or any other member of the De Beers Group—fail as a matter of law. As the Court has held earlier, "[i]n order to state a claim pursuant to *Section 1* [of the Sherman Act], the SAC must name [at] least one, specific, non-De Beers entity that is allegedly **[*38]** acting in concert with Diamond Trading . . . . The SAC's failure to do so means that it would not survive a *Rule 12(b)(6)* motion to dismiss." Tese-Milner II at 32. See also *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (holding that a parent company and subsidiary are incapable of conspiring for purposes of *Section 1* Sherman Act claims); *Gucci v. Gucci Shops, Inc., 651 F. Supp. 194, 196 (S.D.N.Y. 1986)* (Conner, J.) (applying Copperweld to sister corporations); *N. Atl. Utils., Inc. v. Keyspan Corp., 307 A.D. 2d 342, 343, 762 N.Y.S.2d 820 (App. Div. 2003)* (applying Copperweld to Donnelly Act claims). Accordingly, Plaintiff's claims involving an alleged conspiracy between Defendant and one or more members of the De Beers Group are dismissed.

2. ALROSA

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[15] See OC ¶¶ 165-70, 189, 318, & 331.

[16] Plaintiff does not cite specific dates with respect to her advertising and marketing claims. (See SAC ¶¶ 68-79; 92-94.) In the event that the Sullivan settlement is vacated, Plaintiff is granted leave to replead any claims surrounding Defendant's advertising and marketing activity that are timely as measured from the SAC (accounting for the fact that the Court has found that Plaintiff's advertising and marketing claims in the SAC do not relate back to the OC).

[17] Defendant also argues that Plaintiff's advertising and marketing claims must be dismissed because Plaintiff has (1) failed to allege monopoly power in a relevant market and (2) failed to allege the willful acquisition or maintenance of monopoly power, both of which are prerequisites **[*37]** for a *Section 2* Sherman Act claim. The Court need not address those arguments because it has dismissed Plaintiff's advertising and marketing claims under *Section 2* of the Sherman Act for other reasons.

In the SAC, Plaintiff alleges that a 2001 supply agreement between De Beers Centenary A.G. ("DBCAG") and ALROSA constitutes a horizontal restraint of trade in violation of *Section 1* of the Sherman Act. (SAC ¶ 38.) Plaintiff asserts that "Diamond Trading and other members of the De Beers Group conspired with DBCAG and ALROSA to fix prices and control the supply of rough diamonds in the U.S. Rough Diamond Market through the Alrosa agreement." **[*39]** (SAC ¶ 40.)

Although the ALROSA agreement was mentioned in the OC,[18] the AC did not contain a single reference to ALROSA or to any sales agreement with ALROSA. If it had, the Court, in its February 24, 2010 opinion, might have found that certain parts of the AC related back to the OC. However, like Plaintiff's Supplier of Choice claims and her advertising and marketing claims, the Court finds that the ALROSA claims were abandoned in the AC. The Defendant did not have notice of those claims in the three years between the AC and the SAC, and so relation back is not permissible.

Moreover, even assuming, arguendo, that the ALROSA claims were not abandoned in the AC, the SAC fails to identify Defendant as a party to the 2001 agreement with ALROSA. See SAC ¶ 38 (describing the December 17 2001 agreement as "entered into by DBCAG [De Beers Centenary AG] and Alrosa"). Rather, the SAC contains the broad assertion that, through the 2001 agreement between ALROSA and DBCAG, "Diamond Trading and other members of the De Beers Group conspired with DBCAG and Alrosa to control the **[*40]** supply of rough diamonds." (SAC ¶ 40.) Finally, the SAC suggests that the ALROSA agreement never went into effect, stating that it "was reviewed and ultimately rejected by the European Commission as anticompetitive." (SAC ¶ ¶ 38; 47; see also Def. Mem. at 9 n.5.)

3. Botswana

In the SAC, Plaintiff challenges sales agreements, dated 2001 and 2005, between various members of the De Beers Group and the Government of Botswana. Plaintiff states that, pursuant to those agreements, "the government of Botswana agreed to sell to De Beers all diamonds mined in Botswana by [] Debswana, the joint venture between the government of Botswana and [] Deliebs, a company registered in the British Virgin Island and owned by DBSA [De Beers S.A.]." (SAC ¶ 55.)

The 2005 agreement with Botswana post-dates W.B. David's time as a Sightholder. Accordingly, claims relating to that agreement are barred by the Sullivan Release. See *Tese-Milner I, 613 F. Supp. 2d at 409* ("The parties agree that the settlement limits Plaintiff's claims in the instant case to those based on W.B. David's purchases as a Sightholder . . . .").[19]

With respect to the 2001 agreement, neither the OC nor the AC contains any mention of the Government of Botswana or Debswana. Plaintiff does not dispute this fact, but rather, asserts that the allegations regarding Botswana that are found in the SAC "arise out of the same type of conduct, the formation of sales agreements to maintain Defendant's dominance in the rough diamond market, as that which was alleged in the Original Complaint." (Pl. Supp. Br. at 6 n.2.) Although Plaintiff is seemingly alluding to the OC's reference to the ALROSA agreement, that reference would not have put Defendant on notice of an alleged conspiracy with an entirely different entity that was not mentioned in the OC or in the AC. For these reasons, the SAC's allegations concerning a 2001 agreement with the Government of Botswana do not relate back to the OC.

4. Conclusion

For the foregoing reasons, Plaintiff's claims regarding agreements between Defendant and DBCM, Defendant and ALROSA, and Defendant and the Government of Botswana are dismissed.[20]

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[18] See OC ¶¶ 232-35 (Section titled "De Beers Agreement with ALROSA—De Beers Increases its Rough Diamond Market Control").

[19] In the event that the Sullivan settlement is vacated, Plaintiff is granted leave to replead **[*41]** any claims surrounding Defendant's 2005 agreement with the Government of Botswana.

D. Plaintiff's Remaining Claims

Plaintiff also brings claims for combination and conspiracy to restrain trade in violation of the Wilson Act, *15 U.S.C. § 8*, and for combination and conspiracy to monopolize and restrain trade in violation of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*. (SAC ¶¶ 151-161.)

Plaintiff's claim under the Wilson **[*43]** Act is dismissed on the same grounds as her Sherman Act claims. See *Hunt v. Mobil Oil Corp., 550 F.2d 68, 75 n.8 (2d Cir. 1977)* ("In so far as the substantive antitrust provisions of the Wilson Tariff Act are concerned, they follow the same pattern as the Sherman Act.") (citing *United States v. Cooper Corp., 312 U.S. 600, 608, 61 S. Ct. 742, 85 L. Ed. 1071 (1941)*.)

Plaintiff's claim under the Donnelly Act is also dismissed. The Donnelly Act "was closely patterned after the Sherman Act and has been narrowly construed to encompass only those causes of action falling within the Sherman Act." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., No. 10 Civ. 8, 2011 U.S. Dist. LEXIS 29072, 2011 WL 1044898, at *4 (S.D.N.Y. Mar. 10, 2011)* (Batts, J.) (citations omitted); see also *Great Atl. & Pac. Tea Co., Inc. v. Town of East Hampton, 997 F. Supp. 340, 352 (E.D.N.Y. 1998)* ("The Donnelly Act is patterned after the Sherman Anti-Trust Act . . . and is generally construed in light of federal precedent.").

V. Conclusion

For the reasons stated herein, Defendant's motion to dismiss Plaintiff's SAC is GRANTED.

When a court dismisses a complaint, a "court should freely given leave [to amend]when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Yet, "it is well established **[*44]** that leave to amend a complaint need not be granted when amendment would be futile." *Richardson v. Dept. of Corrections of N.Y.S., No. 10 cv. 6137, 2011 WL 4091491, at *5 (S.D.N.Y Sept. 13, 2011)* (Scheindlin, J.) (citations omitted). Here, because Plaintiff's claims have been dismissed, inter alia, on statute of limitations grounds, the Court finds that any amended complaint would be futile.

However, in the event that the Sullivan settlement is vacated, Plaintiff is granted leave to replead (1) any claims surrounding Defendant's advertising and marketing activity that are timely as measured from the SAC (accounting for the fact that Plaintiff's advertising and marketing claims in the SAC do not relate back to the OC), and (2) any claims related to Defendant's 2005 agreement with the Government of Botswana. In addition, in its February 24, 2010 opinion, the Court dismissed Plaintiff's action against defendant Diamdel N.V. "without prejudice to refile if the Sullivan class action settlement is not finalized."[21] Tese-Milner II, at 5 n.1.

The Clerk of Court is directed to close the docket in this matter.

The parties shall inform the Court within ninety days whether the Sullivan settlement agreement has been vacated.

SO ORDERED.

Dated: New York, New York

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[20] Defendant also argues that Plaintiff's *Section 1* Sherman Act claims related to the **[*42]** ALROSA and Botswana agreements are barred by the Act of State doctrine, which "precludes the courts in this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)*; ***O.N.E. Shipping LTD v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 453-54 (2d Cir. 1987)*** (affirming dismissal of antitrust claims on Act of State grounds). Defendant further argues that Plaintiff's Sherman Act Section 1 claims must be dismissed because Plaintiff has failed to allege a plausible relevant market and has failed to show how Defendant restrained competition. The Court need not address Defendant's Act of State argument, or any of its additional arguments, because it has dismissed Plaintiff's Sherman Act Section 1 claims for other reasons.

[21] The Court noted however, "that Plaintiff [could] assert against Diamdel N.V. only claims that accrued on or after the date on which the Amended Complaint **[*45]** was filed." Tese-Milner II, at 5 n.1.

September 29, 2011

/s/ Kimba M. Wood

Kimba M. Wood

United States District Judge

End of Document

[Vandenberg v. Aramark Educ. Servs.]

Supreme Court of Alabama

September 30, 2011, Released

1100557, 1100560, 1100561

Reporter

81 So. 3d 326 *; 2011 Ala. LEXIS 161 **

David Vandenberg and Elizabeth Beene, individually and for a class of similarly situated persons v. Aramark Educational Services, Inc., et al.Chloe Compton, Morgan Peppers, and Leigh Ellen Black, individually and for a class of similarly situated persons v. Compass Group, USA, Inc., d/b/a/ Chartwells, et al.John Lane and Natalie Smith, individually and for a class of similarly situated persons v. Sodexo, Inc., et al.

Subsequent History: As Corrected May 9, 2012.
Released for Publication February 3, 2012.

Prior History: [1]** Appeals from Jefferson Circuit Court. (CV-10-902889; CV-10-902891; and CV-10-902894). Robert S. Vance, Jr., Trial Judge.

Disposition: 1100557 -- AFFIRMED. 1100560 -- AFFIRMED. 1100561 -- AFFIRMED.

Core Terms

dining, trial court, food-service, vendors, board of trustees, immunity, state-action-immunity, foreseeable, dining-dollars, public corporation, mandatory, antitrust claim, articulated, contracts, programs, campus, dollars, debit card, supervision, on-campus, food service, state policy, conversion, monopoly, semester, funds, motion to dismiss, anticompetitive, merchants, purposes

LexisNexis® Headnotes

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN1[] **Immunities, Sovereign Immunity**

To the extent that an action seeks money damages from the State, it is barred by the doctrine of sovereign immunity.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

In considering whether a complaint is sufficient to withstand a motion to dismiss under *Ala. R. Civ. P. 12(b)(6)*, a court must accept the allegations of the complaint as true. The appropriate standard of review under *Rule 12(b)(6)* is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle it to relief. In determining whether this is true, a court considers only whether the plaintiff may possibly prevail, not whether the plaintiff will ultimately prevail. Put another way, a *Rule 12(b)(6)* dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Governments > State & Territorial Governments > Claims By & Against

HN3[] **State Sovereign Immunity, State Immunity**

Ala. Const. art. I, § 14 provides generally that the State of Alabama shall never be made a defendant in any court of law or equity. The immunity afforded the State by § 14 applies to instrumentalities of the State and State officers sued in their official capacities when such an action is effectively an action against the State. Courts specifically extend the restriction on suits against the State found in § 14 to the State's institutions of higher learning and hold those institutions absolutely immune from suit as agencies of the State. This § 14 bar also prohibits actions against officers, trustees, and employees of State universities in their official capacities.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Governments > State & Territorial Governments > Claims By & Against

HN4[] **State Sovereign Immunity, State Immunity**

Certain causes of action are not barred by *Ala. Const. art. I, § 14*. There are four general categories of actions which do not come within the prohibition of § 14: (1) actions brought to compel State officials to perform their legal duties; (2) actions brought to enjoin State officials from enforcing an unconstitutional law; (3) actions to compel State officials to perform ministerial acts; and (4) actions brought under the Declaratory Judgments Act seeking construction of a statute and its application in a given situation. Other actions which are not prohibited by § 14 are: (5) valid inverse condemnation actions brought against State officials in their representative capacity; and (6) actions for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law. These actions are sometimes referred to as exceptions to § 14; however, in actuality these actions are simply not considered to be actions "against the State" for § 14 purposes. An action is one against the State when a favorable result for the plaintiff would directly affect a contract or property right of the State, or would result in the plaintiff's recovery of money from the State.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

HN5[] **State Declaratory Judgments, Scope of Declaratory Judgments**

The exceptions to *Ala. Const. art. I, § 14*, including the exception for actions seeking a declaratory judgment under the Declaratory Judgments Act, apply only to actions against State officials, not actions against State agencies.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN6[] Private Actions, State Regulation

See *Ala. Code § 6-5-60(a)*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] Exemptions & Immunities, Parker State Action Doctrine

The state-action-immunity doctrine, a tenet of ***antitrust law***, holds States and their instrumentalities immune from antitrust violations if their alleged anticompetitive behavior was in accordance with a clearly articulated and affirmatively expressed policy of the State.

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

HN8[] Regulated Practices, Monopolies & Monopolization

The federal law relating to monopolization governs Alabama antitrust actions.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN9[] Exemptions & Immunities, Parker State Action Doctrine

Nothing in the language of the Sherman Act, *15 U.S.C.S. § 1 et. seq.*, or in its history suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

HN10[] Exemptions & Immunities, Parker State Action Doctrine

The Sherman Act, *15 U.S.C.S. § 1 et. seq.*, makes no mention of the State as such, and gives no hint that it was intended to restrain State action or official action directed by a State. The Act is applicable to persons, including corporations, *15 U.S.C.S. § 7*, and it authorizes suits under it by persons and corporations. *15 U.S.C.S. § 15*. A State may maintain a suit for damages under it, but the United States may not -- conclusions derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute. There is no suggestion of a purpose to restrain state action in the Act's legislative history. It prevents only business combinations. That its purpose is to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

HN11[] **Exemptions & Immunities, Parker State Action Doctrine**

Like the Sherman Act, *15 U.S.C.S. § 1 et. seq.*, there is nothing in the text of *Ala. Code § 6-5-60* that would indicate that the Alabama Legislature intended to restrain State actors by way of *§ 6-5-60*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

The state-action-immunity doctrine may be raised as a defense to claims that state antitrust laws have been violated.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN13[] **Parker State Action Doctrine, Local Governments & Private Parties**

A private party acting in conjunction with the State might be entitled to state-action-immunity protection if the private party is acting pursuant to a clearly articulated and affirmatively expressed State policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN14[] **Exemptions & Immunities, Parker State Action Doctrine**

In an antitrust action, the prerequisite of a clearly articulated policy does not mean that an alleged anti-competitive agreement must be specifically blessed by the legislature for the state-action immunity to apply. A clear articulation does not require the State to declare explicitly that it expects anticompetitive conduct to result from legislation; instead, a clear articulation merely requires that anticompetitive conduct is the foreseeable result of the legislation.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

HN15[] **Sales of Goods, Output, Exclusive & Requirements Agreements**

An exclusive contract is merely a subset of the power to contract.

Education Law > Administration & Operation > Postsecondary School Boards > Authority of Postsecondary Boards

Education Law > Administration & Operation > Tuition > Student Fees

HN16[] Postsecondary School Boards, Authority of Postsecondary Boards

The legislature specifically empowers the boards of trustees governing state universities to control the expenses and fees payable by students at those universities, *Ala. Code §§ 16-47-34* and *16-48-4*.

Public Contracts Law > Types of Contracts > State Government Contracts

HN17[] Types of Contracts, State Government Contracts

Ala. Code § 41-16-27(g) exempts certain contracts, including those for food services, negotiated on behalf of universities from the State's mandatory-bid requirements. However, § 41-16-27(g) does not grant universities the authority to execute contracts for food services; rather, by exempting those specific contracts from the mandatory-bid process, it implicitly recognizes that that authority exists.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

HN18[] Exemptions & Immunities, Parker State Action Doctrine

Foreseeability is an intrinsically factual issue that a jury, not a trial court considering a motion to dismiss, should resolve. However, courts applying the state-action-immunity doctrine routinely resolve foreseeability concerns on motions to dismiss. Federal courts applying the state-action-immunity doctrine typically resolve these issues without resort to a jury.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN19[] Motions to Dismiss, Failure to State Claim

It is the rare case involving the defense of discretionary immunity that would be properly disposed of by a dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*. The distinction between discretionary functions and ministerial functions is often cloudy and difficult to discern.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN20[] Affirmative Defenses, Immunity

Immunity issues should be decided as early as possible once raised. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN21[] **Affirmative Defenses, Immunity**

Courts analyze immunity issues in terms of State-agent' immunity, rather than under the dichotomy of ministerial versus discretionary functions.

Business & Corporate Law > Corporations > Corporate Finance > General Overview

HN22[] **Corporations, Corporate Finance**

Ala. Const. art. IV, § 93 states in part that the State shall not be interested in any private or corporate enterprise. The restraints of § 93 concerning being interested in any private or corporate enterprise are construed to mean, with certain exceptions, that the State may not engage, alone or in concert with others, in the business of any type generally characterized as private enterprise. Section 93 does not apply to public corporations. A public corporation is a separate entity from the State and from any local political subdivision thereof.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

HN23[] **State Sovereign Immunity, State Immunity**

The immunity that comes from *Ala. Const. art. I, § 14* and that is associated with being part of the State, does not automatically attach to all public corporations; some public corporations are entitled to it while others are not. Whether a lawsuit against a body created by legislative enactment is a suit against the state depends on the character of power delegated to the body, the relation of the body to the State, and the nature of the function performed by the body. All factors in the relationship must be examined to determine whether the suit is against an arm of the State or merely against a franchisee licensed for some beneficial purpose.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

HN24[] **State Sovereign Immunity, State Immunity**

State university boards of trustees may be considered the State for purposes of *Ala. Const. art. I, § 14* state immunity, while nevertheless maintaining a status distinct from the State for *Ala. Const. art. IV, § 93* purposes because they are organized as public corporations.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN25[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Midcal test applied by courts when determining whether to extend state-action immunity to nonstate parties typically requires a showing that the alleged anticompetitive conduct is actively supervised by the State. However, this requirement is relaxed when the particular circumstances of the case make it unnecessary.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN26[] **Parker State Action Doctrine, Local Governments & Private Parties**

The mere potential for state supervision is not an adequate substitute for a decision by the State.

Education Law > Administration & Operation > Tuition > Student Fees

HN27[] **Tuition, Student Fees**

See Ala. Code § 16-1-32.

Governments > Legislation > Statutory Remedies & Rights

HN28[] **Legislation, Statutory Remedies & Rights**

A private right of action cannot be presumed; rather, one claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Governments > Legislation > Statutory Remedies & Rights

HN29[] **Standing, Personal Stake**

The general rule is that when a statute imposes a duty for the benefit or protection of particular individuals or classes of individuals, a violation of that duty gives a right of action to any person for whose benefit or protection the statute was enacted. However, by its very terms, this rule grants a right of action only to those individuals for whose benefit the statute was enacted.

Education Law > Administration & Operation > Tuition > Student Fees

Governments > Legislation > Statutory Remedies & Rights

HN30[] **Tuition, Student Fees**

The plain language of Ala. Code § 16-1-32 indicates that it was enacted to open the market for university-issued debit cards to off-campus merchants and to prevent such merchants from being charged excessive transaction fees. Thus, § 16-1-32 was enacted for the benefit of merchants, not students. Although it is possible that excessive transaction fees, if allowed, would be passed on from merchants to students (and the public in general) in the form of higher across-the-board prices, there is no indication that the legislature intended to address that indirect possibility in *§ 16-1-32*. Because *§ 16-1-32* was not enacted for the direct benefit of students, courts will not read into it the creation of a cause of action available to students.

Torts > Intentional Torts > Conversion > Elements

HN31[] **Conversion, Elements**

To establish conversion, one must present proof of a wrongful taking, an illegal assumption of ownership, an illegal use or misuse of another's property, or a wrongful detention or interference with another's property. Possession obtained through fraud, artifice, stealth, or trickery without the consent of the owner is wrongful and will support an action for conversion. In order to constitute conversion, nonconsent to the possession and the disposition of the property by defendant is indispensable.

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For Aramark Educational Services, Inc., Aramark Educational Services, LLC, Appellees: Michael F. Walker, John E. Goodman, Bradley Arant Boult Cummings LLP, Birmingham; Thomas O. Barnett, F. Chadwick Morriss, Gregory C. Padgett, Jesse A. Gurman, Covington & Burling LLP, Washington, D.C.

For the Board of Trustees for the University of Alabama, C. Ray Hayes, Appellees: Norma M. Lemley, Michael I. Spearing, office of counsel, University of Alabama System, Tuscaloosa; Cary T. Wahleim, office of counsel, University of Alabama System, Birmingham.

For Compass Group USA, Inc., d/b/a Chartwells, Thompson Hospitality Services, LLC, Appellees: Maibeth J. Porter, Bonnie B. Monroe, Maynard, Cooper & Gale, P.C., Birmingham; William C. Mayberry, Joshua D. Davey, McGuireWoods, LLP, Charlotte, North Carolina.

For Auburn University, Sarah B. Newton, Dr. Donald L. Large, Appellees: David R. Boyd, Dorman Walker, Balch & Bingham LLP, Montgomery; Lee F. Armstrong, gen. counsel, Auburn University, Auburn.

For Sodexo, Inc., Sodexo Operations LLC, Appellees: Michael L. Bell, J. Gorman Houston, Jr., Enrique J. Gimenez, James W. Gibson, Lightfoot, Franklin & White, LLC, Birmingham; Thomas G. Slater, Jr., Hunton & Williams LLP, Richmond, Virginia; Walfrido J. Martinez, Ryan A. Shores, Hillary E. Maki, Hunton & Williams LLP, Washington, D.C.

Judges: STUART, Justice. Woodall, Bolin, Parker, Main, and Wise, JJ., concur. Shaw, J., concurs in the result. Malone, C.J., recuses himself.

Opinion by: STUART

Opinion

[*329] STUART, Justice.

On August 11, 2010, students and former students (hereinafter referred to as "the students") of the University of Alabama ("UA"), Auburn University ("Auburn"), and the University of Alabama at Birmingham ("UAB") (hereinafter referred to collectively as "the universities") filed three separate class-action lawsuits in the Jefferson Circuit Court challenging the legality of so-called "dining-dollars" programs implemented by the universities and pursuant to which all undergraduate students are required to pay a mandatory dining fee each semester, which is then credited back to the students in the form of "dining dollars" that could be spent only at on-campus dining outlets controlled exclusively by the food-service vendors for the universities -- Aramark Educational Services, Inc., at UA; Compass Group, USA, Inc., d/b/a/ Chartwells at Auburn; and Sodexo, Inc., at UAB (hereinafter referred **[**2]** to collectively as "the food-service vendors"). On December 29, 2010, the trial court dismissed the three actions, and the students now appeal. We have consolidated the three appeals for the purpose of writing one opinion. We affirm.

I.

In 1992, UA hired the Cornyn Fasano Group ("CFG"), a food-service-management consulting firm, to study the dining services available at UA and to make recommendations on how to better administer those services. CFG submitted its final report to UA in July 1995, and among the recommendations made in that report were the recommendations that UA implement a mandatory dining fee for all full-time undergraduate students and that UA contract with a third-party company to administer all food services on the UA Tuscaloosa campus.

Approximately a month after receiving the CFG report, UA issued a notice requesting proposals from vendors interested in operating its on-campus food services. Aramark submitted a proposal in October 1995 and, in June 1996, entered into a contract with UA to operate all food services on the UA Tuscaloosa campus, including vending machines, traditional dining halls for students living on campus, and other restaurant and café outlets. Pursuant **[**3]** to the terms of the contract, Aramark made an initial payment to UA to help finance the renovation of campus dining facilities and also agreed to pay UA an annual commission on all on-campus food sales with a minimum annual guaranteed return. In turn, UA agreed to provide Aramark use of all on-campus dining facilities and to complete renovations of certain facilities. UA also agreed to impose a mandatory dining fee upon all fulltime undergraduate students in the amount of $200 per semester, which would be credited back to the students as dining dollars.[1] Students could then access the dining dollars in their accounts by swiping their student ID cards as payment at the Aramark outlets on campus.[2] At the conclusion of the academic year, students with **[*330]** unspent dining dollars could request a refund of those remaining funds.

In subsequent years, UAB and Auburn each decided to revamp their on-campus food services in a similar fashion. In June 2005, UAB entered into a contract with Sodexo **[**4]** that was substantially similar to the contract UA had entered into with Aramark -- Sodexo provided funds for the renovation and/or construction of on-campus dining facilities and agreed to pay UAB a commission on all food sold by Sodexo while UAB granted Sodexo exclusive control of all food services at UAB. UAB also implemented a dining-dollars program pursuant to which each full-time undergraduate student was charged a mandatory dining fee of $225 each semester, then credited back an equal amount of dining dollars to be used exclusively at Sodexo outlets on campus.

Auburn thereafter implemented its own dining-dollars program beginning with the freshman class entering in the fall semester of 2008.[3] In July 2007, Auburn entered into a contract with Chartwells, pursuant to which Chartwells was made the exclusive provider of food services at Auburn in return for paying Auburn a commission on all food-service sales and helping to fund capital improvements to on-campus dining facilities. Auburn agreed to begin imposing a mandatory dining fee of $995 per semester upon all students living on campus and $300 per semester upon those students living off campus.[4] An amount equal to that fee was **[**5]** then placed in a dining-dollars account linked to each student's ID card, and the student could then spend those funds at Chartwells food outlets on campus. Unlike students at UA, students at Auburn and UAB cannot apply for a refund of the unused dining dollars in their accounts at the end of the academic year, and the programs at Auburn and UAB have not been expanded to include any off-campus dining establishments.

On August 11, 2010, groups of students and former students at UA, UAB, and Auburn who had paid the mandatory dining fee at their respective universities filed three separate actions in the Jefferson Circuit Court. The students

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[1] The fee was later raised to $300 per semester.

[2] The dining-dollars program at UA was eventually modified to allow students to spend their dining dollars at approximately four off-campus dining establishments.

[3] It appears that Auburn, unlike UA and UAB, may not officially use the term "dining dollars" in association with its mandatory dining fee; however, for convenience, and because of the similarities between the dining programs administered by the universities, that term is used in this opinion to refer to Auburn's dining program as well.

[4] Students enrolled in classes prior to the fall 2008 semester are exempt from paying the mandatory dining fee.

named as defendants in those actions the boards of trustees governing the universities and certain university **[**6]** administrators, as well as the food-service vendors (hereinafter referred to collectively as "the defendants").[5] The students specifically alleged that the universities' exclusive contracts with their respective food-service vendors violated *§ 6-5-60, Ala. Code 1975*, inasmuch as those contracts created "an unlawful trust, combine, or monopoly" and that those contracts were unconstitutional in that they violated the prohibition in *Ala. Const. 1901, Art. IV, § 93*, against the State's "be[ing] interested in any private or corporate enterprise." **[*331]** The students suing UA and Auburn -- but not the students suing UAB -- also alleged that UA and Auburn had violated *§ 16-1-32(d), Ala. Code 1975*, because the student ID cards at those universities were effectively acting as university-issued debit cards and the transaction fees associated with their use were accordingly prohibited by law from exceeding five percent, yet, when the commissions due under the food-services contracts were included, those fees were more than three times that statutory limit. Finally, the students also alleged that the universities and food-service vendors had unlawfully converted their funds and transformed them from **[**7]** lawful currency into dining dollars. The students sought class certification for their claims, a judgment declaring the universities' contracts with the food-service vendors to be illegal, and both injunctive relief and money damages.[6]

Along with the complaints, the students also served interrogatories, requests for **[**8]** production, and requests for admissions upon the defendants. The defendants thereafter moved to stay discovery and for an extension of time in which to file motions to dismiss, and, on September 24, 2010, the trial court granted those motions, ordering that all motions to dismiss be filed by October 1, 2010. On that date, the defendants filed motions to dismiss the complaints for failure to state a claim upon which relief could be granted, pursuant to *Rule 12(b)(6), Ala. R. Civ. P.*, and, on December 29, 2010, after conducting a consolidated hearing, the trial court granted the defendants' motions and dismissed all pending claims with prejudice. On February 9, 2011, the students filed these appeals.

II.

We explained the standard of review applicable to an appeal of a trial court's judgment dismissing a case pursuant to *Rule 12(b)(6)* as follows in *Crosslin v. Health Care Authority of Huntsville, 5 So. 3d 1193, 1195 (Ala. 2008)*:

> ***HN2***[] "In considering whether a complaint is sufficient to withstand a motion to dismiss under *Rule 12(b)(6), Ala. R. Civ. P.*, a court 'must accept the allegations of the complaint as true.' *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002)* **[**9]** (emphasis omitted). '"The appropriate standard of review under *Rule 12(b)(6)[, Ala. R. Civ. P.,]* is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief."' *Smith v. National Sec. Ins. Co., 860 So. 2d 343, 345 (Ala. 2003)* (quoting Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993))*. In determining whether this is true, a court considers only whether the plaintiff may possibly prevail, not whether the plaintiff will ultimately prevail. Id. Put another way, '"a *Rule 12(b)(6)* dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."' Id. (emphasis added)."

III.

The students argue that the trial court erred in dismissing: (1) their antitrust claims; (2) their *§ 93* unlawful-state-interest-in-a-private-enterprise constitutional **[*332]** claims; (3) their *§ 16-1-32(d)* excessive-transaction-fee claims; and (4) their conversion claims. We will consider each group of claims in that order; however, inasmuch as the

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[5] The universities are controlled by two boards of trustees. The board of trustees for the University of Alabama system controls both UA and UAB; Auburn has a separate board of trustees. The university administrators named as defendants by the students, all sued solely in their official capacities, were: (1) C. Ray Hayes, vice chancellor for financial affairs for the University of Alabama system; (2) Sarah B. Newton, then president pro tempore of the Auburn board of trustees; and (3) Dr. Donald L. Large, executive vice president and chief financial officer at Auburn.

[6] The students sought money damages only from the food-services vendors, presumably because this Court has held that ***HN1***[] "to the extent that [an] action seeks money damages from the State, it is barred by the doctrine of sovereign immunity." *Ex parte Murphy, [Ms. 1090699, May 13, 2011] __ So. 3d __, __, 72 So. 3d 1202, 2011 Ala. LEXIS 71 (Ala. 2011)*.

students have named certain public entities **[**10]** and officials -- the boards of trustees and administrators of the universities -- as defendants, we first must consider the applicability of ***HN3***[] *Ala. Const. 1901, Art. I, § 14*, which provides generally that "the State of Alabama shall never be made a defendant in any court of law or equity."

This Court has held that the immunity afforded the State by *§ 14* applies to instrumentalities of the State and State officers sued in their official capacities when such an action is effectively an action against the State. *Lyons v. River Road Constr., Inc., 858 So. 2d 257, 261 (Ala. 2003)*. We have specifically "extended the restriction on suits against the State found in *§ 14* 'to the state's institutions of higher learning' and ha[ve] held those institutions absolutely immune from suit as agencies of the State." *Ex parte Troy Univ., 961 So. 2d 105, 109 (Ala. 2006)* (quoting *Taylor v. Troy State Univ., 437 So. 2d 472, 474 (Ala. 1983))*. This *§ 14* bar also prohibits "actions against officers, trustees, and employees of state universities in their official capacities." *Alabama Agric. & Mech. Univ. v. Jones, 895 So. 2d 867, 873 (Ala. 2004)*. We have, however, stated that ***HN4***[] certain causes of action are not barred **[**11]** by *§ 14*:

> ""'There are four general categories of actions which in *Aland v. Graham, 287 Ala. 226, 250 So. 2d 677 (1971)*, we stated do not come within the prohibition of *§ 14*: (1) actions brought to compel State officials to perform their legal duties; (2) actions brought to enjoin State officials from enforcing an unconstitutional law; (3) actions to compel State officials to perform ministerial acts; and (4) actions brought under the Declaratory Judgments Act ... seeking construction of a statute and its application in a given situation. *287 Ala. at 229-230, 250 So.2d 677*. Other actions which are not prohibited by *§ 14* are: (5) valid inverse condemnation actions brought against State officials in their representative capacity; and (6) actions for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law. *Wallace v. Board of Education of Montgomery County, ... 280 Ala. [635] at 639, 197 So. 2d 428 [(1967)]*; *Unzicker v. State, 346 So. 2d 931, 933 (Ala. 1977)*; Engelhardt v. Jenkins, *273 Ala. 352, 141 So. 2d 193 (1962)*.'"
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> "*Drummond Co. v. Alabama Dep't of Transp., 937 So. 2d 56, 58 (Ala. 2006)* **[**12]** (quoting [Ex parte] Carter, 395 So.2d [65,] 68 [(Ala. 1980)]) (emphasis omitted). These actions are sometimes referred to as 'exceptions' to *§ 14*; however, in actuality these actions are simply not considered to be actions '"against the State" for *§ 14* purposes.' *Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002)*. This Court has qualified those 'exceptions,' noting that '"[a]n action is one against the [S]tate when a favorable result for the plaintiff would directly affect a contract or property right of the State, or would result in the plaintiff's recovery of money from the [S]tate."' *Alabama Agric. & Mech. Univ. v. Jones, 895 So. 2d 867, 873 (Ala. 2004)* (quoting *Shoals Cmty. Coll. v. Colagross, 674 So. 2d 1311, 1314 (Ala. Civ. App. 1995))* (emphasis added in Jones)."

[*333] *Alabama Dep't of Transp. v. Harbert Int'l, Inc., 990 So. 2d 831, 840 (Ala. 2008)*. As clarified in Harbert, ***HN5***[] these "exceptions," including the exception for actions seeking a declaratory judgment under the Declaratory Judgments Act, apply only to actions against State officials, not actions against State agencies. *Id. at 841*. The defendant boards of trustees are corporate bodies governing the universities, and **[**13]** there is no exception to the immunity afforded the State by *§ 14* that would permit the trial court to entertain an action against them, regardless of whether monetary, injunctive, or declaratory relief is being sought. Accordingly, the boards of trustees are due to be dismissed as parties with regard to all the claims alleged by the students, and we need only consider those claims as they relate to the university administrators and the food-service vendors.[7]

The students' first claim is that the dining-dollars programs violate *§ 6-5-60*, which states, in relevant part:

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[7] However, although the students may seek injunctive and declaratory relief against the university administrators, ***§ 14*** still immunizes those State officials from any claim for money damages. *Harbert, 990 So. 2d at 839-41*.

> *HN6*[] "(a) Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and may commence the action therefor against any one or more of **[**14]** the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly."

The trial court granted the defendants' motions to dismiss the students' *§ 6-5-60* antitrust claims on the basis of *HN7*[] the state-action-immunity doctrine, a tenet of ***antitrust law*** that holds states and their instrumentalities immune from antitrust violations if their alleged anticompetitive behavior was in accordance with a clearly articulated and affirmatively expressed policy of the State. *Mobile Cnty. Water, Sewer & Fire Prot. Auth., Inc. v. Mobile Area Water & Sewer Sys., Inc., 567 F. Supp. 2d 1342, 1349 (S.D. Ala. 2008)*. On appeal, the students argue (1) that the state-action-immunity doctrine is not applicable to their antitrust claims because those claims are made under state, not federal, law, and (2) that the application of the state-action-immunity doctrine is inappropriate in this case even if it does apply to state antitrust claims. For the reasons that follow, we reject both arguments.

It is well settled that *HN8*[] "[t]he federal law relating to monopolization governs Alabama antitrust actions." *McCluney v. Zap Prof'l Photography, Inc., 663 So. 2d 922, 926 (Ala. 1995)* **[**15]** (citing *Ex parte Rice, 259 Ala. 570, 67 So. 2d 825 (1953))*. The state-action-immunity doctrine has been a part of that federal ***antitrust law*** since 1943 when it was first articulated by the Supreme Court of the United States in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. The United States Supreme Court summarized Parker and the origin of the state-action-immunity doctrine as follows in *Community Communications Co. v. City of Boulder, 455 U.S. 40, 48-49, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*:

> "[Parker] addressed the question whether the federal antitrust laws prohibited a State, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. These took the form of a 'marketing program' adopted by the State of California for **[*334]** the 1940 raisin crop; that program prevented appellee from freely marketing his crop in interstate commerce. Parker noted that California's program 'derived its authority ... from the legislative command of the state,' *id., at 350*, and went on to hold that the program was therefore exempt, by virtue of the Sherman Act's own limitations, from antitrust attack:
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> > "'We find *HN9*[] nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain **[**16]** a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' *Id., at 350-351*."

Notwithstanding the fact that this Court has previously cited Parker and applied state-action-immunity principles to a state antitrust claim in *Twine v. Liberty National Life Insurance Co., 294 Ala. 43, 47, 311 So. 2d 299, 302 (1975)*, the students argue that the state-action-immunity doctrine should not apply to state antitrust claims because, they say, the doctrine was formulated to address federalism and state-sovereignty concerns, and there can be no such concerns when it is alleged that only state, as opposed to federal, antitrust laws have been violated. Applying the state-action-immunity doctrine in such cases, the students argue, would be illogical, effectively "giving a state agency 'state immunity' from limitations directed specifically to the state." (Students' brief in case no. 1100557, p. **[**17]** 38.)

However, this argument fails to recognize that the limitations implicit in *§ 6-5-60* are not directed specifically to the State; rather, they are directed to "any person, firm, or corporation creating, operating, aiding, or abetting such [a] trust, combine, or monopoly." (Emphasis added.) Indeed, while federalism and state-sovereignty principles may have been the primary impetus behind the formulation of the state-action-immunity doctrine, they are not the only basis for the doctrine. It is also evident from Parker that the doctrine was derived from the plain language of the Sherman Act:

> ***HN10***[] "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations, *§ 7, 15 U.S.C.A.*, and it authorizes suits under it by persons and corporations. *§ 15*. A state may maintain a suit for damages under it, *State of Georgia v. Evans, 316 U.S. 159, 62 S. Ct. 972, 86 L. Ed. 1346 [(1942)]*, but the United States may not, *United States v. Cooper Corp., 312 U.S. 600, 61 S. Ct. 742, 85 L. Ed. 1071 [(1941)]* -- conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, **[**18]** the subject matter, the context and the legislative history of the statute.
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> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations'. 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. See *Apex Hosiery Co. v. Leader, 310 U.S. 469, 492, 493, 60 S. Ct. 982, 84 L. Ed. 1311* and note 15 [(1940)]; *United States v. Addyston* ***[*335]*** *Pipe & Steel Co., 6 Cir., 85 F. 271 [(1898)]*, affirmed *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 [(1899)]*; *Standard Oil Co. v. United States, 221 U.S. 1, 54-58, 31 S. Ct. 502, 55 L. Ed. 619 [(1911)]*."

317 U.S. at 351. ***HN11***[] Like the Sherman Act, there is nothing in the text of *§ 6-5-60* that would indicate that the Alabama Legislature intended to restrain state actors by way of *§ 6-5-60*. Nor have the students identified anything in the relevant legislative history that would indicate as much. In fact, if anything, the language in *§ 6-5-60* allowing for recovery only from a "person, firm, or corporation" would seem to indicate the **[**19]** contrary.

The state-action-immunity doctrine also has a logical basis that is as relevant to state antitrust claims as it is to federal antitrust claims. The United States District Court for the Western District of Louisiana summarized the logical basis for granting states and their instrumentalities immunity from liability for violating state antitrust laws as follows in *Airline Car Rental, Inc. v. Shreveport Airport Authority, 667 F. Supp. 303, 308 (W.D. La. 1987)*:

> "The principles of federalism and state sovereignty on which the Supreme Court relied in *Parker [v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*,] have no bearing on the question whether state antitrust laws should apply to municipalities acting pursuant to a clearly expressed state policy permitting anticompetitive conduct; however, it would be illogical to hold that a state legislature which had clearly articulated such a policy nevertheless intended that a municipality acting pursuant to that policy should be subject to liability under state antitrust laws. For this reason, the court will dismiss both [the appellant's] federal and state antitrust claims."

For all these reasons, we now reaffirm *Twine*, which applied the state-action-immunity **[**20]** doctrine without clearly denominating it as such and explicitly hold that ***HN12***[] the state-action-immunity doctrine may be raised as a defense to claims that state antitrust laws have been violated. The university administrators are accordingly entitled to immunity with regard to the students' *§ 6-5-60* antitrust claims. We further note that this is consistent with our long-standing caselaw applying federal antitrust principles to state-law antitrust claims. See *Ex parte Rice, 259 Ala. 570, 575, 67 So. 2d 825, 829 (1953)* (noting that "[w]e do not seem to have in Alabama a statute which defines an unlawful monopoly" and accordingly holding that the federal statutes "prescribe the terms of unlawful monopolies and restraints of trade as they should also be administered in Alabama"), and *Parker, 317 U.S. at 350-51* ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." (emphasis added)). However, further inquiry is necessary to determine if the food-service vendors may also claim the protections of the state-action-immunity doctrine.

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* **[**21]** ("Midcal"), the Supreme Court of the United States unanimously held that ***HN13***[] a private party acting in conjunction with the state might be entitled to state-action-immunity protection if the private party is acting pursuant to a clearly articulated and affirmatively expressed state policy. In discussing whether the defendants acted pursuant to a clearly articulated and affirmatively expressed state policy, the trial court, in its orders dismissing the cases challenging the dining-dollars programs at UA and UAB, stated:

[*336] "Applying such law here, the court begins with the legal basis for [UA's and UAB's] operations. *Section 264 of the Alabama constitution* declares that the University of Alabama system 'shall be under the management and control of a board of trustees.' *[Section 16-47-2, Ala. Code 1975*,] provides that the board of trustees 'shall have all the rights, powers and franchises necessary to or promotive of the end of its creation and shall be charged with all the corresponding duties, liabilities and responsibilities.' Further, from *[§ 16-47-34, Ala. Code 1975]*, comes the additional power 'to organize the university by appointing a corps of instructors, who shall be styled the faculty **[**22]** of the university, and such other officers as the interest of the university may require; to remove such instructors or officers, and to fix their salaries or compensation, and increase or reduce the same at their discretion; to institute, regulate, alter or modify the government of the university, as it may deem advisable; to prescribe courses of instruction, rates of tuition and price of board and regulate the necessary expenses of students; and to confer such degrees as are usually conferred by similar institutions.' (Emphasis added.)

"The board of trustees for the University of Alabama system has been given, both from the constitution and from the Alabama legislature, broad authority to operate and manage [its universities'] operations. It is foreseeable that, in the exercise of such authority, the board would contract food services to third-party entities possessing expertise in that area. That such is foreseeable is evidenced by [§ 41-16-27(g), Ala. Code 1975], which generally exempts from the mandatory bid process 'contractual services and purchases of personal property regarding the athletic department, food services, and transit services negotiated on behalf of two-year and **[**23]** four-year colleges and universities ....'

"The court agrees with the defendants that ***HN14***[] the prerequisite of a clearly articulated policy does not mean that the alleged anti-competitive agreement must be specifically blessed by the legislature for the state-action immunity to apply. The U.S. Supreme Court has before made clear that a clear articulation does not require the state to declare explicitly that it expects anticompetitive conduct to result from legislation; instead, a clear articulation merely requires that anticompetitive conduct is the foreseeable result of the legislation. See Town of Hallie [v. City of Eau Claire], 471 U.S. [34,] 41-43, 105 S.Ct. [1713,] 1718 (1985); see also *F.T.C. v. Hospital Board of Directors of Lee County, 38 F.3d 1184, 1189-91 (11th Cir. 1994)*.

"It is certainly foreseeable that a university would require some form of a mandated meal plan for its students, and it is foreseeable that an exclusive management contract would govern the provision of meal service on campus. Given the broad authority of [the board of trustees for the University of Alabama system] to govern all aspects of campus life, including the terms, conditions and fees for board provided **[**24]** to students, the clear articulation requirement for state-action immunity is met."[8]

[*337] The students challenge the trial court's conclusion that the requirement that there be a clear articulation of a state policy was met, arguing that it is too great a leap to conclude that it was foreseeable that the boards of trustees of the universities would enter into the exclusive contractual relationships with the food-service vendors merely because they were granted broad authority to operate and to manage the operations of the universities. We

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[8] The order entered in the case dismissing the complaint challenging Auburn's dining-dollars program was virtually identical; however, the paragraph describing the legal basis for Auburn's operations read as follows:

"Applying such law here, the court begins with the legal basis for Auburn's operations. *Section 266 of the Alabama constitution* declares that 'Auburn University shall be under the management and control of a board of trustees.' *[Section 16-48-2, Ala. Code 1975*,] provides that the Auburn board of trustees 'shall have all the rights, privileges and franchises necessary to a promotion of the end of its creation and shall be charged with all corresponding duties, liabilities and responsibilities.' Further, from *[§ 16-48-4, Ala. Code 1975*,] comes the additional power 'to organize the institute by appointing a corps of instructors, who shall be styled the faculty of the university and such other instructors and officers as the interest of the university may require; and to remove any such instructors or other officers, and to fix their salaries or compensation, and increase or reduce the same at **[**25]** its discretion, to regulate, alter, or modify the government of the university, as it may deem advisable; to prescribe courses of instruction, rates of tuition and fees; to confer such academic and honorary degrees as are usually conferred by institutions of similar character; and to do whatever else it may deem best for promoting the interest of the university.' (Emphasis added.)"

disagree. As detailed in trial court's order, the legislature has granted to the boards of trustees broad authority to manage the operations of their universities, and that authority certainly encompasses the authority to enter into contracts. That the statutes do not explicitly state that the boards may enter into "exclusive" contracts is irrelevant -- as one **[**26]** court has noted, ***HN15***[] "an exclusive contract is merely a subset of the power to contract." *Active Disposal, Inc. v. City of Darien, 635 F.3d 883, 886 (7th Cir. 2011)*. Moreover, ***HN16***[] the legislature has also specifically empowered the boards of trustees governing UA, UAB, and Auburn to control the "expenses" and "fees" payable by students at those universities, *§§ 16-47-34* and *16-48-4, Ala. Code 1975*. Accordingly, we agree with the trial court's determination that it is "foreseeable that a university would require some form of a mandated meal plan for its students, and it is foreseeable that an exclusive management contract would govern the provision of meal service on campus."[9] We also hold that all other elements of the dining-dollars programs implemented by the universities are equally foreseeable in light of the broad authority granted the boards of trustees in these areas.[10]

The students also argue that it was inappropriate for the trial court to decide issues of foreseeability and immunity at this stage of the proceedings. Citing *Thetford v. City of Clanton, 605 So. 2d 835, 841 (Ala. 1992)* ("Foreseeability is an issue for the jury to resolve."), and *Doe v. McRae's of Alabama, 703 So. 2d 348, 350 (Ala. Civ. App. 1996)* ("Ordinarily, foreseeability is a question of fact for the jury."), the students argue that ***HN18***[] foreseeability is an intrinsically **[*338]** factual issue that a jury, not a trial court considering a motion to dismiss, should resolve. The defendants, however, **[**28]** argue that other courts applying the state-action-immunity doctrine routinely resolve foreseeability concerns on motions to dismiss. See, e.g., *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*; *Active Disposal, 635 F.3d at 889*; *Rectrix Aerodrome Ctrs. v. Barnstable Mun. Airport Comm'n, 610 F.3d 8, 16 (1st Cir. 2010)*; and *Pennsylvania v. Susquehanna Area Reg'l Airport Auth., 423 F. Supp. 2d 472, 484 (M.D. Pa. 2006)*.

We agree with the defendants that the trial court properly decided this issue. Unlike both *Thetford* and *McRae's*, where the issue was whether a business should be held liable for the allegedly foreseeable criminal acts of a third party, the issue here is whether the universities' actions in implementing the dining-dollars programs were foreseeable based on the power vested in the boards of trustees by the Alabama constitution and Alabama statutes.[11] By necessity, this inquiry focused on the review and interpretation of the relevant constitutional provisions and statutes, a task traditionally reserved for the court. Federal courts applying the state-action-immunity doctrine typically resolve these issues without resort to a jury, and we find no error in the trial **[**29]** court's doing the same in this case.

The students also argue that the trial court erred by deciding the immunity issue at this time, quoting *Patton v. Black, 646 So. 2d 8, 10 (Ala. 1994)*: "[I]t is a rare case involving the defense of immunity that would be properly disposed of by dismissal pursuant to *Rule 12(b)(6)*" (as quoted in the students' brief in case no. 1100557, p. 49). However, this quotation omits the word "discretionary" from the language of the Patton Court's actual opinion, which reads "[t]hus, ***HN19***[] it is the rare case involving the defense of discretionary immunity that would be properly disposed of by a dismissal pursuant to *Rule 12(b)(6)*." (Emphasis added.) The Court elsewhere in Patton discussed the difficulties associated with the application of the discretionary-immunity **[**30]** defense, stating that "[t]he

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9 We also note that the CFG report submitted to UA in 1995 indicates that "mandatory board plans" were required at earlier periods in UA's history and that on-campus dining services had been contractor-operated since 1965.

10 The students object to the trial court's use of ***HN17***[] § 41-16-27(g), Ala. Code 1975 -- which exempts certain **[**27]** contracts, including those for food services, negotiated on behalf of universities from the State's mandatory-bid requirements -- to bolster its finding of foreseeability because that statute was not enacted until 2000, 6 years after the implementation of the first dining-dollars program at UA and around 100 years after the enactment of the first incarnation of *§ 6-5-60*. However, § 41-16-27(g) does not grant universities the authority to execute contracts for food services; rather, by exempting those specific contracts from the mandatory-bid process, it implicitly recognizes that that authority exists.

11 We also note that this Court overruled *McRae's* in *Ex parte McRae's of Alabama, Inc., 703 So. 2d 351, 352 (Ala. 1997)*, effectively agreeing with the trial court's determination that the criminal acts of the third party were not foreseeable as a matter of law, stating: "[s]uffice it to say that there had never been a similar assault on the defendant's store premises, or any violent crimes of any nature on those premises."

distinction between discretionary functions and ministerial functions is often cloudy and difficult to discern." *646 So. 2d at 10*. That difficulty eventually led this Court to restate the principle of discretionary immunity in *Ex parte Cranman, 792 So. 2d 392 (Ala. 2000)*.[12] Discretionary immunity is not an issue in this case, and, because the defendants have properly raised and argued the state-action-immunity defense in their motions to dismiss, the trial court's consideration of that defense was consistent with the judicial policy that ***HN20***[] immunity issues should be decided as early as possible once raised. See, e.g., *Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)* ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily **[*339]** imposed upon those defending a long drawn out lawsuit.").

The students' final argument with regard to whether the dining-dollars programs are the foreseeable result of a clearly articulated state policy is that they cannot be, if only because there is a more clearly articulated state policy that, they argue, forbids such programs. That policy, the students argue, is set forth in ***HN22***[] *§ 93 of the Alabama Constitution of 1901*, which states in relevant part that "[t]he state shall not ... be interested in any private or corporate enterprise." The students argue that the dining-dollars programs violate *§ 93* inasmuch as the contracts between the universities and the food-service vendors provide that the universities receive a percentage of each transaction in which dining dollars are used. Thus, the students argue, the universities are effectively business partners with the food-service vendors, in violation of the prohibition of such arrangements in *§ 93*. See *Knight v. West Alabama Envtl. Improvement Auth., 287 Ala. 15, 20, 246 So. 2d 903, 906 (1971)* ("The restraints of said *Section 93* concerning being interested in any private or corporate enterprise have **[**32]** been construed to mean, with certain exceptions not here relevant, that the State may not engage, alone or in concert with others, in the business of any type generally characterized as private enterprise.").

The trial court rejected this argument on the basis of caselaw clearly indicating that *§ 93* does not apply to public corporations. See, e.g., *Thomas v. Alabama Mun. Elec. Auth., 432 So. 2d 470, 481 (Ala. 1983)* ("A public corporation is a separate entity from the State and from any local political subdivision thereof. The prohibitions of *Sections 93* and *94* are directed to the State and not to public corporations."); and *Knight, 287 Ala. at 19, 246 So. 2d at 905* ("It is well established by the decisions of this Court that a public corporation is a separate entity from the State and from any local political subdivision thereof, including a city or county, and that the prohibitions of *Section 93* are directed to the State and not to public corporations."). The board of trustees governing UA and UAB was organized as a public corporation by *§ 16-47-1, Ala. Code 1975*, and the board of trustees governing Auburn was similarly organized as a public corporation by *§ 16-48-1, Ala. Code 1975*; **[**33]** thus, Thomas and Knight would seem applicable. However, the students argue that it is inconsistent to consider the boards of trustees as the State for immunity purposes and then in the same case declare that they are not the State for *§ 93* purposes; if the boards are the "State" for one purpose, the students argue, they must be the "State" for other purposes. However, while it may seem inconsistent, the trial court correctly decided these issues, because that is the result our caselaw dictates.

As referenced above, our caselaw is unanimous in its treatment of *§ 93* and public corporations -- *§ 93* does not apply to them. See, e.g., Thomas and Knight, supra. ***HN23***[] The immunity that comes from *§ 14* and that is associated with being part of the State, however, does not automatically attach to all public corporations; some public corporations are entitled to it while others are not. In *Armory Commission of Alabama v. Staudt, 388 So. 2d 991, 993 (Ala. 1980)*, we explained what more is required before a public corporation may claim that immunity, stating:

> "Whether a lawsuit against a body created by legislative enactment is a suit against the state depends on the character of power delegated to the **[**34]** body, the relation of the body to the state, and the nature of the

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[12] "Since Cranman, ***HN21***[] we analyze immunity issues in terms of 'State-agent' immunity, rather than 'under the dichotomy of ministerial versus discretionary functions.' *Ex parte Hudson, 866 So. 2d 1115, 1117 (Ala. 2003)*" *Howard v. City of Atmore, 887 So. 2d 201, 203 (Ala. 2003)*. The analysis in Cranman, **[**31]** a plurality opinion, was adopted by this Court in ***Ex parte Butts, 775 So. 2d 173 (Ala. 2000)***.

> function performed by the body. All factors in the relationship **[*340]** must be examined to determine whether the suit is against an arm of the state or merely against a franchisee licensed for some beneficial purpose."

We have previously considered whether state universities, as public corporations, should be entitled to that state immunity and answered that inquiry in the affirmative. See, e.g., *Rigby v. Auburn Univ., 448 So. 2d 345, 347 (Ala. 1984)* ("[W]e conclude that because of the character of the power delegated to it by the state, its relation to the state as an institution of higher learning, and the nature of the function it performs as an institution of higher learning, Auburn University is an instrumentality of the state and therefore immune to suit by the terms of *Section 14 of our state constitution.*"). For those same reasons, we conclude that ***HN24***[] the boards of trustees may be considered the State for purposes of *§ 14* state immunity, while nevertheless maintaining a status distinct from the State for *§ 93* purposes because they are organized as public corporations. The trial court correctly held that the dining-dollars **[**35]** programs are the foreseeable result of a clearly articulated state policy.

However, although the clear-articulation-of-a-state-policy test has been met, ***HN25***[] the Midcal test applied by courts when determining whether to extend state-action immunity to nonstate parties also typically requires a showing that the alleged anticompetitive conduct is actively supervised by the state. *445 U.S. at 105*. However, beginning with Town of Hallie, this requirement has been relaxed when the particular circumstances of the case make it unnecessary. *471 U.S. at 46-47* (holding that municipalities need not satisfy the second prong of the Midcal test). Relying on the rationale of *Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495 (10th Cir. 1997)*, the trial court found that these were such cases because the universities had the exclusive authority both to mandate the mandatory dining fees and to set the amount of those fees, and the food-service vendors merely acted to fullfill the terms of their contracts. See *Zimomra, 111 F.3d at 1499-1500* (holding that active supervision by the state need not be shown in a case challenging the legality of mandatory fees attached to car rentals because the city and the county **[**36]** -- not a private party -- had the ultimate responsibility of setting those mandatory fees). The students argue that the rationale of Zimomra should not apply because the food-service vendors played an active part in the negotiations that led to the implementation of the mandatory dining fees and the dining-dollars programs, and because the food-service vendors exercise substantial autonomy in the manner in which they provide food services under the contracts. We ultimately decline to address this issue, however, because, by any standard, it is clear that the universities actively supervised the challenged dining-dollars programs on their respective campuses.

Each of the universities' contracts with the respective food-service vendor contains detailed provisions setting forth guidelines governing nearly every facet of the food-service vendor's on-campus operation, including menu selection and food preparation. The universities also retain ultimate authority over food prices and the operating hours of the on-campus dining outlets. The contracts are sufficiently comprehensive that there can be no question that the universities are actively involved in and supervising the food-service operations **[**37]** on their campuses. Moreover, lest there be any doubt that the contracts merely allow for the possibility of supervision as opposed to actual supervision, see *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* (***HN26***[] "The mere potential for state supervision is not **[*341]** an adequate substitute for a decision by the State."), we also note that the contracts require the food-service vendors to file regular reports with the universities detailing their operations. For example, UA's contract with Aramark requires Aramark to "[s]ubmit quarterly reports to the university addressing issues that affect the efficiency of the operations, security, services, food, sanitation, and any other relevant topics, and including back-up data and recommendations for improving the situation." UA's decision to raise the mandatory dining fee from its original $200 per semester to $300 per semester is further evidence that it is actively involved in and supervising its dining-dollars program, as opposed to merely deciding to implement such a program and then leaving the details of operation to Aramark.

The defendants have established that the food-service vendors were acting according to a clearly articulated state policy **[**38]** and that their actions were actively supervised by the universities; accordingly, they are protected by the state-action-immunity doctrine with regard to the students' antitrust claims, and the trial court did not err by dismissing those claims. As explained supra, the students' *§ 93* claims are also without merit because *§ 93* does not apply to public corporations like the boards of trustees; the trial court therefore correctly dismissed those claims as well. We thus turn to the UA and Auburn students' argument that the trial court erred by dismissing their claims alleging a violation of *§ 16-1-32(d)*.

Section 16-1-32 provides, in relevant part, as follows:

> **HN27**[] "(a) The board of trustees or any other governing body of a public institution of higher education as defined in Section 16-5-1 may establish a program which provides students enrolled at the institution with debit cards issued by the institution. This specific authority shall exist in addition to any pre-existing authority to establish such a program conferred elsewhere by the Constitution of Alabama of 1901, or statute.
>
> "(b) A student issued a debit card under the program may use the card to purchase merchandise or services available **[**39]** through the institution or at the institution through a person authorized to sell merchandise or services at the institution, or at any other location or through any other person as determined by the board of trustees or the governing body.
>
> "(c) Without limiting the generality of the foregoing subsection, the debit card program shall at a minimum allow a person who operates an off-campus college bookstore which sells merchandise or services of the same kind as the merchandise or services that a student may purchase at a bookstore operated on the campus of the institution under subsection (b), to participate in the program under the same or equivalent terms applicable to a person authorized to sell merchandise or services under subsection (b), and to accept a debit card payment from a student to whom a debit card has been issued under the program for purchase of that merchandise or service.
>
> "(d) A per transaction fee, not to exceed 3.25 percent of the total purchase price may be charged the off-campus bookstore by the institution administering the debit card program. Other merchants may participate in the program under the terms and conditions established by the institution. The transaction **[**40]** fee for all other merchants or vendors, irrespective of type of business, shall not exceed five percent of the total purchase price."

[*342] In their complaints, the UA and Auburn students argue that UA and Auburn have been charging transaction fees in excess of the five-percent cap in subsection (d) because the commission charged on every dining-dollars transaction exceeds five percent even before other debit-card fees are considered. The defendants argue that there has been no violation of § 16-1-32 because the commission is not properly considered a "transaction fee" for purposes of the statute. The trial court ultimately declined to reach that issue, stating:

> "Finally, while the plaintiffs attempt to assert a claim under [§ 16-1-32], there is no indication that the Alabama legislature intended to create a private cause of action for any violation of that statute. **HN28**[] A private right of action cannot be presumed; rather, '[o]ne claiming a private right of action within a statutory scheme must show clear evidence of a legislative intent to impose civil liability for a violation of the statute.' *Blockbuster, Inc. v. White, 819 So. 2d 43, 44 (Ala. 2001)*; *American Auto. Ins. Co. v. McDonald, 812 So. 2d 309, 311 (Ala. 2001)*. **[**41]** Accordingly, no claim can be based on [§ 16-1-32]."

Citing Corpus Juris Secundum, the students argue that the trial court erred because, they argue, **HN29**[] the general rule is that when a statute imposes a duty for the benefit or protection of particular individuals or classes of individuals, a violation of that duty gives a right of action to any person for whose benefit or protection the statute was enacted. 1A C.J.S. Actions § 57. However, by its very terms, this rule would grant a right of action only to those individuals for whose benefit the statute was enacted. **HN30**[] The plain language of § 16-1-32 indicates that it was enacted to open the market for university-issued debit cards to off-campus merchants and to prevent such merchants from being charged excessive transaction fees. Thus, § 16-1-32 was enacted for the benefit of merchants, not students. Although it is possible that excessive transaction fees, if allowed, would be passed on from merchants to students (and the public in general) in the form of higher across-the-board prices, there is no indication that the legislature intended to address that indirect possibility in § 16-1-32. Because § 16-1-32 was not enacted for the direct benefit **[**42]** of students, we will not read into it the creation of a cause of action available to the students at UA and Auburn. The trial court's dismissal of the § 16-1-32 claims is accordingly affirmed.

The students' final argument is that the trial court erred by dismissing their conversion claims. The trial court does not specifically discuss these claims in its orders; however, they were implicitly included in the final paragraph of the orders, which stated: "[h]aving considered the defendants' contentions, and the plaintiffs' responses thereto, the court concludes that the plaintiffs may not maintain any of the causes of action asserted in their complaint." (Emphasis added.) The defendants argue that the reason the trial court did not address the students' conversion claims is because, the defendants argue, the students are asserting them for the first time on appeal. Upon review, however, each of the complaints filed by the students at the different universities does contain a broad allegation of conversion. See, e.g., brief of the students in case no. 1100557 ("This scheme also constitutes a conversion of the plaintiffs' funds by requiring the payment into the dining dollars account, then **[**43]** transforming lawful currency into 'dining dollars' over which [the food-service vendor] exercises exclusive dominion and control."). Nevertheless, the trial court's dismissal of the students' conversions claims is due to be affirmed because, even when the allegations of the students' **[*343]** complaints are viewed most strongly in their favor, it is apparent that they cannot prevail on these claims.

HN31[] "To establish conversion, one must present proof of a wrongful taking, an illegal assumption of ownership, an illegal use or misuse of another's property, or a wrongful detention or interference with another's property." *Crown Life Ins. Co. v. Smith, 657 So. 2d 821, 823 (Ala. 1994)*. The complaints do not support a finding that any party took or otherwise illegally assumed ownership of the students' funds. There is no allegation that any party wrongfully accessed deposit accounts belonging to the students and withdrew the money or that any party otherwise took the funds from the students without the students' consent. Nor is there an allegation that the funds were obtained through fraud, artifice, stealth, or trickery. See *Brown v. Campbell, 536 So. 2d 920, 921 (Ala. 1988)* (holding that possession **[**44]** obtained through fraud, artifice, stealth, or trickery without the consent of the owner is wrongful and will support an action for conversion). Rather, the only conclusion that can be gleaned from the complaints is that the students were presented with a lawful mandatory charge associated with attendance at their chosen university and that they subsequently consented to pay that charge as a condition of attendance. Undoubtedly, some of the students did not like paying the mandatory dining fee and would have preferred to attend their respective university without paying it; however, the same is no doubt as true of any tuition payments. Such dissatisfaction, however, is not tantamount to a lack of consent. Because the students clearly consented to pay the mandatory dining fee, their conversion claims fail. See also *Jones v. DCH Health Care Auth., 621 So. 2d 1322, 1324 (Ala. 1993)* ("'In order to constitute conversion, nonconsent to the possession and the disposition of the property by defendant is indispensable.'" (quoting 89 C.J.S. Trover & Conversion § 5, p. 535 (1955))).

IV.

The students sued the boards of trustees governing the universities, the administrators of the universities, and **[**45]** the food-service vendors, alleging that the dining-dollars programs operated by the universities violated: (1) state antitrust laws; (2) *§ 93 of the Alabama Constitution* inasmuch as it forbids the State from having an interest in a private enterprise; (3) the rule in *§ 16-1-32(d)* barring universities from charging excessive transaction fees to merchants that accept university-issued debit cards; and (4) the common-law prohibition on conversion. However, because the boards of trustees are entitled to state immunity pursuant to *§ 14 of the Alabama Constitution*, all claims against them were properly dismissed. The university administrators and foodservice vendors are entitled to immunity on the asserted antitrust claims as well, albeit state-action immunity as opposed to state immunity; thus, the trial court's dismissal of the antitrust claims was also proper. Moreover, because the universities are public corporations not subject to *§ 93*, because the students lack standing to pursue a cause of action for a violation of *§ 16-1-32(d)*, and because the students have not and cannot allege the necessary elements of a conversion claim, the trial court also properly dismissed the students' other **[**46]** claims. Accordingly, the judgments of the trial court are hereby affirmed.

1100557 -- AFFIRMED.

1100560 -- AFFIRMED.

1100561 -- AFFIRMED.

Woodall, Bolin, Parker, Main, and Wise, JJ., concur.

[*344] Shaw, J., concurs in the result.

Malone, C.J., recuses himself.

End of Document

Marsh v. Anesthesia Services Medical Group, Inc.

Court of Appeal of California, Fourth Appellate District, Division One

October 6, 2011, Filed

D057858

Reporter

200 Cal. App. 4th 480 *; 132 Cal. Rptr. 3d 660 **; 2011 Cal. App. LEXIS 1358 ***; 2012-1 Trade Cas. (CCH) P77,902

M. LOU MARSH, Plaintiff and Appellant, v. ANESTHESIA SERVICES MEDICAL GROUP, INC., et al., Defendants and Respondents.

Notice: CERTIFIED FOR PARTIAL PUBLICATION[*]

Subsequent History: **[***1]** The Publication Status of this Document has been Changed by the Court from Unpublished to Published October 31, 2011.

Decision reached on appeal by *Marsh v. Anesthesia Servs. Med. Grp., 2014 Cal. App. Unpub. LEXIS 3947 (Cal. App. 4th Dist., June 3, 2014)*

Prior History: APPEAL from judgments of the Superior Court of San Diego County, No. 37-2007-00082724-CU-BT-CTL, David B. Oberholtzer, Judge.

Disposition: Affirmed in part, reversed in part.

Core Terms

allegations, cause of action, antitrust, demurrers, practices, trial court, surgeons, pleadings, privileges, unfair, relevant market, anticompetitive, patient, conspiracy, competitor, staff, anti trust law, leave to amend, wrongful act, anesthesiologists, staffing, intentional interference, Cartwright Act, pled, economic advantage, practitioners, anesthesia, vertical, disrupt, anticompetitive conduct

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

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

[*] Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts VI and VII.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] Standards of Review, Abuse of Discretion

A demurrer tests the legal sufficiency of the complaint. Therefore, an appellate court reviews the complaint de novo to determine whether it contains sufficient facts to state a cause of action. The appellate court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. A trial court exercises its discretion in declining to grant leave to amend. If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend. The plaintiff has the burden of proving the possibility of cure by amendment. Although a court must on demurrer accept as true properly pleaded facts, a demurrer does not admit contentions or conclusions of law or fact. Determining the meaning of a statutory standard requires the resolution of a question of law. The soundness of the resolution of such a question is examined de novo.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

HN2[] Private Actions, State Regulation

Bus. & Prof. Code, § 16750, subd. (a), generally allows any person injured in her business or property by reason of anything forbidden or declared unlawful by this chapter to bring a private action for treble damages or injunctive relief. *Bus. & Prof. Code, § 16720, subd. (a)*, defines the prohibited kinds of "trusts" (combinations of capital, skill or acts by two or more persons) as including those created for or carrying out unreasonable restrictions in trade or commerce. The elements of this California Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, claim are (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. California requires a high degree of particularity in the pleading of Cartwright Act violations, and therefore generalized allegations of antitrust violations are usually insufficient. The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN3[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

California's Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, prohibits combinations in unreasonable restraint of trade. Certain restraints that lack redeeming virtue are conclusively presumed to be unreasonable and illegal, and constitute a per se illegal practice. For example, a horizontal combination (an anticompetitive agreement among competitors who are at the same level of distribution) is ordinarily illegal per se. Likewise, market division and certain types of group boycotts are unlawful per se. Elaborate market analysis and case-by-case evaluation are unnecessary in cases involving per se antitrust violations because the anticompetitive effects of the practice are presumed.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN4[] Practices Governed by Per Se Rule, Boycotts

At the pleadings stage, mere conclusory allegations of manifestly anticompetitive conduct may be deemed insufficient as a matter of law, where there exists no tenable per se boycott theory.

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

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

HN5[] Practices Governed by Per Se Rule, Boycotts

A vertical boycott occurs when entities at different levels of distribution combine to deny a competitor at one level the benefits enjoyed by the members of the vertical combination. For such allegations, the rule of reason test applies to determine whether particular concerted conduct unreasonably restrains competition.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN6[] Private Actions, State Regulation

The antitrust laws were enacted for the protection of competition, not competitors. The laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN7[] Private Actions, State Regulation

A complaint must allege facts from which injury to market-wide competition can be inferred. An antitrust injury must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct that renders defendants' acts unlawful.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN8[] Price Fixing & Restraints of Trade, Vertical Restraints

Where an antitrust plaintiff alleges vertical restraints, facts must be pled showing some anticompetitive effect in the larger, interbrand market. The prevailing standard is the rule-of-reason, which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. It is the plaintiff's burden to make the required showing of a substantially adverse effect on competition in the relevant market. Injury to an individual plaintiff is insufficient to establish standing to assert antitrust violations. In the medical field, sufficient, successful allegations of antitrust injury might include negative impacts upon overall prices, quantity or quality of medical services, resulting from the plaintiff's absence as an available provider at the facility.

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

HN9[] **Market Definition, Relevant Market**

Defining the market is not the aim of ***antitrust law***; it merely aids the search for competitive injury. Once defined, the relevant market demarcates objective benchmarks for separating reasonable and unreasonable restraints. It requires the claimant to demonstrate harm to the economy beyond the claimant's own injury. In so doing, market definition furthers antitrust policy: the protection of competitive processes and not individual competitors.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

There is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions. Generally, antitrust challenges to a staffing decision at a single hospital do not succeed, because such cases normally do not present any facts indicating special circumstances raising antitrust concerns. The reasons for such a lack of success in pursuing an antitrust claim may include a lack of antitrust injury, failure to show a detrimental effect on competition, or insufficient market power in the relevant market. When circumstantial evidence of conspiracy to prevent the physician-plaintiff from practicing at the subject hospital is presented by such an antitrust plaintiff, the defendant can rebut such allegations of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice.

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Judicial Review

Healthcare Law > Business Administration & Organization > Hospital Privileges > Restrictions

HN11[] **Healthcare Litigation, Antitrust Actions**

The setting of privileging criteria by a hospital is consistent with providing quality patient care and keeping insurance costs manageable. The courts have drawn distinctions between the intentional actions of a hospital directed specifically toward the exclusion of a particular physician or groups of physicians, and the actions of a hospital that may, as a practical matter, result in the exclusion of individual practitioners but were undertaken for less personally directed reasons. Even where a structural staffing change may result in the exclusion of certain doctors from practice, if the justification is sufficient, the doctor's vested rights must give way to public and patient interest in improving the quality of medical services. Judicial deference is paid to managerial decisions concerning operation of a hospital, where the decisions appear to have been made rationally and in good faith by the hospital authorities. Hospitals have special expertise in promoting quality of care and in making workable administrative arrangements. Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors for every hospital in the state.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

***HN12*[]** **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Even vertical restrictions may legitimately be allowed to reduce some forms of competition, if they also promote other forms of competition by allowing health care service providers to achieve certain efficiencies in the distribution of their products, under the rule of reason standard. Normally, a staffing decision does not itself constitute an antitrust injury. Unless the effect of the conduct of a single health care provider is to deny patients reasonable access to any health care, the marketplace is not significantly affected by such individualized conduct. If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market. It is not enough to allege as antitrust injury, in a hospital context, that the plaintiffs cannot now practice in the business form they prefer and the prices the hospital charges may be somewhat higher now than they were. Before a court will interfere with how one hospital staffs its physician needs, a strong showing would be required that the purpose and effect of the anticompetitive conduct, within the relevant market defined by the plaintiffs, was outside of reasonable professional standards.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > General Overview

***HN13*[]** **Trade Practices & Unfair Competition, State Regulation**

The purpose of the California Unfair Practices Act, *Bus. & Prof. Code, § 17000 et seq.*, is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. *Bus. & Prof. Code, § 17001*. The Act prohibits specific practices that the legislature has determined constitute unfair trade practices.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Torts > Business Torts > Unfair Business Practices > General Overview

***HN14*[]** **Trade Practices & Unfair Competition, State Regulation**

Actions under the unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., are not meant to be substitutes for tort or contract actions. Instead, the UCL provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. The overarching legislative concern was to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.

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

HN15[] Intentional Interference, Elements

The elements of the tort of intentional interference with prospective economic advantage are usually stated as follows (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. The third element of the tort of interference with prospective economic advantage also requires a plaintiff to plead intentional wrongful acts on the part of the defendant designed to disrupt the relationship. Whether an act is independently wrongful depends on its unlawfulness (if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard).

Torts > Intentional Torts > Defamation > Procedural Matters

HN16[] Defamation, Procedural Matters

Common law defamation claims are subject to determinable legal standards for resolution, as required for such a tort claim.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court sustained demurrers filed by respondents, an anesthesiologist's former practice group and a hospital served by the practice group, to portions of the anesthesiologist's first amended complaint and her third amended complaint, allowing no further leave to amend. The anesthesiologist alleged respondents' acts were in violation of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and that respondents injured her by intentionally interfering with her prospective business advantage. (Superior Court of San Diego County, No. 37-2007-00082724-CU-BT-CTL, David B. Oberholtzer, Judge.)

The Court of Appeal affirmed the judgment as to the hospital but reversed the judgment as to the practice group with directions to the trial court to allow further proceedings to enable the anesthesiologist to file an amended complaint against the practice group only, if desired, to plead a theory of intentional interference with prospective economic advantage, and/or to reassert her voluntarily dismissed breach of contract claim. The court held that the anesthesiologist had not successfully alleged, on the operative facts and theories she had consistently pled, the statutory causes of action under the Cartwright Act or the UCL, nor had she demonstrated any realistic possibility of further amendments. The anesthesiologist did not allege, nor did her proposed amendments add, the kind of facts indicating special circumstances raising antitrust concerns, with respect to any detrimental effect on competition

that caused injury, in excess of her own personal business concerns and **[*481]** circumstances. The implementation of the rules and policies of which she complained did not clearly create any adverse effect upon consumer choice in the relevant market. The court did not find adequate support for the anesthesiologist's pleaded claims of unfair business conduct, in the form of certain threatened incipient violations of antitrust laws, or their policy or spirit, or other acts significantly threatening or harming competition in the medical field as a whole. As against the practice group, the cause of action for intentional interference with prospective business advantage was not previously subjected to demurrers, and the record required that the anesthesiologist be allowed an opportunity to amend her pleading to assert the type of wrongful conduct that, under established legal measures, might be able to support a cognizable claim. (Opinion by Huffman, Acting P. J., with McDonald and O'Rourke, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Actions—Conspiracy Claims—Pleading Requirements.

Bus. & Prof. Code, § 16750, subd. (a), generally allows any person injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter to bring a private action for treble damages or injunctive relief. *Bus. & Prof. Code, § 16720, subd. (a)*, defines the prohibited kinds of trusts (combinations of capital, skill or acts by two or more persons) as including those created for or carrying out unreasonable restrictions in trade or commerce. The elements of this Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) claim are (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. California requires a high degree of particularity in the pleading of Cartwright Act violations, and therefore generalized allegations of antitrust violations are usually insufficient. The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient.

CA(2)[] **(2)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Per Se Illegal Practices.

The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) prohibits combinations in unreasonable restraint of trade. Certain restraints that lack redeeming virtue are conclusively presumed to be unreasonable and illegal, and constitute a per se illegal practice. For example, a horizontal combination (an anticompetitive agreement among competitors who are **[*482]** at the same level of distribution) is ordinarily illegal per se. Likewise, market division and certain types of group boycotts are unlawful per se. Elaborate market analysis and case-by-case evaluation are unnecessary in cases involving per se antitrust violations because the anticompetitive effects of the practice are presumed.

CA(3)[] **(3)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Actions—Pleading.

At the pleadings stage, mere conclusory allegations of manifestly anticompetitive conduct may be deemed insufficient as a matter of law, where there exists no tenable per se boycott theory.

CA(4)[] **(4)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Vertical Boycott—Rule of Reason Test.

A vertical boycott occurs when entities at different levels of distribution combine to deny a competitor at one level the benefits enjoyed by the members of the vertical combination. For such allegations, the rule of reason test applies to determine whether particular concerted conduct unreasonably restrains competition.

CA(5)[] **(5)**

Monopolies and Restraints of Trade § 1—Focus of Antitrust Laws.

The antitrust laws were enacted for the protection of competition, not competitors. The laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.

CA(6)[] **(6)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Actions—Complaints—Burden of Proof.

A complaint must allege facts from which injury to market-wide competition can be inferred. An antitrust injury must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct that renders defendants' acts unlawful.

CA(7)[] **(7)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Vertical Restraints—Rule of Reason Test—Burden of Proof.

Where an antitrust plaintiff alleges vertical restraints, facts must be pled showing some anticompetitive effect in the larger, interbrand market. The prevailing standard is the rule of reason, which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. It is the plaintiff's burden to make the required showing of a substantially adverse effect on competition in the relevant market. Injury to an individual plaintiff is insufficient to establish standing to assert antitrust violations. In the medical field, sufficient, successful allegations of antitrust injury might **[*483]** include negative impacts upon overall prices, quantity or quality of medical services, resulting from the plaintiff's absence as an available provider at the facility.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Market.

Defining the market is not the aim of ***antitrust law***; it merely aids the search for competitive injury. Once defined, the relevant market demarcates objective benchmarks for separating reasonable and unreasonable restraints. It requires the claimant to demonstrate harm to the economy beyond the claimant's own injury. In so doing, market definition furthers antitrust policy: the protection of competitive processes and not individual competitors.

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Conspiracy—Hospitals—Setting of Staff Privileges.

There is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions. Generally, antitrust challenges to a staffing decision at a single hospital do not succeed, because such cases normally do not present any facts indicating special circumstances raising antitrust concerns. The reasons for such a lack of success in pursuing an antitrust claim may include a lack of antitrust injury, failure to show a detrimental effect on competition, or insufficient market power in the relevant market. When circumstantial evidence of conspiracy to prevent the physician-plaintiff from practicing at the subject hospital is presented by such an antitrust plaintiff, the defendant can rebut such allegations of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice.

CA(10)[] **(10)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Hospitals—Setting of Staff Privileges—Judicial Deference.

The setting of privileging criteria by a hospital is consistent with providing quality patient care and keeping insurance costs manageable. The courts have drawn distinctions between the intentional actions of a hospital directed specifically toward the exclusion of a particular physician or groups of physicians, and the actions of a hospital that may, as a practical matter, result in the exclusion of individual practitioners but were undertaken for less personally directed reasons. Even where a structural staffing change may result in the exclusion of certain doctors from practice, if the justification is **[*484]** sufficient, the doctor's vested rights must give way to public and patient interest in improving the quality of medical services. Judicial deference is paid to managerial decisions concerning operation of a hospital, where the decisions appear to have been made rationally and in good faith by the hospital authorities. Hospitals have special expertise in promoting quality of care and in making workable administrative arrangements. Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors for every hospital in the state.

CA(11)[] **(11)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Vertical Restrictions—Hospital Staffing Decisions.

Even vertical restrictions may legitimately be allowed to reduce some forms of competition, if they also promote other forms of competition by allowing service providers to achieve certain efficiencies in the distribution of their products, under the rule of reason standard. Normally, a staffing decision does not itself constitute an antitrust injury. Unless the effect of the conduct of a single health care provider is to deny patients reasonable access to any health care, the marketplace is not significantly affected by such individualized conduct. If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market. It is not enough to allege as antitrust injury, in a hospital context, that the plaintiffs cannot now practice in the business form they prefer and the prices the hospital charges may be somewhat higher now than they were. Before a court will interfere with how one hospital staffs its physician needs, a strong showing would be required that the purpose and effect of the anticompetitive conduct, within the relevant market defined by the plaintiffs, was outside of reasonable professional standards.

CA(12)[] **(12)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations—Exclusion of Physician from Practice in Relevant Market Area.

The trial court did not err or abuse its discretion in sustaining demurrers, without leave to amend, to an anesthesiologist's cause of action that alleged violations of the Cartwright Act by her former practice group and by a hospital served by the practice group, where the anesthesiologist did not allege, nor did her proposed amendments add, the kind of facts indicating special circumstances raising antitrust concerns, with respect to any detrimental effect on competition that caused injury, in excess of her own personal business concerns and circumstances. The implementation of the rules and policies of which she complained did not clearly create any adverse **[*485]** effect upon consumer choice in the relevant market. The circumstances described in the pleadings showed that the anesthesiologist had been able to retain privileges to practice at other outpatient facilities.

[Cal. Forms of Pleading and Practice (2011) ch. 565, Unfair Competition, § 565.173; Simon et al., Matthew Bender Practice Guide: Cal. Unfair Competition and Business Torts (2011) § 5.40; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 591; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 120; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 741.]

CA(13)[] **(13)**

Unfair Competition § 3—Unfair Trade Practices Act—Purpose.

The purpose of the Unfair Practices Act (*Bus. & Prof. Code, § 17000 et seq.*) is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented (*Bus. & Prof. Code, § 17001*). The act prohibits specific practices that the Legislature has determined constitute unfair trade practices.

CA(14)[] **(14)**

Unfair Competition § 8—Actions.

Actions under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) are not meant to be substitutes for tort or contract actions. Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. The overarching legislative concern was to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.

CA(15)[] **(15)**

Interference § 6—Prospective Economic Advantage—Elements.

The elements of the tort of intentional interference with prospective economic advantage are usually stated as follows (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. The third element of the tort of interference with prospective economic advantage also requires a plaintiff to plead intentional wrongful acts on the part of the defendant designed to disrupt the relationship. Whether an act is independently wrongful depends on its unlawfulness (if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard).

CA(16)[] **(16)**

Libel and Slander § 1—Common Law Defamation.

Common law defamation claims are subject to determinable legal standards for resolution, as required for such a tort claim.

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Arent Fox, Steven E. Bledsoe, Roy Z. Silva and Steven A. Haskins for Defendants and Respondents Scripps Memorial Hospital La Jolla, Scripps Ximed Surgery Center and Scripps Health.

Judges: Opinion by Huffman, Acting P. J., with McDonald and O'Rourke, JJ., concurring.

Opinion by: Huffman

Opinion

[665] HUFFMAN, Acting P. J.**—Plaintiff and appellant M. Lou Marsh (Appellant) is a board certified anesthesiologist **[**666]** licensed to practice medicine in California. She filed this action for damages and other relief against her former practice group, defendant and respondent Anesthesia Service Medical Group, Inc. (ASMG), a professional medical corporation that provides physician services to hospitals and other medical centers in **[***2]** San Diego County. She also sued one of the facilities served by ASMG, Scripps Memorial Hospital La Jolla (Scripps), after she experienced interpersonal and professional difficulties in carrying on her medical practice at a Scripps facility, the Scripps XiMED Surgery Center (Ximed).

In several successive pleadings that were challenged by a series of demurrers by ASMG and Scripps (together, Respondents), Appellant pled several types of unlawful or unfair business practices and related tort theories, which allegedly caused her unfair exclusion from practice. She contends Respondents' acts were in violation of the Cartwright Act (*Bus. & Prof. Code,*[1] *§ 16700 et seq.*), and/or the unfair competition law (the UCL; *§ 17200 et seq.*). She also alleged that Respondents injured her by intentionally and/or negligently interfering with her prospective business advantage, and intentionally inflicted severe emotional distress (IIED) on her.

The trial court sustained demurrers to portions of the first amended complaint (FAC) and the third amended complaint (TAC), allowing no further leave to amend. In connection **[***3]** with filing her notice of appeal, Appellant voluntarily dismissed, without prejudice, an additional cause of action for **[*487]** breach of contract against ASMG, based on its alleged violations of a nondisparagement clause in her 2004 separation agreement with ASMG.

[1] All further statutory references are to the Business and Professions Code unless noted.

Appellant contends on appeal that all of her causes of action are well pled, or could be successfully amended to add any essential allegations to state such causes of action. She argues her statutory claims seek legitimate remedies, including injunctive relief and restitution, and the tort claims for damages are necessary to redress her economic and personal injury.

Having reviewed the pleadings in light of well-established legal principles, we conclude Appellant has not successfully alleged, on the operative facts and theories she has consistently pled, the statutory causes of action under the Cartwright Act or the UCL, nor has she demonstrated any realistic possibility of further amendments. The trial court's analysis of the relevant legal and policy considerations, as applied to those pleaded facts, was correct as a matter of law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186–187 [83 Cal. Rptr. 2d 548, 973 P.2d 527]* **[***4]** (*Cel-Tech*); *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 195–196 [91 Cal. Rptr. 2d 534]* (*Freeman*).)

We reach similar conclusions on the demurrer rulings with respect to each of the tort causes of action asserted, with one exception. As against ASMG, the cause of action pled in the TAC for intentional interference with prospective business advantage was not previously subjected to demurrers, and this record requires that Appellant should be allowed an opportunity to amend her pleading to assert the type of wrongful conduct that, under established legal measures, may be able to support a cognizable claim. (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158 [131 Cal. Rptr. 2d 29, 63 P.3d 937]* (*Korea Supply*).) Even though, as stated by the Supreme Court in *Korea Supply*, the pleading and proof requirements **[**667]** for pursuing a cause of action for damages for intentional interference with prospective economic advantage are more rigorous in some respects than those of the UCL, we cannot say on this record that Appellant clearly lacks any such recourse in damages against ASMG for the injuries she claims to have suffered as a result of its alleged wrongful acts controverting her economic interests. As to Scripps, however, **[***5]** such claims are not well taken, for reasons to be explained.

Moreover, our examination of the record in light of the applicable pleading standards leads us to conclude that, as against either respondent, Appellant cannot demonstrate how she could state any viable theory of negligent interference with prospective business advantage, nor the “outrageous conduct” required to support a claim of IIED, in this overall factual context of a dispute among professionals in the business of health care. (See *LiMandri v.* ***[*488]*** *Judkins (1997) 52 Cal.App.4th 326, 348–350 [60 Cal. Rptr. 2d 539]*; *Christensen v. Superior Court (1991) 54 Cal.3d 868, 903 [2 Cal. Rptr. 2d 79, 820 P.2d 181]*.)

The judgment dismissing the action against Scripps is accordingly affirmed. We reverse the judgment of dismissal as to ASMG, with directions to the trial court to conduct appropriate further proceedings to allow Appellant to file an amended pleading against ASMG solely on the claim of intentional interference with economic advantage, as well as allowing her to reassert, if so desired, her voluntarily dismissed breach of contract claim.

I

BACKGROUND: PARTICIPANTS AND FILING OF ACTION

For purposes of analyzing the demurrer rulings, we take the facts properly pleaded **[***6]** to assess whether they may state their causes of action, as matters of law. (*Blank v. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58]*.) In the original and all her amended complaints, Appellant alleges essentially the following transactional facts (to be expanded as needed in the discussion portion of this opinion). We mainly postpone our summary of the individual rulings on demurrer giving rise to this appeal until the discussion portion of this opinion.

Until 2004, Appellant was a longtime member of ASMG, and she had staff privileges to provide anesthesia services at several institutions, including Scripps and its outpatient facility, Ximed.[2] After overcoming health problems (breast cancer), and learning that the facility where she was currently working was closing, she decided to leave ASMG to pursue her own practice. Upon leaving ASMG in July 2004, Appellant negotiated a separation agreement to resolve

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[2] Ximed was originally named as a defendant, but was dismissed and is no longer a party.

their disputes over professional fees she was claiming were due to her, and the agreement included a nondisparagement clause.

After her separation from ASMG employment, Appellant alleges she appropriately communicated **[***7]** to ASMG and Scripps/Ximed doctors and staff that she was not able to or interested in taking on scheduled call duties at Scripps for emergency and other services for nights and weekends, as the ASMG contractual arrangement provided for its affiliates to do. Appellant made it clear to ASMG and Scripps officials that she was unable or unqualified to take such call duty, due to her interest in preserving her health by avoiding such unexpected calls, and because she had not practiced in an **[*489]** emergency and trauma care setting for more than 15 years, but **[**668]** instead had specialized in elective plastic surgery for that time.

Upon leaving ASMG in 2004, Appellant retained her privileges at Scripps, although she mainly continued to practice anesthesia in private outpatient surgery centers, working primarily with two plastic surgeons, Dr. Steven Cohen and Dr. Stewart Kincaid (the two surgeons). Appellant also provided anesthesia services to these two surgeons when they performed procedures at other outpatient surgery centers affiliated with other hospitals in the area (a Sharp Metro Hospital facility, and Mercy Outpatient Pavilion (MOPP), at Scripps Mercy Hospital, where she also obtained privileges).

In **[***8]** 2006, the two surgeons with whom Appellant worked started performing procedures at Ximed, utilizing anesthesia services there from Appellant and from ASMG doctors. Ninety-nine percent of the anesthesiologists serving on staff at Scripps are employed by ASMG, and Appellant came to believe ASMG was unlawfully influencing the Scripps medical staff to cooperate in interfering with her efforts to practice there.

Specifically, Appellant alleges that when she decided in 2006 to resume practicing at Scripps, to take cases there with the two surgeons, ASMG and Scripps together allegedly took actions to limit her practice at Scripps/Ximed in several ways, all of which she claims amounted to unfair business practices or were otherwise wrongful. Appellant asserts that ASMG and/or Scripps allegedly made knowing misrepresentations to interested parties that her employment status was “retired,” that she did not carry her fair share of call duty, that this adversely affected hospital morale, and that she was disruptive, adversarial, and should be avoided. Scripps officials allegedly told surgeons using its facilities that, according to some unwritten rule or practice, they were not allowed to specifically **[***9]** request her professional services, but instead had to use those anesthesiologists who took scheduled call duty pursuant to ASMG arrangements.

When Appellant obtained privileges at MOPP (with Scripps Mercy), ASMG officials allegedly threatened to withhold ASMG services previously provided there, unless Appellant's privileges were blocked. Also around that time, ASMG notified her that her health insurance policy on its plan had been canceled, although it later claimed this was a mistake, and the policy remained in effect. Appellant, as a cancer survivor, alleges she suffered serious emotional distress while unfairly placed under that misapprehension.

Appellant further alleges that ASMG and Scripps worked together, without justification, to enact new hospital staffing rules that imposed unfair burdens upon her in particular, such as adopting rules that required all staff, including **[*490]** her, to participate in regular night and weekend hospital call duty. Other such new utilization and staff rules required anesthesiologists practicing at Scripps to attend a minimum number of monthly meetings, and to participate in at least 20 surgical cases over a two-year period. Unilaterally, Scripps reclassified **[***10]** Appellant as having “active” status, rather than “courtesy” privileges, which subjected her to additional administrative requirements for renewal of privileges at Scripps.[3] However, about 50 other similarly situated anesthesiologists **[**669]** were allowed to retain their courtesy status.

In December of 2007, Appellant filed this action and amended her complaint (FAC) in January 2008. Originally, in addition to her unlawful business practices, antitrust and emotional distress claims, Appellant pursued separate

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[3] The record is not clear as to Appellant's current status as to hospital privileges at Scripps. According to her opening brief (filed in Dec. 2010), Appellant's privileges “technically” expired in March 2008 and February 2010, but she does not know whether her applications have been processed by Scripps.

causes of action for conspiracy and negligent infliction of emotional distress. Each respondent successfully brought demurrers to certain of these causes of action but not others,[4] and eventually each respondent filed an answer to the SAC.

By stipulation, Appellant filed her TAC, which retained the same four causes of action as in the SAC (except for correctly omitting Scripps from the IIED claim). As against ASMG, Appellant was allowed to add a breach of contract theory, based on alleged violation of the nondisparagement clause in her 2004 separation agreement from ASMG (defamatory remarks calling her “disruptive,” “unfair,” and “adversarial”). Respondents again demurred and sought judgment on the pleadings.

After extensive briefing and hearing, all demurrers were sustained without leave to amend and judgments of dismissal were entered. Appellant voluntarily dismissed her breach of contract claim against ASMG, without prejudice, to seek this immediate appellate review.
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II

STANDARD OF REVIEW AND ISSUES PRESENTED

We apply well-established **[***12]** rules of review. ***HN1***[] “A demurrer tests the legal sufficiency of the complaint. [Citation.] Therefore, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’ [Citation.] The trial court exercises its discretion in declining to grant leave to amend. [Citation.] If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend. [Citation.] The plaintiff has the burden of proving the possibility of cure by amendment.” (*Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, 78 [14 Cal. Rptr. 3d 893]*; see *Blank v. Kirwan, supra, 39 Cal.3d 311, 318*; *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 327 [70 Cal. Rptr. 849, 444 P.2d 481]* (*Chicago Title*), distinguished on another point in *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 781, fn. 18 [111 Cal. Rptr. 3d 666, 233 P.3d 1066]*.)

Although a court must on demurrer accept as true properly pleaded facts, a demurrer does not admit contentions or conclusions of law or fact. (*Chicago Title, supra, 69 Cal.2d 305, 327*.) Particularly **[***13]** as to the Cartwright Act and UCL causes of action, in ruling on these demurrers, the superior court was required to apply statutory standards to the pleaded facts. Determining the meaning of a statutory standard requires the resolution of a question of law. (*People ex rel. Lockyer v. Shamrock Foods **[**670]** Co. (2000) 24 Cal.4th 415, 432 [101 Cal. Rptr. 2d 200, 11 P.3d 956]*.) “The soundness of the resolution of such a question is examined de novo.” (*Ibid*.) As will be explained, those statutory claims are not well stated on this record, as to either of the Respondents, and we will discuss the problems with Appellant's statutory arguments as to Respondents collectively.

However, a different approach is required as to Appellant's tort theories, in which she has more clearly pled she stands in a different relationship to ASMG than to the Scripps facilities served by ASMG. We address, separately, those interference with economic relations and emotional distress claims against Respondents.
[*492]

III

[4] The trial court sustained the demurrers to the FAC without leave to amend as to Appellant's causes of action for violation of the Cartwright Act, **[***11]** a separate claim of conspiracy, and negligent infliction of emotional distress. At the second amended complaint (SAC) stage, Scripps obtained an order sustaining its demurrer to the claim for IIED without leave to amend (although that claim remained pending as to ASMG). It was not until the TAC was filed that either respondent demurred to the claims for damages for interference with prospective economic advantage.

ALLEGED VIOLATIONS OF ***ANTITRUST LAW***

A. FAC Hearing and Ruling

In this claim in the FAC, Appellant incorporated her general allegations, and added that Respondents effectively conspired against her in order to limit her services and to bar her from competing **[***14]** with ASMG. She alleged she was targeted, exclusively, by the promulgation of the rules requiring call obligations and utilization requirements, and this was anticompetitive activity, since Scripps represented itself to be an "open staff" facility. She sought injunctive relief to prevent Respondents from enforcing those rules or regulations or from intimidating or interfering with her exercise of her professional skills.

To challenge the FAC's cause of action for violation of the Cartwright Act, the demurrers each argued that Appellant had failed to adequately identify a recognized form of a relevant market, in which their actions had allegedly interfered with business interests. In opposition, Appellant argued that she could add further allegations about how she, as a sole practitioner, and possibly other such persons, were being excluded from the San Diego County hospital market.

At the hearing before the trial court, Appellant represented she could possibly identify other non-ASMG anesthesiologists who could have been precluded from practicing at Scripps. She maintained that Respondents should not be able to require single practitioners to operate their practices in a different way. **[***15]** In the briefs and in later filings regarding the related UCL claim, she argues she could add allegations about injuries occurring in the relevant marketplace, because she has a practice of charging less per patient than ASMG doctors do. This would arguably support her claim there is indirect injury to patients, who might be able to pay less for their elective, cash basis surgeries, if her practice were unrestrained.

After its hearing, the trial court determined that Appellant had only alleged individualized economic injury at a single outpatient surgery center, the claim could not be successfully amended as described, and the demurrers would be sustained without leave to amend.

B. Applicable Legal Principles

HN2[] ***CA(1)***[] **(1)** *Section 16750, subdivision (a)* of the Cartwright Act generally allows any person injured in her business or property "by reason of anything forbidden or declared unlawful by this chapter" to bring a private action for **[*493]** treble damages or injunctive relief. *Section 16720, subdivision (a)*, defines the prohibited kinds of "trusts" **[***16]** (combinations of capital, skill or acts by two or more persons) as including those created for or carrying out unreasonable restrictions in trade or commerce.

The elements of this Cartwright Act claim are " ' "(1) the formation and **[**671]** operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. [Citations.]" ' " (*Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 47 [77 Cal. Rptr. 2d 709, 960 P.2d 513]*; see *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 373 [113 Cal. Rptr. 2d 175]*.) "An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. [Citation.] California requires a 'high degree of particularity' in the pleading of Cartwright Act violations [citation], and therefore generalized allegations of antitrust violations are usually insufficient. [Citation.] … The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient. [Citation.]" (*Freeman, supra, 77 Cal.App.4th 171, 196*, fn. omitted.)

Appellant believes she has adequately pled both horizontal and vertical types of illegal restraint of trade arrangements **[***17]** between Respondents, under the tests applicable to those claims. We first examine these two types of alleged anticompetitive conduct, then turn to the requirements for identification of the marketplace in which competition is allegedly being unreasonably restrained. We can then analyze these allegations for sufficiency.

1. *Distinctions: Horizontal Restraints and Vertical Restraints*

HN3[] CA(2)[] **(2)** The Cartwright Act prohibits combinations in unreasonable restraint of trade. (*Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540 [78 Cal. Rptr. 2d 133]* (*Morrison*).) "Certain restraints which lack redeeming virtue are conclusively presumed to be unreasonable and illegal," and constitute a per se illegal practice. (*Ibid.*) For example, a horizontal combination (an anticompetitive agreement among competitors who are at the same level of distribution) is ordinarily illegal per se. (*Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672, 1680–1681 [60 Cal. Rptr. 2d 195]* (*Exxon Corp*.).) Likewise, "market division, and *certain types of group boycotts* are unlawful per se." (*Big Bear Lodging Assn. v. Snow Summit, Inc. (9th Cir. 1999) 182 F.3d 1096, 1101* (*Big Bear*), italics added & omitted; see *Oltz v. St. Peter's Community Hosp. (9th Cir. 1988) 861 F.2d 1440, 1445* **[***18]** (*Oltz*).)

Appellant's theory is that she, as a sole practitioner, and possibly other such persons, were being excluded from practice at Scripps, through false **[*494]** statements made by ASMG and Scripps, and through their conspiracy to implement unjustifiable rules and regulations. She contends that those actions amounted to a "horizontal group boycott," in which "entities at the same level combin[e] to deny a competitor at their level the benefits enjoyed by the members of the group," jointly disadvantaging the competitor. (*Freeman, supra, 77 Cal.App.4th 171, 196, fn. 26*.) Since ASMG competes at the same level as Appellant, she would have us apply per se rules of illegality, because such conduct is "manifestly anticompetitive." (*Oltz, supra, 861 F.2d at p. 1445*.) Appellant thus argues she need not further define the local hospital marketplace in her pleadings, because she is alleging, inter alia, per se violations. "Elaborate market analysis and case-by-case evaluation are unnecessary in cases involving *per se* antitrust violations because the anticompetitive effects of the practice are presumed." (*Big Bear, supra, 182 F.3d 1096, 1101–1102*.)

HN4[] CA(3)[] **(3)** At the pleadings stage, mere conclusory allegations **[***19]** of "manifestly anticompetitive" conduct may be deemed insufficient as a matter of law, "where there **[**672]** exists 'no tenable *per se* boycott theory.' " (*Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1044, 1049 [219 Cal. Rptr. 203]* (*Bert G. Gianelli*), disapproved on another point in *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 394 [46 Cal. Rptr. 3d 668, 139 P.3d 56]*.) Appellant only pleads legal conclusions that ASMG, by influencing the other Respondent, Scripps, with respect to enactment and application of rules and regulations and professional relations, achieved a substantially adverse effect on her own practice. This does not suffice to support any viable legal theory of a per se type of violation, in the form of "restraints which lack redeeming virtue." (*Morrison, supra, 66 Cal.App.4th 534, 540*.)

CA(4)[] **(4)** Scripps, where ASMG doctors work, is not in a horizontal competitive relationship with Appellant, but supplies facilities to practitioners. A HN5[] "vertical boycott" occurs when "entities at different levels of distribution combine to deny a competitor at one level the benefits enjoyed by the members of the vertical combination." (*Freeman, supra, 77 Cal.App.4th 171, 196, fn. 26*; see *Exxon Corp., supra, 51 Cal.App.4th 1672, 1680–1681*.)

For **[***20]** such allegations against both Respondents, the rule of reason test applies, to determine " 'whether particular concerted conduct unreasonably restrains competition.' " (*Big Bear, supra, 182 F.3d 1096, 1101*; see *Freeman, supra, 77 Cal.App.4th 171, 194*.) To examine if Respondents' alleged anticompetitive actions had any basis in reason, we next consider the extent to which Appellant can adequately plead the existence of the relevant market, as **[*495]** a means of demonstrating how the alleged unlawful conduct had evident adverse effects upon competition within that market. (*Big Bear, supra, at p. 1101*.)

2. *Vertical Restraint Test: Antitrust Market and Injury*

CA(5)[] **(5)** It is well accepted that HN6[] "the ' "antitrust laws … were enacted for 'the protection of competition, not competitors.' " ' [Citation.] They 'do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws.' [Citation.] Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." (*Cel-Tech, supra, 20 Cal.4th 163, 186*, italics omitted.)

HN7[] CA(6)[] **(6)** A complaint must allege "facts from which injury **[***21]** to market-wide competition can be inferred." (*Korshin v. Benedictine Hosp. (N.D.N.Y. 1999) 34 F.Supp.2d 133, 138* (*Korshin*).) " 'An "antitrust injury" must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. [Citations.]' " (*Morrison, supra, 66 Cal.App.4th 534, 548*, quoting *Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 723 [187 Cal. Rptr. 797]*.)

CA(7)[] **(7)** In *Exxon Corp., supra, 51 Cal.App.4th 1672*, the court explained that ***HN8***[] where an antitrust plaintiff alleges vertical restraints, facts must be pled showing "some anticompetitive effect in the larger, interbrand market." (*Id. at p. 1681*, citing *Bert G. Gianelli, supra, 172 Cal.App.3d at pp. 1044, 1048*.) "[T]he prevailing standard [is] the 'rule-of-reason' which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. [Citation.] **[**673]** And it is plaintiff's burden to make the required showing of a '"substantially adverse effect on competition in the relevant market." ' [Citation.]" (*Exxon, supra, at p. 1681*.)

Injury to an individual plaintiff is insufficient to establish standing to assert antitrust violations. **[***22]** (*Korshin, supra, 34 F.Supp.2d 133, 139–140*.) In the medical field, sufficient, successful allegations of antitrust injury might include negative impacts upon overall prices, quantity or quality of medical services, resulting from the plaintiff's absence as an available provider at the facility. (*Ibid.*) On the face of the pleadings, the nature of this dispute, in the context of highly specialized and regulated medical practice, implicates such public policy concerns regarding prices, and the quantity or quality of medical services. We accordingly inquire into the precise harm allegedly caused by the actions complained of, and whether there is any business excuse for the alleged acts. (*Bert G. Gianelli, supra, 172 Cal.App.3d at p. 1044*.)
[*496]

3. *Relevant Public Policies*

To support her claims of unfair competition, Appellant mainly relies on *Oltz*, in which the court used the rule of reason test and accepted the plaintiff's argument that a hospital's exclusive arrangement to utilize medical doctor anesthesiologists, rather than a nurse-anesthetist like the plaintiff, "potentially affected two different segments of the economy. One segment was the market in which anesthesia service providers compete **[***23]** for staff privileges at hospitals; the other was the patient market for anesthesia services. Consideration of the impact of the exclusive contract on competition does not require acceptance of one segment as the relevant market and rejection of the other. Rather … a showing of injury to competition in either market suffices for the rule of reason." (*Oltz, supra, 861 F.2d 1440, 1447*.)

CA(8)[] **(8)** In *Oltz*, these guidelines for analyzing the relevant marketplace are set forth: ***HN9***[] "Defining the market is not the aim of ***antitrust law***; it merely aids the search for competitive injury. Once defined, the relevant market demarcates 'objective benchmarks' for separating reasonable and unreasonable restraints. [Citation.] It requires the claimant to demonstrate harm to the economy beyond the claimants' own injury. [Citation.] In so doing, market definition furthers antitrust policy: the protection of competitive processes and not individual competitors." (*Oltz, supra, 861 F.2d 1440, 1448*.)

In *Oltz, supra, 861 F.2d 1440, 1447*, the relevant market was two hospitals in the greater Helena, Montana area, where there were essentially no other opportunities for the plaintiff nurse-anesthetist to practice his profession. **[***24]** On appeal, the court determined that the interests of the two sets of defendants (the hospitals and the medical doctors who had tried to keep the plaintiff from practicing there) were sufficiently independent so that their collaborated conduct was arguably harmful to competition, and was not protected by the rule of reason. (*Ibid.*)

CA(9)[] **(9)** In *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Assn. (7th Cir. 1994) 36 F.3d 664, 667* (*BCB Anesthesia Care*), the court analyzed antitrust claims involving "one hospital's decisions about staff privileges and staffing patterns," in light of other authorities challenging hospital decisions about medical staffing. There, the court stated: "Those cases invariably analyze those circumstances under the rule of reason—***HN10***[] there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to **[**674]** some rather than many, or all. [Citation.] A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. [Citation.] Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those **[***25]** decisions." (*Ibid.*)

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In its analysis, the court deciding *BCB Anesthesia Care, supra, 36 F.3d 664, 668*, took note that *Oltz, supra, 861 F.2d 1440*, stood alone as the only important antitrust medical staffing case in which the plaintiff had prevailed, to date. The court explained that in *Oltz*, "the court was apparently persuaded by the determination that the relevant market, while not one hospital, was only two hospitals." (*BCB Anesthesia Care, supra, at p. 668*.) Generally, however, antitrust challenges to a staffing decision at a single hospital do not succeed, because such cases normally do not present any "facts indicating special circumstances raising antitrust concerns." (*Ibid.*) The reasons for such a lack of success in pursuing an antitrust claim may include, as relevant here, a "lack of antitrust injury, failure to show a detrimental effect on competition, [or] insufficient market power in the relevant market." (*Ibid.*)

Oltz, supra, 861 F.2d 1440, is still good authority, on its own facts. It has not been extensively cited or followed. The Ninth Circuit Court of Appeals discussed and distinguished it on an evidentiary point in *County of Tuolumne v. Sonora Community Hosp. (9th Cir. 2001) 236 F.3d 1148* **[***26]** (*County of Tuolumne*). Specifically, *Oltz* was described there as an example of successful antitrust allegations by a health care provider-plaintiff, who had supplied direct evidence supporting his theory of a conspiracy to engage in anticompetitive conduct against him, carried out by a hospital and a group of anesthesiologists. (*Id. at pp. 1155–1156*.) In *Oltz* there was direct evidence about the ongoing feud between the plaintiff-nurse anesthesiologist, and a group of physician-anesthesiologists, and the defendant hospital governing board's meeting minutes directly showed knowledge that this feud might cause deterioration of the quality of care there, leading the board to take anticompetitive action to appease the group of physician-anesthesiologists. (*Ibid.*)

In *County of Tuolumne, supra, 236 F.3d 1148, 1155–1156*, the court did not find the required supporting direct evidence of conspiracy to prevent the physician-plaintiff from practicing at the subject hospital, as he alleged. We need not describe the distinguishable factual context of that dispute, but instead refer to its use of the legal test to be applied when circumstantial evidence of conspiracy is presented by such an antitrust **[***27]** plaintiff. The defendant can rebut such allegations of conspiracy " 'by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice.' " (*Id. at p. 1156*.)

CA(10)[] **(10)** In *County of Tuolumne, supra, 236 F.3d at pages 1155 through 1156*, the hospital that was accused of conspiring with other physicians to harm the plaintiff, through anticompetitive conduct, made an adequate showing of its "plausible and justifiable reason" for establishing certain criteria for allowing doctors to practice there, under the applicable public policies: ***HN11***[] "The setting of **[*498]** privileging criteria by a hospital is consistent with providing quality patient care and keeping insurance costs manageable." (*Ibid.*) There, the physician-plaintiff who had objected to the application of those criteria had failed to carry the burden to show that the defendants' actions were outside the scope of " 'permissible competitive behavior,' " or to show they were conspiracy related. (*Ibid.*)

In applying the rule of reason in such cases, the courts have drawn distinctions **[**675]** "'between the intentional actions of a hospital directed specifically toward the exclusion of a particular physician or groups of physicians, **[***28]** and the actions of a hospital which may, as a practical matter, result in the exclusion of individual practitioners but were undertaken for less personally directed reasons.'" (*Mateo-Woodburn v. Fresno Community Hospital & Medical Center (1990) 221 Cal.App.3d 1169, 1183–1184 [270 Cal. Rptr. 894]* (*Mateo-Woodburn*), quoting *Redding v. St. Francis Medical Center (1989) 208 Cal.App.3d 98, 104 [255 Cal. Rptr. 806]* (*Redding*).) Even where a structural staffing change may result in the exclusion of certain doctors from practice, "[i]f the justification is sufficient, the doctor's vested rights must give way to public and patient interest in improving the quality of medical services." (*Mateo-Woodburn, supra, at p. 1185*.)

Such cases illustrate that judicial deference is paid to managerial decisions concerning operation of a hospital, where the decisions appear to have been made rationally and in good faith by the hospital authorities. Hospitals have special expertise in promoting quality of care and in making workable administrative arrangements. (*Mateo-Woodburn, supra, 221 Cal.App.3d at p. 1185*.) " ' "Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening **[***29]** boards of directors for every … hospital … in the state." [Citations.]' " (*Ibid.*)

HN12[] ***CA(11)***[] **(11)** Even vertical restrictions may legitimately be allowed to reduce some forms of competition, if they also promote other forms of competition by allowing service providers " 'to achieve certain efficiencies in the distribution of its products [citation],' " under the rule of reason standard. (*Bert G. Gianelli, supra, 172 Cal.App.3d 1020, 1045*, fn. 7.)

Normally, "[a] staffing decision does not itself constitute an antitrust injury." (*BCB Anesthesia Care, supra, 36 F.3d 664, 669*.) Unless the effect of the conduct of a single health care provider is to deny patients reasonable access to any health care, the marketplace is not significantly affected by such individualized conduct. "'If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the **[*499]** reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.' [Citation.]" (*Ibid.*)

It is not enough to allege as antitrust injury, in a hospital context, "that plaintiffs cannot **[***30]** now practice in the business form they prefer and the prices the hospital charges may be somewhat higher now than they were." (*BCB Anesthesia Care, supra, 36 F.3d 664, 668*.) Before a court will interfere with how one hospital staffs its physician needs, a strong showing would be required that the purpose and effect of the anticompetitive conduct, within the relevant market defined by the plaintiffs, was outside of reasonable professional standards. (*Id. at pp. 668–669*.)

4. *Analysis*

On this set of allegations, the identification of the relevant market should be treated as a matter of law, and Appellant has not shown injury across the relevant market. (*Exxon Corp., supra, 51 Cal.App.4th 1672, 1682*.) Even though Appellant alleges different kinds of techniques were used to single her out and to impede her ability to carry on her profession, she still alleges that only **[**676]** she or possibly other unnamed single practitioners were or might have been affected.

The case before us is more like *County of Tuolumne, supra, 236 F.3d 1148*, than it is like *Oltz, supra, 861 F.2d 1440*, because these Respondents have put forth some legitimate policy explanations for the alleged anticompetitive conduct, and the record **[***31]** does not support Appellant's characterization of Respondents' only rationales for their actions (e.g., appeasement of other competitors). Instead, as in *Korshin, supra, 34 F.Supp.2d 133, 139–140*, the pleading fails to sufficiently allege damage to the relevant marketplace, such as: "any change in the price of anesthesiology services, a decrease in quality or efficiency of care, or that the consumers of anesthesiology services … have less of a market choice, other than their ability to select [the plaintiff], as a result of defendants' actions. [Citations.] … 'Without any allegation as to how market-wide competition will be affected, the complaint fails to allege a claim on which relief may be granted.' " (*Ibid.*)

Moreover, the circumstances described in the pleadings show that Appellant has been able to retain privileges to practice at other outpatient facilities, such as MOPP. Such allegations do not support her claim she has been wholly excluded from practice in the relevant market area (since it is undisputed that San Diego, unlike Helena, Montana in the *Oltz* case (*Oltz, supra, 861 F.2d 1440*), has a number of hospital facilities within the immediate area). (See also *Korshin, supra, 34 F.Supp.2d 133, 140* **[***32]** [antitrust injury not shown because the plaintiff was not precluded from practicing at **[*500]** other hospitals, and patients were not foreclosed from going to hospitals at which he could obtain privileges, etc.]; see *BCB Anesthesia Care, supra, 36 F.3d 664, 668* ["Nothing in the complaint suggests that patients are foreclosed from going elsewhere in the unlikely event that they are involved in pricing decisions [and the plaintiff was not] disabled from practicing [elsewhere]."].)

CA(12)[] **(12)** Appellant did not allege, nor did her proposed amendments add, the kind of "facts indicating special circumstances raising antitrust concerns," with respect to any detrimental effect on competition that caused injury, in excess of her own personal business concerns and circumstances. (*BCB Anesthesia Care, supra, 36 F.3d 664, 668*.) The implementation of the rules and policies of which she complains did not clearly create any adverse effect upon consumer choice in the relevant market. For all of the above reasons, the trial court did not err or abuse its discretion in sustaining the demurrers to this cause of action without leave to amend.

IV

UCL

A. Trial Court Ruling: TAC

With respect to the UCL claim, each respondent argued **[***33]** on demurrer that such causes of action require an underlying or predicate "independently wrongful" act, but Appellant had failed to assert a cognizable claim in that respect. (*§ 17000 et seq.*; the Unfair Practices Act.) Rather, the allegations were the same as in the other previous versions of the complaint, and still reflected conduct arguably within the scope of administration of the respective professions, that should not be properly subject to injunctive relief or recovery of restitution, which were said to be inappropriate remedies against the alleged practices. (*§ 17203*.)

As proposed amendments, Appellant's opposition to the demurrers sought to add allegations that Respondents' acts caused competitive injury, because if Appellant were allowed to continue to provide services at Scripps, she would charge less **[**677]** than ASMG doctors. The reason is that the procedures she would work on would be typically "cash" procedures that are not covered by insurance, in which the patients pay the surgeon directly. Those surgeons have to pay ASMG doctors more, thus costing the patient more.

In sustaining the demurrers to this claim in the TAC without leave to amend, the trial court first clarified **[***34]** that Appellant was not alleging any unlawful or fraudulent business acts, but instead "unfair" business practices. **[*501]** The court relied on the definitions in *Cel-Tech, supra, 20 Cal.4th 163*, for determining when such a claim of unfairness to competitors under *section 17200* is actionable: When it is "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [it] otherwise significantly threatens or harms competition." (*Cel-Tech, supra, at pp. 186–187*.)

The trial court then concluded the TAC did not successfully allege unfairness, in the form of "facts which violate ***antitrust law***, are tethered to some legislatively declared policy, or establish proof of some actual or threatened impact on competition. (*Cel-Tech, supra, 20 Cal.4th at pp. 186–187*.) Instead, Plaintiff alleges only individualized harm which does not support a claim for violation of the UCL. [Citation.] While Plaintiff concludes Defendants' conduct is anticompetitive activity which harms consumers, she fails to assert sufficient facts to support an 'unfair' business act."

B. Legal Principles **[***35]** and Analysis

CA(13)[] **(13)** In support of her unfairness argument, Appellant refers to this cause of action as being founded in the Unfair Practices Act (*§ 17000 et seq.*), but the briefing substantively discusses the related enforcement provisions for that chapter, the UCL, *section 17200*. ***HN13***[] "The purpose of the Unfair Practices Act is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' (*§ 17001*.) It prohibits specific 'practices which the legislature has determined constitute unfair trade practices.' [Citation.]" (*Cel-Tech, supra, 20 Cal.4th 163, 179*.)

Here, it is not disputed that Appellant seeks relief under the rubric of the UCL for anticompetitive actions that allegedly harmed her, including the Unfair Practices Act, the Cartwright Act theory, or tort theories, as the "borrowed" substantive law prohibiting unfair business practices. She does not specify which portions of the Unfair Practices Act were allegedly violated.

In *Redding, supra, 208 Cal.App.3d 98, 107*, the court found **[***36]** allegations of unfair business practices were insufficient, regarding a hospital's decision to enter into an exclusive contract with one particular surgeon, because the plaintiffs could not establish such an arrangement was "undertaken for anti-competitive purposes," and moreover, the defendant hospital was not " 'in competition' " with the plaintiffs (other qualified surgeons). (*Ibid.*)
[*502]

In analyzing Appellant's Cartwright Act claims above, we have not found adequate support for her pleaded claims of unfair business conduct, in the form of certain threatened incipient violations of antitrust laws, or their "policy or spirit," or other acts significantly threatening **[**678]** or harming competition in the medical field as a whole. (*Cel-Tech, supra, 20 Cal.4th at p. 187*.) As already discussed, courts are traditionally reluctant to specify how hospital contracting and staffing policies may be applied to individual practitioners. (*Mateo-Woodburn, supra, 221 Cal.App.3d 1169, 1184–1185*.) Appellant's proposed amendments, claiming patients are ultimately harmed by anticompetitive conduct because her fees would be lower, appear to be speculative in nature and do not address specific " 'practices which the legislature **[***37]** has determined constitute unfair trade practices.' " (*Cel-Tech, supra, at p. 179*.)

CA(14)[] **(14)** Nor do Appellant's alternative tort theories provide an underlying body of law to plead unfair "practices" in this context, where they affected her specifically. ***HN14***[] Actions under the UCL are not meant to be substitutes for tort or contract actions. (*Korea Supply, supra, 29 Cal.4th 1134, 1150*.) "Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. As we have said, the 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.]" (*Ibid.*)

Without more extensive or clear allegations of how these administrative decisions amounted to " 'anti-competitive business practices' " that injure consumers, Appellant cannot state a claim for necessary " 'preservation of fair business competition.' " (*Cel-Tech, supra, 20 Cal.4th 163, 179–180*.) The individualized relief she seeks, injunctions against the ongoing use of the hospital rules and policies of which she complains, **[***38]** or restitution of lost income, are not appropriate recovery or civil penalties under the UCL. (*§ 17206*.) Such relief could undermine legitimate public policy concerns and would be inconsistent with judicial recognition of special expertise in the field of hospital administration. (*Redding, supra, 208 Cal.App.3d at p. 107*.)

In any case, as we next discuss, other relief in damages may conceivably be available. "While plaintiff may not recover monetary relief under the limited remedies provided by the UCL, plaintiff may pursue a cause of action under traditional tort law." (*Korea Supply Co., supra, 29 Cal.4th 1134, 1152*.) We next inquire into the viability of such claims.
[*503]

V

INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE (TAC)

A. Argument and Rulings

In demurring to the TAC, Respondents for the first time argued there were defects in the causes of action for intentional and negligent interference with prospective business advantage (i.e., lack of supporting allegations of underlying wrongful acts or duty). Appellant pointed out at the trial court hearing that until this set of demurrers, she had been unaware that Respondents would be attacking them, and she could add more allegations **[***39]** to support her interference claims, about defamatory comments and misrepresentations.

At the hearing, the superior court discussed all the claims in detail, observing at one point that there might be a qualified privilege applicable under *Civil Code section 47*. However, that statutory analysis **[**679]** does not appear in the written order, nor is it significantly relied on in the briefing, and it is not before us.

The main focus before the trial court was whether Appellant had successfully pleaded the type of underlying wrongful conduct by Respondents (either intentional or negligent), under some established legal measure, that would justify a finding that such interference went beyond normally tolerated business competition. Appellant asserted to the trial court that ASMG personnel had falsely told at least one prospective patient and a surgeon who inquired about her availability that she was retired. Appellant stated that ASMG had made defamatory and disparaging comments to the two surgeons that she wished to work with, and to others, that her conduct and character were bad, such that defamation was a separate wrongful, intentional act in support of this claim of interference with her economic **[***40]** expectancies. At that time, she was still pursuing her breach of contract claim, that ASMG had breached the nondisparagement clause in their separation agreement.

In the rulings, the trial court found it was inadequate for Appellant to allege that Respondents' motives were improper: "[A]n act is not independently wrongful merely because defendant acted with an improper motive. [Citation.] An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. [Citation.]"

Next, the court disagreed with Appellant that her allegations were sufficient, that "ASMG created and enforced an unwritten policy at Scripps that **[*504]** surgeons were prohibited from requesting a specific anesthesiologist. [Citation.] [Appellant] complains about the effect of this unwritten policy on her, but does not explain how it is wrongful or even that it is unwise. She complains about new departmental rules requiring attendance at meetings, minimum numbers of procedures, and taking on call duty. [Citation.] [She] prefers not take call, attend meetings, or obtain the necessary training to take call. These are all **[***41]** personal choices, to apparently diminish the stress in her life, but this conduct does not inflate the policies, or other conduct alleged, to an independent wrongful act." The court ruled that her proposed additional allegations of defamation or disparagement did not sink to the level of independently wrongful conduct, apart from any unfair trade practices claims. The court found these tort claims were unfounded under her situation as described. The respective demurrers to the TAC were sustained without leave to amend (mooting the motions for judgment on the pleadings).

B. Governing Legal Principles

At this stage of the proceedings, we analyze Appellant's allegations only as they are pleaded in her complaints, and "express no view as to whether plaintiff's proof will be sufficient to establish these elements at trial." (*Korea Supply, supra, 29 Cal.4th 1134, 1164*, fn. 14.) It is not dispositive that Respondents did not bring demurrers to attack these particular claims earlier, since we are examining their legal validity as matters of law. However, we also must consider whether Appellant presented enough supporting allegations to the trial court to justify an exercise of its discretion in allowing **[***42]** her leave to amend.

CA(15)[] **(15)** "We first articulated the elements of the tort of intentional interference with prospective economic advantage in *Buckaloo v. Johnson (1975) 14 Cal.3d 815, 827 [122 Cal. Rptr. 745, 537 P.2d 865]* (*Buckaloo*). ***HN15***[] These elements are usually stated **[**680]** as follows: ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' " (*Korea Supply, supra, 29 Cal.4th 1134, 1153*.)

In *Korea Supply, supra, 29 Cal.4th 1134*, the court clarified that the third element of the tort of interference with prospective economic advantage "also requires a plaintiff to plead intentional wrongful acts on the part of the defendant designed to disrupt the relationship." (*Id. at p. 1154*, italics omitted.) Whether an act is independently wrongful depends on its unlawfulness (if it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard"). (*Id. at p. 1159*.)

[*505]

In **[***43]** *Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 618–619 [17 Cal. Rptr. 2d 708]*, the plaintiff retail businessman (beauty supply store) alleged that the defendant and respondent company had breached a contract to keep supplying certain products to him. It mainly supplied products to hair salons, not retailers. He additionally sought to plead the tort of intentional interference with prospective business advantage, but the court found those allegations were defective, because there was no factual basis for the assertion that the defendant company had tortiously interfered with the retailer's existing commercial contacts, for any improper purpose. Rather, the company had made a business supply decision, and its effect on customers and any damage to business "were simply consequences of breach of contract." (*Id. at p. 618*.) In finding the pleading of interference with prospective advantage to be defective, the court referred to "the cautious policy of the courts about extending tort remedies to ordinary commercial contracts." (*Ibid.*) The court found no abuse of discretion had occurred when leave to amend was denied, because the trial court had not incorrectly applied the standard for **[***44]** determining " 'whether behind the words of the pleading anything of legal substance lies, whether on further revision the pleading can honestly state a cause of action.' " (*Ibid.*)

C. Analysis: ASMG

CA(16)[] **(16)** In analyzing this theory, we are mindful that the TAC also contained a cause of action for breach of contract against ASMG, alleging that it had disparaged and defamed Appellant, contrary to its previous promises not to do so in her agreement regarding separation from employment with them. We think it is appropriate to read the allegations of this contract cause of action (dismissed without prejudice pending appeal) together with the current claims of intentional interference with economic advantage, although they were pled separately. Those alleged acts of defamation or disparagement could legitimately be considered to meet, for pleadings purposes, the standards for establishing "independent wrongfulness" of interference, as enunciated in *Korea Supply, supra, 29 Cal.4th 1134, 1159*, if properly incorporated into the TAC cause of action. ***HN16***[] Common law defamation claims are subject to "determinable legal standard[s]" for resolution, as required for such a tort claim. (*Ibid.*) Even though we have not **[***45]** found the Cartwright Act and UCL causes **[**681]** of action to be well pled, there are apparently other allegations of wrongful conduct by ASMG, potentially supporting the current cause of action to claim injury through ASMG's intentional interference with economic advantage.

As to ASMG, we conclude Appellant has sufficiently alleged the first of the required elements, existence of a previous economic relationship with the two surgeons, with probability of future economic benefit to her. Next, Appellant adequately alleged that ASMG had knowledge of this ongoing economic **[*506]** relationship with the two surgeons, and that the relationship would have probable future economic benefit to her, but ASMG nevertheless engaged in certain "intentional wrongful acts" designed to disrupt her professional relationships. (*Korea Supply, supra, 29 Cal.4th at p. 1154*, italics omitted.) For example, ASMG officials allegedly threatened to withhold ASMG services previously provided at MOPP, unless Appellant's privileges there were blocked. They are also said to have defamed or disparaged her character and ability to perform adequately, and they told their members to avoid her.

Alternatively, Appellant claims that if specific intent was **[***46]** lacking, such ASMG acts were performed at least with knowledge that some adverse interference was certain or substantially certain to occur as a result. In some ways, Appellant is claiming that she has a right to carry on her practice in her own business model of a sole practitioner, different from the group practice of her competitor, ASMG. We can express no opinion about the validity of the respective business models, and only observe that the alleged anticompetitive measures had some probability of impeding Appellant's existing practice and business expectancies. ASMG demonstrated that there were some legitimate professional reasons for its own form of practice, and for the Scripps rules and regulations on practice. However, for pleadings purposes, we assume the truth of the allegations that these were imposed without adequate justification and specifically against her interests. As noted, issues of privilege under *Civil Code section 47*, discussed with the trial court, have not been fully briefed or litigated, and we express no opinion on them.

Accordingly, we cannot currently determine that Appellant will be unable to adequately allege proximate causation of economic harm to her **[***47]** from wrongful acts of ASMG. The disruption in her practice that she attributes to its acts may well have been caused by other factors, but it is not yet before the courts whether there is a causal relationship between ASMG's allegedly wrongful acts and Appellant's harm. We therefore conclude she may be able to assert alleged facts that satisfy the proximate cause element of this tort. (*Korea Supply, supra, 29 Cal.4th 1134, 1164–1166*.)

Finally, Appellant represented to the trial court and states in her briefs that she can add more allegations about the type of wrongful conduct or malice that would further support her claims, such as misrepresentations of hospital rules, representations to prospective patients or other surgeons that she had retired, and disparaging comments about her character and abilities, as more fully alleged in the breach of contract claim. These may add to the viability of the current cause of action, and the trial court should have allowed Appellant an opportunity to file an amended pleading to state her best case on this theory, in addition to reasserting her breach of contract claim, if desired, and we will reverse the judgment of dismissal as to ASMG with directions **[***48]** to that effect.

[*507]

[682]** D. Analysis: Scripps

In the ruling, the trial court did not materially distinguish between the conduct alleged against Scripps and ASMG. This was understandable, in light of the conspiracy allegations Appellant consistently made to tie them together. However, it is difficult to find among the allegations against Scripps, even considering such conspiracy language, the type of independently wrongful conduct that would support this claim.

Specifically, Appellant claims that Scripps engaged in intentionally wrongful acts designed to disrupt her economic relationship with the two surgeons with whom she had consistently worked. She claims Scripps falsely told at least one surgeon and one patient she had retired, and that Scripps officials imposed call, utilization, and meeting requirements in a way that operated to target her in a wrongful fashion. However, those allegations are undermined by her admissions that she previously held Scripps privileges, was in the process of renewing them, and had not yet been turned down. Although she claims that she was unilaterally reclassified from courtesy to active status, and had difficulty meeting those requirements, it is not clear how **[***49]** those changes in her professional status would impede her efforts to continue to work with the two doctors, who also practiced at several other locations. She does not support her allegations that it was the Scripps officials who expressly sought to interfere with her existing professional relationships, or that Scripps knew or should have had knowledge that its actions would certainly or substantially certainly cause interference with her prospective advantage.

The gist of Appellant's allegations of interference with economic advantage is clearly directed toward the ASMG activities, and Scripps (not a direct competitor), appears as a more or less peripheral actor. The regulatory activities by Scripps, as alleged, seem to fall within the sphere of lawful administrative behavior, rather than any tortious interference or predatory economic behavior. (*Korea Supply, supra, 29 Cal.4th 1134, 1159–1160*.) There is no basis to reverse the judgment of dismissal as to Scripps as to this claim.

VI–VII[*] **[***50]** [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

Judgment is affirmed as to Scripps.
[*508]

Judgment is reversed as to ASMG with directions to the trial court to allow further proceedings to enable Appellant to file an amended complaint versus ASMG only, if desired, to plead a theory of intentional interference with prospective economic advantage, and/or to reassert her breach of contract claim.

Scripps is to receive its costs on appeal. Appellant and ASMG shall both bear their own costs.

McDonald, J., and O'Rourke, J., concurred.

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[*] See footnote, *ante*, page 480.

LexisNexis

Marsh v. Anesthesia Servs. Med. Group

Court of Appeal of California, Fourth Appellate District, Division One

October 6, 2011, Filed

D057858

Reporter

2011 Cal. App. Unpub. LEXIS 7632 *

M. LOU MARSH, Plaintiff and Appellant, v. ANESTHESIA SERVICES MEDICAL GROUP, INC., et al., Defendants and Respondents.

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

Prior History: **[*1]** APPEAL from judgments of the Superior Court of San Diego County. Super. Ct. No. 37-2007-00082724-CU-BT-CTL. David B. Oberholtzer, Judge.

Disposition: Affirmed in part, reversed in part.

Core Terms

allegations, cause of action, demurrers, practices, antitrust, trial court, unfair, surgeons, privileges, pleadings, anticompetitive, patient, staffing, staff, relevant market, conspiracy, decisions, pled, emotional distress, leave to amend, anesthesiologists, competitor, anti trust law, prospective economic advantage, intentional interference, wrongful act, Cartwright Act, regulations, anesthesia, outrageous

Judges: HUFFMAN, Acting P. J.; McDONALD, J., O'ROURKE, J. concurred.

Opinion by: HUFFMAN

Opinion

Plaintiff and appellant M. Lou Marsh (Appellant) is a board certified anesthesiologist licensed to practice medicine in California. She filed this action for damages and other relief against her former practice group, defendant and respondent Anesthesia Service Medical Group, Inc. (ASMG), a professional medical corporation that provides physician services to hospitals and other medical centers in San Diego County. She also sued one of the facilities served by ASMG, Scripps Memorial Hospital of La Jolla (Scripps), after she experienced interpersonal and professional difficulties in carrying on her medical practice at a Scripps facility, the Scripps XiMED Surgery Center (Ximed).

In several successive pleadings that were challenged by a series of demurrers by ASMG and Scripps (together, Respondents), Appellant pled several types of unlawful or unfair business practices and related tort theories, which allegedly caused her unfair exclusion from practice. **[*2]** She contends Respondents' acts were in violation of the

Cartwright Act (*Bus. & Prof. Code,*[1] *§ 16700 et seq.*), and/or the Unfair Competition Law (the UCL, § 17200 et seq.). She also alleged that Respondents injured her by intentionally and/or negligently interfering with her prospective business advantage, and intentionally inflicted severe emotional distress (IIED) on her.

The trial court sustained demurrers to portions of the first amended complaint (FAC) and the third amended complaint (TAC), allowing no further leave to amend. In connection with filing her notice of appeal, Appellant voluntarily dismissed, without prejudice, an additional cause of action for breach of contract against ASMG, based on its alleged violations of a nondisparagement clause in her 2004 separation agreement with it.

Appellant contends on appeal that all of her causes of action are well pled, or could be successfully amended to add any essential allegations to state such causes of action. She argues her statutory claims seek legitimate remedies, including injunctive relief and restitution, and the tort claims for damages **[*3]** are necessary to redress her economic and personal injury.

Having reviewed the pleadings in light of well established legal principles, we conclude Appellant has not successfully alleged, on the operative facts and theories she has consistently pled, the statutory causes of action under the Cartwright Act or the UCL, nor has she demonstrated any realistic possibility of further amendments. The trial court's analysis of the relevant legal and policy considerations, as applied to those pleaded facts, was correct as a matter of law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186-187* (*Cel-Tech*); *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 195-196* (*Freeman*).)

We reach similar conclusions on the demurrer rulings with respect to each of the tort causes of action asserted, with one exception. As against ASMG, the cause of action pled in the TAC for intentional interference with prospective business advantage was not previously subjected to demurrers, and this record requires that Appellant should be allowed an opportunity to amend her pleading to assert the type of wrongful conduct that, under established legal measures, **[*4]** may be able to support a cognizable claim. (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158* (*Korea Supply*).) Even though, as stated by the Supreme Court in *Korea Supply,* the pleading and proof requirements for pursuing a cause of action for damages for intentional interference with prospective economic advantage are more rigorous in some respects than those of the UCL, we cannot say on this record that Appellant clearly lacks any such recourse in damages against ASMG for the injuries she claims to have suffered as a result of its alleged wrongful acts controverting her economic interests. As to Scripps, however, such claims are not well taken, for reasons to be explained.

Moreover, our examination of the record in light of the applicable pleading standards leads us to conclude that, as against either Respondent, Appellant cannot demonstrate how she could state any viable theory of negligent interference with prospective business advantage, nor the "outrageous conduct" required to support a claim of IIED, in this overall factual context of a dispute among professionals in the business of health care. (See *LiMandri v. Judkins (1997) 52 Cal.App.4th 326, 348-350* (*LiMandri*); **[*5]** *Christensen v. Superior Court (1991) 54 Cal.3d 868, 903* (*Christensen*).)

The judgment dismissing the action against Scripps is accordingly affirmed. We reverse the judgment of dismissal as to ASMG, with directions to the trial court to conduct appropriate further proceedings to allow Appellant to file an amended pleading against ASMG solely on the claim of intentional interference with economic advantage, as well as allowing her to reassert, if so desired, her voluntarily dismissed breach of contract claim.

I

BACKGROUND: PARTICIPANTS AND FILING OF ACTION

For purposes of analyzing the demurrer rulings, we take the facts properly pleaded to assess whether they may state their causes of action, as matters of law. (*Blank v. Kirwan (1985) 39 Cal.3d 311, 318*.) In the original and all

[1] All further statutory references are to the Business and Professions Code unless noted.

her amended complaints, Appellant alleges essentially the following transactional facts (to be expanded as needed in the discussion portion of this opinion). We mainly postpone our summary of the individual rulings on demurrer giving rise to this appeal until the discussion portion of this opinion.

Until 2004, Appellant was a longtime member of ASMG, and she had staff privileges to provide anesthesia services at several **[*6]** institutions, including Scripps and its outpatient facility, Ximed.[2] After overcoming health problems (breast cancer), and learning that the facility where she was currently working was closing, she decided to leave ASMG to pursue her own practice. Upon leaving ASMG in July 2004, Appellant negotiated a separation agreement to resolve their disputes over professional fees she was claiming were due to her, and the agreement included a nondisparagement clause.

After her separation from ASMG employment, Appellant alleges she appropriately communicated to ASMG and Scripps/Ximed doctors and staff that she was not able to or interested in taking on scheduled call duties at Scripps for emergency and other services for nights and weekends, as the ASMG contractual arrangement provided for its affiliates to do. Appellant made it clear to ASMG and Scripps officials that she was unable or unqualified to take such call duty, due to her interest in preserving her health by avoiding such unexpected calls, and because she had not practiced in an emergency and trauma care setting for more than 15 years, but instead **[*7]** had specialized in elective plastic surgery for that time.

Upon leaving ASMG in 2004, Appellant retained her privileges at Scripps, although she mainly continued to practice anesthesia in private outpatient surgery centers, working primarily with two plastic surgeons, Dr. Steven Cohen and Dr. Stewart Kincaid (the two surgeons). Appellant also provided anesthesia services to these two surgeons when they performed procedures at other outpatient surgery centers affiliated with other hospitals in the area (a Sharp Metro Hospital facility, and Mercy Outpatient Pavilion (MOPP), at Scripps Mercy Hospital, where she also obtained privileges).

In 2006, the two surgeons with whom Appellant worked started performing procedures at Ximed, utilizing anesthesia services there from Appellant and from ASMG doctors. Ninety-nine percent of the anesthesiologists serving on staff at Scripps are employed by ASMG, and Appellant came to believe ASMG was unlawfully influencing the Scripps medical staff to cooperate in interfering with her efforts to practice there.

Specifically, Appellant alleges that when she decided in 2006 to resume practicing at Scripps, to take cases there with the two surgeons, ASMG and **[*8]** Scripps together allegedly took actions to limit her practice at Scripps/Ximed in several ways, all of which she claims amounted to unfair business practices or were otherwise wrongful. Appellant asserts that ASMG and/or Scripps allegedly made knowing misrepresentations to interested parties that her employment status was "retired," that she did not carry her fair share of call, that this adversely affected hospital morale, and that she was disruptive, adversarial, and should be avoided. Scripps officials allegedly told surgeons using its facilities that, according to some unwritten rule or practice, they were not allowed to specifically request her professional services, but instead they must use those anesthesiologists who take scheduled call duty pursuant to ASMG arrangements.

When Appellant obtained privileges at MOPP (with Scripps Mercy), ASMG officials allegedly threatened to withhold ASMG services previously provided there, unless Appellant's privileges were blocked. Also around that time, ASMG notified her that her health insurance policy on its plan had been canceled, although it later claimed this was a mistake, and the policy remained in effect. Appellant, as a cancer survivor, **[*9]** alleges she suffered serious emotional distress while unfairly placed under that misapprehension.

Appellant further alleges that ASMG and Scripps worked together, without justification, to enact new hospital staffing rules that imposed unfair burdens upon her in particular, such as adopting rules that required all staff, including her, to participate in regular night and weekend hospital call duty. Other such new utilization and staff rules required anesthesiologists practicing at Scripps to attend a minimum number of monthly meetings, and to participate in at least 20 surgical cases over a two-year period. Unilaterally, Scripps reclassified Appellant as having

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[2] Ximed was originally named as a defendant, but was dismissed and is no longer a party.

"active" status, rather than "courtesy" privileges, which subjected her to additional administrative requirements for renewal of privileges at Scripps.[3] However, about 50 other similarly situated anesthesiologists were allowed to retain their courtesy status.

In December of 2007, Appellant filed this action and amended her complaint ("FAC") in January 2008. Originally, in addition to her unlawful business practices, antitrust and emotional distress claims, Appellant pursued separate causes of action for conspiracy and negligent infliction of emotional distress. Each Respondent successfully brought demurrers to certain of these causes of action but not others,[4] and eventually each Respondent filed an answer to the SAC.

By stipulation, Appellant filed her TAC, which retained the same four causes of action as in the SAC (except for correctly omitting Scripps from the IIED claim). As **[*11]** against ASMG, Appellant was allowed to add a breach of contract theory, based on alleged violation of the nondisparagement clause in her 2004 separation agreement from ASMG (defamatory remarks calling her "disruptive," "unfair," and "adversarial"). Respondents again demurred and sought judgment on the pleadings.

After extensive briefing and hearing, all demurrers were sustained without leave to amend and judgments of dismissal were entered. Appellant voluntarily dismissed her breach of contract claim against ASMG, without prejudice, to seek this immediate appellate review.

II

STANDARD OF REVIEW AND ISSUES PRESENTED

We apply well established rules of review. "A demurrer tests the legal sufficiency of the complaint. [Citation.] Therefore, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' [Citation.] The trial court exercises its discretion in declining to grant leave to amend. [Citation.] If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its **[*12]** discretion by not granting leave to amend. [Citation.] The plaintiff has the burden of proving the possibility of cure by amendment." (*Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, 78* (*Grinzi*); *Blank v. Kirwan, supra, 39 Cal.3d 311, 318*; *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 327* (*Chicago Title*); distinguished in another point in *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 781, fn. 18*.)

Although a court must on demurrer accept as true properly pleaded facts, a demurrer does not admit contentions or conclusions of law or fact. (*Chicago Title, supra, 69 Cal.2d 305, 327*.) Particularly as to the Cartwright Act and UCL causes of action, in ruling on these demurrers, the superior court was required to apply statutory standards to the pleaded facts. Determining the meaning of a statutory standard requires the resolution of a question of law. (*People ex rel Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 432*.) "The soundness of the resolution of such a question is examined de novo." (*Ibid.*) As will be explained, those statutory claims are not well stated on this record, as to either of the Respondents, and we will discuss the problems **[*13]** with Appellant's statutory arguments as to Respondents collectively.

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[3] The record is not clear as to Appellant's current status as to hospital privileges at Scripps. According to her opening brief (filed in December 2010), Appellant's privileges "technically" expired in March 2008 and February 2010, but she does not know whether her applications **[*10]** have been processed by Scripps.

[4] The trial court sustained the demurrers to the FAC without leave to amend as to Appellant's causes of action for violation of the Cartwright Act, a separate claim of conspiracy, and negligent infliction of emotional distress. At the SAC stage, Scripps obtained an order sustaining its demurrer to the claim for IIED without leave to amend (although that claim remained pending as to ASMG). It was not until the TAC was filed that either Respondent demurred to the claims for damages for interference with prospective economic advantage.

However, a different approach is required as to Appellant's tort theories, in which she has more clearly pled she stands in a different relationship to ASMG than to the Scripps facilities served by ASMG. We address, separately, those interference with economic relations and emotional distress claims against Respondents.

III

ALLEGED VIOLATIONS OF ***ANTITRUST LAW***

A. FAC Hearing and Ruling

In this claim in the FAC, Appellant incorporated her general allegations, and added that Respondents effectively conspired against her in order to limit her services and to bar her from competing with ASMG. She alleged she was targeted, exclusively, by the promulgation of the rules requiring call obligations and utilization requirements, and this was anticompetitive activity, since Scripps represented itself to be an "open staff" facility. She sought injunctive relief to prevent Respondents from enforcing those rules or regulations or from intimidating or interfering with her exercise of her professional skills.

To challenge the FAC's cause of action for violation of the Cartwright Act, the demurrers each argued that Appellant had failed to **[*14]** adequately identify a recognized form of a relevant market, in which their actions had allegedly interfered with business interests. In opposition, Appellant argued that she could add further allegations about how she, as a sole practitioner, and possibly other such persons, were being excluded from the San Diego County hospital market.

At the hearing before the trial court, Appellant represented she could possibly identify other non-ASMG anesthesiologists who could have been precluded from practicing at Scripps. She maintained that Respondents should not be able to require single practitioners to operate their practices in a different way. In the briefs and in later filings regarding the related UCL claim, she argues she could add allegations about injuries occurring in the relevant marketplace, because she has a practice of charging less per patient than ASMG doctors do. This would arguably support her claim there is indirect injury to patients, who might be able to pay less for their elective, cash basis surgeries, if her practice were unrestrained.

After its hearing, the trial court determined that Appellant had only alleged individualized economic injury at a single outpatient surgery **[*15]** center, the claim could not be successfully amended as described, and the demurrers would be sustained without leave to amend.

B. Applicable Legal Principles

Section 16750, subdivision (a) of the Cartwright Act generally allows any person injured in her business or property "by reason of anything forbidden or declared unlawful by this chapter" to bring a private action for treble damages or injunctive relief. Section 16720, subdivision (a), defines the prohibited kinds of "trusts" (combinations of capital, skill or acts by two or more persons) as including those created for or carrying out unreasonable restrictions in trade or commerce.

The elements of this Cartwright Act claim are """(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. [Citation.]""" (*Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 47*; *Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 373*.) "An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. [Citation.] California requires a 'high degree of particularity' in the **[*16]** pleading of Cartwright Act violations [citation] and therefore generalized allegations of antitrust violations are usually insufficient. [Citation.] . . . The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient. [Citation.]" (*Freeman, supra, 77 Cal.App.4th 171, 196*.)

Appellant believes she has adequately pled both horizontal and vertical types of illegal restraint of trade arrangements between Respondents, under the tests applicable to those claims. We first examine these two types of alleged anticompetitive conduct, then turn to the requirements for identification of the marketplace in which competition is allegedly being unreasonably restrained. We can then analyze these allegations for sufficiency.

1. Distinctions: Horizontal Restraints and Vertical Restraints

The Cartwright Act prohibits combinations in unreasonable restraint of trade. (*Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540* (*Morrison*).) "Certain restraints which lack redeeming virtue are conclusively presumed to be unreasonable and illegal," and constitute a per se illegal practice. (*Ibid.*) For example, a horizontal **[*17]** combination (an anticompetitive agreement among competitors who are at the same level of distribution) is ordinarily illegal per se. (*Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672, 1680-1681* (*Exxon Corp.*).) Likewise, "market division, and *certain types of group boycotts* are unlawful per se." (*Big Bear Lodging Ass'n v. Snow Summit, Inc. (9th Cir. 1999) 182 F.3d 1096, 1101* (*Big Bear*); italics added); *Oltz v. St. Peter's Community Hosp. (9th Cir. 1988) 861 F.2d 1440, 1445* (*Oltz*).)

Appellant's theory is that she, as a sole practitioner, and possibly other such persons, were being excluded from practice at Scripps, through false statements made by ASMG and Scripps, and through their conspiracy to implement unjustifiable rules and regulations. She contends that those actions amounted to a "horizontal group boycott," in which "entities at the same level combin[e] to deny a competitor at their level the benefits enjoyed by the members of the group," jointly disadvantaging the competitor. (*Freeman, supra, 77 Cal.App.4th 171, 196, fn. 26*.) Since ASMG competes at the same level as Appellant, she would have us apply per se rules of illegality, because such conduct is "manifestly **[*18]** anticompetitive." (*Oltz, supra, 861 F.2d at p. 1445*.) Appellant thus argues she need not further define the local hospital marketplace in her pleadings, because she is alleging, inter alia, per se violations. "Elaborate market analysis and case-by-case evaluation are unnecessary in cases involving *per se* antitrust violations because the anticompetitive effects of the practice are presumed." (*Big Bear, supra, 182 F.3d 1096, 1101-1102*.)

At the pleadings stage, mere conclusory allegations of "manifestly anticompetitive" conduct may be deemed insufficient as a matter of law, "where there exists 'no tenable *per se* boycott theory.'" (*Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1044, 1049* (*Bert G. Gianelli*); disapproved on another point in *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 394*.) Appellant only pleads legal conclusions that ASMG, by influencing the other Respondent, Scripps, with respect to enactment and application of rules and regulations and professional relations, achieved a substantially adverse effect on her own practice. This does not suffice to support any viable legal theory of a per se type of violation, in the form of "restraints **[*19]** which lack redeeming virtue." (*Morrison, supra, 66 Cal.App.4th 534, 540*.)

Scripps, where ASMG doctors work, is not in a horizontal competitive relationship with Appellant, but supplies facilities to practitioners. Regarding this "vertical boycott" allegation, it occurs when "entities at different levels of distribution combine to deny a competitor at one level the benefits enjoyed by the members of the vertical combination." (*Freeman, supra, 77 Cal.App.4th 171, 196, fn. 26*; *Exxon Corp., supra, 51 Cal.App.4th 1672, 1680-1681*.)

For such allegations against both Respondents, the rule of reason test applies, to determine "'whether particular concerted conduct unreasonably restrains competition.'" (*Big Bear, supra, 182 F.3d 1096, 1101*; *Freeman, supra, 77 Cal.App.4th 171, 194*.) To examine if Respondent's alleged anticompetitive actions had any basis in reason, we next consider the extent to which Appellant can adequately plead the existence of the relevant market, as a means of demonstrating how the alleged unlawful conduct had evident adverse effects upon competition within that market. (*Big Bear, supra, at p. 1101*.)

2. Vertical Restraint Test: Antitrust Market and Injury

It is well accepted **[*20]** that "the '"antitrust laws . . . were enacted for 'the protection of competition, not competitors.'"' [Citation.] They 'do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws.' [Citation.] Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." (*Cel-Tech, supra, 20 Cal.4th 163, 186*.)

A complaint must allege "facts from which injury to market-wide competition can be inferred." (*Korshin v. Benedictine Hosp. (N.D.N.Y. 1999) 34 F.Supp.2d 133, 138* (*Korshin*).) "'An "antitrust injury" must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. [Citations.]'" (*Morrison, supra, 66 Cal.App.4th 534, 548*, citing *Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 723*.)

In *Exxon Corp., supra, 51 Cal.App.4th 1672*, the court explained that where an antitrust plaintiff alleges vertical restraints, facts must be pled showing "some anticompetitive effect in the larger, interbrand market." **[*21]** (*Id. at p. 1681*, citing *Bert G. Gianelli, supra, 172 Cal.App.3d at pp. 1044, 1048*.) "[T]he prevailing standard [is] the 'rule-of-reason' which measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. [Citation.] And it is plaintiff's burden to make the required showing of a '"substantially adverse effect on competition in the relevant market."' [Citation.]" (*Exxon, supra, at p. 1681*.)

Injury to an individual plaintiff is insufficient to establish standing to assert antitrust violations. (*Korshin, supra, 34 F.Supp.2d 133, 139-140*.) In the medical field, sufficient, successful allegations of antitrust injury might include negative impacts upon overall prices, quantity or quality of medical services, resulting from the plaintiff's absence as an available provider at the facility. (*Ibid.*) On the face of the pleadings, the nature of this dispute, in the context of highly specialized and regulated medical practice, implicates such public policy concerns regarding prices, and the quantity or quality of medical services. We accordingly inquire into the precise harm allegedly caused by the actions complained of, and whether there is any business **[*22]** excuse for the alleged acts. (*Bert G. Gianelli, supra, 172 Cal.App.3d at p. 1044*.)

3. Relevant Public Policies

To support her claims of unfair competition, Appellant mainly relies on *Oltz,* in which the court used the rule of reason test and accepted the plaintiff's argument that a hospital's exclusive arrangement to utilize medical doctor anesthesiologists, rather than a nurse-anesthetist like the plaintiff, "potentially affected two different segments of the economy. One segment was the market in which anesthesia service providers compete for staff privileges at hospitals; the other was the patient market for anesthesia services. Consideration of the impact of the exclusive contract on competition does not require acceptance of one segment as the relevant market and rejection of the other. Rather . . . a showing of injury to competition in either market suffices for the rule of reason." (*Oltz, supra, 861 F.2d 1440, 1447*.)

In *Oltz,* these guidelines for analyzing the relevant marketplace are set forth: "Defining the market is not the aim of ***antitrust law***; it merely aids the search for competitive injury. Once defined, the relevant market demarcates 'objective benchmarks' for separating **[*23]** reasonable and unreasonable restraints. [Citation.] It requires the claimant to demonstrate harm to the economy beyond the claimants' own injury. [Citations.] In so doing, market definition furthers antitrust policy: the protection of competitive processes and not individual competitors." (*Oltz, supra, 861 F.2d 1440, 1448*.)

In *Oltz, supra, 861 F.2d 1440, 1447*, the relevant market was two hospitals in the greater Helena, Montana area, where there were essentially no other opportunities for the plaintiff nurse-anesthetist to practice his profession. On appeal, the court determined that the interests of the two sets of defendants (the hospitals and the medical doctors who had tried to keep plaintiff from practicing there) were sufficiently independent so that their collaborated conduct was arguably harmful to competition, and was not protected by the rule of reason. (*Ibid.*)

In BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n (7th Cir. 1994) 36 F.3d 664, 667 (*BCB Anesthesia Care*), the court analyzed antitrust claims involving "one hospital's decisions about staff privileges and staffing patterns," in light of other authorities challenging hospital decisions about medical **[*24]** staffing. There, the court stated: "Those cases invariably analyze those circumstances under the rule of reason—there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. [Citation.] A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. [Citation.] Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions." (*Ibid.*)

In its analysis, the court deciding BCB Anesthesia Care, supra, 36 F.3d 664, 668, took note that Oltz, supra, 861 F.2d 1440, stood alone as the only important antitrust medical staffing case in which the plaintiff had prevailed, to date. The court explained that in *Oltz,* "the court was apparently persuaded by the determination that the relevant market, while not one hospital, was only two hospitals." (BCB Anesthesia Care, supra, at p. 668.) Generally, however, antitrust challenges to a staffing decision at a single hospital do not succeed, because such cases normally do not present any "facts indicating special circumstances **[*25]** raising antitrust concerns." (*Ibid.*) The reasons for such a lack of success in pursuing an antitrust claim may include, as relevant here, a "lack of antitrust injury, failure to show a detrimental effect on competition, [or] insufficient market power in the relevant market." (*Ibid.*)

Oltz, supra, 861 F.2d 1440, is still good authority, on its own facts. It has not been extensively cited or followed. The Ninth Circuit Court of Appeals discussed and distinguished it on an evidentiary point in County of Tuolumne v. Sonora Community Hosp. (9th Cir. 2001) 236 F.3d 1148 (*County of Tuolumne*). Specifically, *Oltz* was described there as an example of successful antitrust allegations by a health care provider-plaintiff, who had supplied direct evidence supporting his theory of a conspiracy to engage in anticompetitive conduct against him, carried out by a hospital and a group of anesthesiologists. (Id. at pp. 1155-1156.) In *Oltz* there was direct evidence about the ongoing feud between the plaintiff-nurse anesthesiologist, and a group of physician-anesthesiologists, and the defendant hospital governing board's meeting minutes directly showed knowledge that this feud might cause deterioration of **[*26]** the quality of care there, leading the board to take anticompetitive action to appease the group of physician-anesthesiologists. (*Ibid.*)

In County of Tuolumne, supra, 236 F.3d 1148, 1155-1156, the court did not find the required supporting direct evidence of conspiracy to prevent the physician-plaintiff from practicing at the subject hospital, as he alleged. We need not describe the distinguishable factual context of that dispute, but instead refer to its use of the legal test to be applied when circumstantial evidence of conspiracy is presented by such an antitrust plaintiff. The defendant can rebut such allegations of conspiracy "by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." (Id. at p. 1156.)

In County of Tuolumne, supra, 236 F.3d at pages 1155 through 1156, the hospital that was accused of conspiring with other physicians to harm the plaintiff, through anti-competitive conduct, made an adequate showing of its "plausible and justifiable reason" for establishing certain criteria for allowing doctors to practice there, under the applicable public policies: "The setting of privileging criteria by a hospital is consistent **[*27]** with providing quality patient care and keeping insurance costs manageable." (*Ibid.*) There, the physician-plaintiff who had objected to the application of those criteria had failed to carry the burden to show that the defendants' actions were outside the scope of "permissible competitive behavior," or to show they were conspiracy related. (*Ibid.*)

In applying the rule of reason in such cases, the courts have drawn distinctions "'between the intentional actions of a hospital directed specifically toward the exclusion of a particular physician or groups of physicians, and the actions of a hospital which may, as a practical matter, result in the exclusion of individual practitioners but were undertaken for less personally directed reasons.'" (Mateo-Woodburn v. Fresno Community Hospital & Medical Center (1990) 221 Cal.App.3d 1169, 1183-1184 (*Mateo-Woodburn*); Redding v. St. Francis Medical Center (1989) 208 Cal.App.3d 98, 104 (*Redding*).) Even where a structural staffing change may result in the exclusion of certain doctors from practice, "[i]f **[*28]** the justification is sufficient, the doctor's vested rights must give way to public and patient interest in improving the quality of medical services." (Mateo-Woodburn, supra, at p. 1185.)

Such cases illustrate that judicial deference is paid to managerial decisions concerning operation of a hospital, where the decisions appear to have been made rationally and in good faith by the hospital authorities. Hospitals have special expertise in promoting quality of care and in making workable administrative arrangements. (*Mateo-Woodburn, supra, 221 Cal.App.3d at p. 1185*.) ""'Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors for every . . . hospital . . . in the state." [Citations.]"' (*Ibid.*)

Even vertical restrictions may legitimately be allowed to reduce some forms of competition, if they also promote other forms of competition by allowing service providers "'to achieve certain efficiencies in the distribution of its products [citation],'" under the rule of reason standard. (See *Bert G. Gianelli, supra, 172 Cal.App.3d 1020, 1045*.)

Normally, "[a] staffing decision does not **[*29]** itself constitute an antitrust injury." (*BCB Anesthesia Care, supra, 36 F.3d 664, 668*.) Unless the effect of the conduct of a single health care provider is to deny patients reasonable access to any health care, the marketplace is not significantly affected by such individualized conduct. "'If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.' [Citation.]" (*Ibid.*)

It is not enough to allege as antitrust injury, in a hospital context, "that plaintiffs cannot now practice in the business form they prefer and the prices the hospital charges may be somewhat higher now than they were." (*BCB Anesthesia Care, supra, 36 F.3d 664, 668*.) Before a court will interfere with how one hospital staffs its physician needs, a strong showing would be required that the purpose and effect of the anticompetitive conduct, within the relevant market defined by plaintiffs, was outside of reasonable professional standards. (*Id. at pp. 668-669*.)

4. ***[*30]*** *Analysis*

On this set of allegations, the identification of the relevant market should be treated as a matter of law, and Appellant has not shown injury across the relevant market. (*Exxon Corp., supra, 51 Cal.App.4th 1672, 1682*.) Even though Appellant alleges different kinds of techniques were used to single her out and to impede her ability to carry on her profession, she still alleges that only she or possibly other unnamed single practitioners were or might have been affected.

The case before us is more like *County of Tuolumne, supra, 236 F.3d 1148*, than it is like *Oltz, supra, 861 F.2d 1440*, because these Respondents have put forth some legitimate policy explanations for the alleged anticompetitive conduct, and the record does not support Appellant's characterization of Respondents' only rationales for their actions (e.g., appeasement of other competitors). Instead, as in *Korshin, supra, 34 F.Supp.2d 133, 139-140*, the pleading fails to sufficiently allege damage to the relevant marketplace, such as: "any change in the price of anesthesiology services, a decrease in quality or efficiency of care, or that the consumers of anesthesiology services . . . have less of a market choice, other **[*31]** than their ability to select [plaintiff], as a result of defendants' actions. [Citations.] . . . 'Without any allegation as to how market-wide competition will be affected, the complaint fails to allege a claim on which relief may be granted.'" (*Ibid.*)

Moreover, the circumstances described in the pleadings show that Appellant has been able to retain privileges to practice at other outpatient facilities, such as MOPP. Such allegations do not support her claim she has been wholly excluded from practice in the relevant market area (since it is undisputed that San Diego, unlike Helena, Montana in the *Oltz* case (*861 F.2d 1440*), has a number of hospital facilities within the immediate area). (Also see *Korshin, supra, 34 F.Supp.2d 133, 140* [antitrust injury not shown because the plaintiff was not precluded from practicing at other hospitals, and patients were not foreclosed from going to hospitals at which he could obtain privileges, etc.;] see *BCB Anesthesia Care, supra, 36 F.3d 664, 668* ["Nothing **[*32]** in the complaint suggests that patients are foreclosed from going elsewhere in the unlikely event that they are involved in pricing decisions [and plaintiff was not] disabled from practicing [elsewhere]"].)

Appellant did not allege, nor did her proposed amendments add, the kind of "facts indicating special circumstances raising antitrust concerns," with respect to any detrimental effect on competition that caused injury, in excess of her own personal business concerns and circumstances. (*BCB Anesthesia Care, supra, 36 F.3d 664, 668*.) The implementation of the rules and policies of which she complains did not clearly create any adverse effect upon consumer choice in the relevant market. For all of the above reasons, the trial court did not err or abuse its discretion in sustaining the demurrers to this cause of action without leave to amend.

IV

UCL

A. Trial Court Ruling: TAC

With respect to the UCL claim, each Respondent argued on demurrer that such causes of action require an underlying or predicate "independently wrongful" act, but Appellant had failed to assert a cognizable claim in that respect. (§ 17000 et seq., the Unfair Practices Act.) Rather, the allegations were the same as in **[*33]** the other previous versions of the complaint, and still reflected conduct arguably within the scope of administration of the respective professions, that should not be properly subject to injunctive relief or recovery of restitution, which were said to be inappropriate remedies against the alleged practices. (§ 17203.)

As proposed amendments, Appellant's opposition to the demurrers sought to add allegations that Respondents' acts caused competitive injury, because if Appellant were allowed to continue to provide services at Scripps, she would charge less than ASMG doctors. The reason is that the procedures she would work on would be typically "cash" procedures that are not covered by insurance, in which the patients pay the surgeon directly. Those surgeons have to pay ASMG doctors more, thus costing the patient more.

In sustaining the demurrers to this claim in the TAC without leave to amend, the trial court first clarified that Appellant was not alleging any unlawful or fraudulent business acts, but instead "unfair" business practices. The court relied on the definitions in *Cel-Tech, supra, 20 Cal.4th 163*, for determining when such a claim of unfairness to competitors under section **[*34]** 17200 is actionable: When it is "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [it] otherwise significantly threatens or harms competition." (*Cel-Tech, supra, at pp. 186-187*.)

The trial court then concluded the TAC did not successfully allege unfairness, in the form of "facts which violate ***antitrust law***, are tethered to some legislatively declared policy, or establish proof of some actual or threatened impact on competition. (*Cel-Tech, supra, 20 Cal.4th at pp. 186-187*.) Instead, Plaintiff alleges only individualized harm which does not support a claim for violation of the UCL. [Citation.] While Plaintiff concludes Defendants' conduct is anticompetitive activity which harms consumers, she fails to assert sufficient facts to support an 'unfair' business act."

B. Legal Principles and Analysis

In support of her unfairness argument, Appellant refers to this cause of action as being founded in the Unfair Practices Act (§ 17000 et seq.), but the briefing substantively discusses the related enforcement provisions for that chapter, the UCL, **[*35]** section 17200. "The purpose of the Unfair Practices Act is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' (§ 17001.) It prohibits specific 'practices which the legislature has determined constitute unfair trade practices.' [Citation.]" (*Cel-Tech, supra, 20 Cal.4th 163, 179*.)

Here, it is not disputed that Appellant seeks relief under the rubric of the UCL for anticompetitive actions that allegedly harmed her, including the Unfair Practices Act, the Cartwright Act theory, or tort theories, as the "borrowed" substantive law prohibiting unfair business practices. She does not specify which portions of the Unfair Practices Act were allegedly violated.

In *Redding, supra, 208 Cal.App.3d 98, 107*, the court found allegations of unfair business practices were insufficient, regarding a hospital's decision to enter into an exclusive contract with one particular surgeon, because the plaintiffs could not establish such an arrangement was "undertaken for anti-competitive **[*36]** purposes;" and moreover, the defendant hospital was not "'in competition'" with plaintiffs (other qualified surgeons). (*Ibid.*)

In analyzing Appellant's Cartwright Act claims above, we have not found adequate support for her pleaded claims of unfair business conduct, in the form of certain threatened incipient violations of antitrust laws, or their "policy or spirit," or other acts significantly threatening or harming competition in the medical field as a whole. (*Cel-Tech, supra, 20 Cal.4th at p. 187*.) As already discussed, courts are traditionally reluctant to specify how hospital contracting and staffing policies may be applied to individual practitioners. (*Mateo-Woodburn, supra, 221 Cal.App.3d 1169, 1184-1185*.) Appellant's proposed amendments, claiming patients are ultimately harmed by anticompetitive conduct because her fees would be lower, appear to be speculative in nature and do not address specific "'practices which the legislature has determined constitute unfair trade practices.'" (*Cel-Tech, supra, at p. 179*.)

Nor do Appellant's alternative tort theories provide an underlying body of law to plead unfair "practices" in this context, where they affected her specifically. Actions **[*37]** under the UCL are not meant to be substitutes for tort or contract actions. (*Korea Supply, supra, 29 Cal.4th 1134, 1150*.) "Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. As we have said, the 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.]" (*Ibid.*)

Without more extensive or clear allegations of how these administrative decisions amounted to "'anti-competitive business practices'" that injure consumers, Appellant cannot state a claim for necessary "'preservation of fair business competition.'" (*Cel-Tech, supra, 20 Cal.4th 163, 179-180*.) The individualized relief she seeks, injunctions against the ongoing use of the hospital rules and policies of which she complains, or restitution of lost income, are not appropriate recovery or civil penalties under the UCL. (§ 17206.) Such relief could undermine legitimate public policy concerns and would be inconsistent with judicial recognition of special expertise in the **[*38]** field of hospital administration. (*Redding, supra, 208 Cal.App.3d at p. 107*.)

In any case, as we next discuss, other relief in damages may conceivably be available. "While plaintiff may not recover monetary relief under the limited remedies provided by the UCL, plaintiff may pursue a cause of action under traditional tort law." (*Korea Supply Co., supra, 29 Cal.4th 1134, 1152*.) We next inquire into the viability of such claims.

V

INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE (TAC)

A. Argument and Rulings

In demurring to the TAC, Respondents for the first time argued there were defects in the causes of action for intentional and negligent interference with prospective business advantage (i.e., lack of supporting allegations of underlying wrongful acts or duty). Appellant pointed out at the trial court hearing that until this set of demurrers, she had been unaware that Respondents would be attacking them, and she could add more allegations to support her interference claims, about defamatory comments and misrepresentations.

At the hearing, the superior court discussed all the claims in detail, observing at one point that there might be a qualified privilege applicable under *Civil Code section 47*. **[*39]** However, that statutory analysis does not appear in the written order, nor is it significantly relied on in the briefing, and it is not before us.

The main focus before the trial court was whether Appellant had successfully pleaded the type of underlying wrongful conduct by Respondents (either intentional or negligent), under some established legal measure, that would justify a finding that such interference went beyond normally tolerated business competition. Appellant asserted to the trial court that ASMG personnel had falsely told at least one prospective patient and a surgeon who inquired about her availability that she was retired. Appellant stated that ASMG had made defamatory and disparaging comments to the two surgeons that she wished to work with, and to others, that her conduct and character were bad, such that defamation was a separate wrongful, intentional act in support of this claim of interference with her economic expectancies. At that time, she was still pursuing her breach of contract claim, that ASMG had breached the nondisparagement clause in their separation agreement.

In the rulings, the trial court found it was inadequate for Appellant to allege that Respondents' **[*40]** motives were improper: "[A]n act is not independently wrongful merely because defendant acted with an improper motive. [Citation.] An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. [Citation.]"

Next, the court disagreed with Appellant that her allegations were sufficient, that "ASMG created and enforced an unwritten policy at Scripps that surgeons were prohibited from requesting a specific anesthesiologist. [Citation.] [Appellant] complains about the effect of this unwritten policy on her, but does not explain how it is wrongful or even that it is unwise. She complains about new departmental rules requiring attendance at meetings, minimum numbers of procedures, and taking on call duty. [Citation.] [She] prefers not take call, attend meetings, or obtain the necessary training to take call. These are all personal choices, to apparently diminish the stress in her life, but this conduct does not inflate the policies, or other conduct alleged, to an independent wrongful act." The court ruled that her proposed additional allegations of defamation or disparagement **[*41]** did not sink to the level of independently wrongful conduct, apart from any unfair trade practices claims. The court found these tort claims were unfounded under her situation as described. The respective demurrers to the TAC were sustained without leave to amend (mooting the motions for judgment on the pleadings).

B. Governing Legal Principles

At this stage of the proceedings, we analyze Appellant's allegations only as they are pleaded in her complaints, and "express no view as to whether plaintiff's proof will be sufficient to establish these elements at trial." (*Korea Supply, supra, 29 Cal.4th 1134, 1164*.) It is not dispositive that Respondents did not bring demurrers to attack these particular claims earlier, since we are examining their legal validity as matters of law. However, we also must consider whether Appellant presented enough supporting allegations to the trial court to justify an exercise of its discretion in allowing her leave to amend.

"We first articulated the elements of the tort of intentional interference with prospective economic advantage in *Buckaloo v. Johnson (1975) 14 Cal.3d 815, 827* (*Buckaloo*). These elements are usually stated as follows: '"(1) an economic **[*42]** relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant."' [Citations.]" (*Korea Supply, supra, 29 Cal.4th 1134, 1153*.)

In *Korea Supply, supra, 29 Cal.4th 1134*, the court clarified that the third element of the tort of interference with prospective economic advantage "also requires a plaintiff to plead intentional wrongful acts on the part of the defendant designed to disrupt the relationship." (*Id. at p. 1154*.) Whether an act is independently wrongful depends on its unlawfulness (if it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard"). (*Id. at p. 1159*.)

In *Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 618-619*, the plaintiff retail businessman (beauty supply store) alleged that the defendant and respondent company had breached a contract to keep supplying certain products to **[*43]** him. It mainly supplied products to hair salons, not retailers. He additionally sought to plead the tort of intentional interference with prospective business advantage, but the court found those allegations were defective, because there was no factual basis for the assertion that the defendant company had tortiously interfered with the retailer's existing commercial contacts, for any improper purpose. Rather, the company had made a business supply decision, and its effect on his customers and any damage to his business "were simply consequences of breach of contract." (*Id. at p. 618*.) In finding the pleading of interference with prospective advantage to be defective, the court referred to "the cautious policy of the courts about extending tort remedies to ordinary commercial contracts." (*Ibid.*) The court found no abuse of discretion had occurred when leave to amend was denied, because the trial court had not incorrectly applied the standard for determining "'whether behind the words of the pleading anything of legal substance lies, whether on further revision the pleading can honestly state a cause of action.'" (*Ibid.*)

C. Analysis: ASMG

In analyzing this theory, we are mindful that **[*44]** the TAC also contained a cause of action for breach of contract against ASMG, alleging that it had disparaged and defamed Appellant, contrary to its previous promises not to do so in her agreement regarding separation from employment with them. We think it is appropriate to read the allegations of this contract cause of action (dismissed without prejudice pending appeal) together with the current claims of intentional interference with economic advantage, although they were pled separately. Those alleged acts of defamation or disparagement could legitimately be considered to meet, for pleadings purposes, the standards for establishing "independent wrongfulness" of interference, as enunciated in *Korea Supply, supra, 29 Cal.4th 1134, 1159*, if properly incorporated into the TAC cause of action. Common law defamation claims are subject to "determinable legal standards" for resolution, as required for such a tort claim. (*Ibid.*) Even though we have not found the Cartwright Act and UCL causes of action to be well pled, there are apparently other allegations of wrongful conduct by ASMG, potentially supporting the current cause of action to claim injury through ASMG's intentional interference **[*45]** with economic advantage.

As to ASMG, we conclude Appellant has sufficiently alleged the first of the required elements, existence of a previous economic relationship with the two surgeons, with probability of future economic benefit to her. Next, Appellant adequately alleged that ASMG had knowledge of this ongoing economic relationship with the two surgeons, and that the relationship would have probable future economic benefit to her, but ASMG nevertheless engaged in certain "intentional wrongful acts" designed to disrupt her professional relationships. (*Korea Supply, supra, 29 Cal.4th at p. 1154*.) For example, ASMG officials allegedly threatened to withhold ASMG services previously provided at MOPP, unless Appellant's privileges there were blocked. They are also said to have defamed or disparaged her character and ability to perform adequately, and they told their members to avoid her.

Alternatively, Appellant claims that if specific intent was lacking, such ASMG acts were performed at least with knowledge that some adverse interference was certain or substantially certain to occur as a result. In some ways, Appellant is claiming that she has a right to carry on her practice in her **[*46]** own business model of a sole practitioner, different from the group practice of her competitor, ASMG. We can express no opinion about the validity of the respective business models, and only observe that the alleged anticompetitive measures had some probability of impeding Appellant's existing practice and business expectancies. ASMG demonstrated that there were some legitimate professional reasons for its own form of practice, and for the Scripps rules and regulations on practice. However, for pleadings purposes, we assume the truth of the allegations that these were imposed without adequate justification and specifically against her interests. As noted, issues of privilege under *Civil Code section 47*, discussed with the trial court, have not been fully briefed or litigated, and we express no opinion on them.

Accordingly, we cannot currently determine that Appellant will be unable to adequately allege proximate causation of economic harm to her from wrongful acts of ASMG. The disruption in her practice that she attributes to its acts may well have been caused by other factors, but it is not yet before the courts whether there is a causal relationship between ASMG's allegedly wrongful **[*47]** acts and Appellant's harm. We therefore conclude she may be able to assert alleged facts that satisfy the proximate cause element of this tort. (*Korea Supply, supra, 29 Cal.4th 1134, 1164-1166*.)

Finally, Appellant represented to the trial court and states in her briefs that she can add more allegations about the type of wrongful conduct or malice that would further support her claims, such as misrepresentations of hospital rules, representations to prospective patients or other surgeons that she had retired, and disparaging comments about her character and abilities, as more fully alleged in the breach of contract claim. These may add to the viability of the current cause of action, and the trial court should have allowed Appellant an opportunity to file an amended pleading to state her best case on this theory, in addition to reasserting her breach of contract claim, if desired, and we will reverse the judgment of dismissal as to ASMG with directions to that effect.

D. Analysis: Scripps

In the ruling, the trial court did not materially distinguish between the conduct alleged against Scripps and ASMG. This was understandable, in light of the conspiracy allegations Appellant consistently **[*48]** made to tie them together. However, it is difficult to find among the allegations against Scripps, even considering such conspiracy language, the type of independently wrongful conduct that would support this claim.

Specifically, Appellant claims that Scripps engaged in intentionally wrongful acts designed to disrupt her economic relationship with the two surgeons with whom she had consistently worked. She claims Scripps falsely told at least one surgeon and one patient she had retired, and that Scripps officials imposed call, utilization, and meeting requirements in a way that operated to target her in a wrongful fashion. However, those allegations are undermined by her admissions that she previously held Scripps privileges, was in the process of renewing them, and had not yet been turned down. Although she claims that she was unilaterally reclassified from courtesy to active status, and had difficulty meeting those requirements, it is not clear how those changes in her professional status would impede her efforts to continue to work with the two doctors, who also practiced at several other locations. She does not support her allegations that it was the Scripps officials who expressly **[*49]** sought to interfere with her existing professional relationships, or that Scripps knew or should have had knowledge that its actions would certainly or substantially certainly cause interference with her prospective advantage.

The gist of Appellant's allegations of interference with economic advantage is clearly directed toward the ASMG activities, and Scripps (not a direct competitor), appears as a more or less peripheral actor. The regulatory activities by Scripps, as alleged, seem to fall within the sphere of lawful administrative behavior, rather than any tortious interference or predatory economic behavior. (*Korea Supply, supra, 29 Cal.4th 1134, 1159-1160*.) There is no basis to reverse the judgment of dismissal as to Scripps as to this claim.

VI

NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

A. TAC and Rulings

In this claim of negligent interference with prospective advantage, Appellant argued and pled that she had a special relationship with Scripps, where she held privileges to practice, such that both Scripps and ASMG (which controlled the anesthesia department there) owed her direct duties of care. She claimed economic damages from the breach of such duties. However, **[*50]** the court concluded this failed to allege sufficient facts to support the existence of a negligence-based duty owed by ASMG to Appellant. As to both Respondents, the ruling generally found Appellant had failed to plead any negligent acts of interference with economic relations that would be actionable, or independently wrongful.

B. Governing Legal Principles and Analysis

To state a claim for negligent interference with an economic relationship, the plaintiff must plead the defendant owes the plaintiff a duty of care. (*LiMandri, supra, 52 Cal.App.4th 326, 348-349*.) It is not enough for the complaint to allege a general duty to refrain from committing intentionally tortious conduct. (*Ibid.*) "Moreover, a plaintiff who is not a party to a contract between a defendant and a third party generally may not recover for loss of expected economic advantage resulting from the defendant's negligent performance of the contract unless there is a special relationship between the parties." (*Id. at p. 349*, citing *J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 804* (*J'Aire*) [acknowledging there is a cause of action for negligent interference with prospective economic advantage].)

In J'Aire, supra, 24 Cal.3d 799, **[*51]** the court identified the key component for determining whether a relationship between a plaintiff and a defendant, in a commercial setting, gives rise to a duty of care, as the foreseeability of the harm suffered by the plaintiff. (Id. at p. 806.) Foreseeability is normally measured by the closeness of the connection or nexus between the defendant's conduct and risk of injury to the plaintiff; "that is, whether the defendant had 'entered into any relationship or undertaken any activity where negligence on his part was reasonably likely to affect plaintiff adversely.'" (LiMandri, supra, 52 Cal.App.4th at p. 349.)

Where such a special relationship exists, "there exists 'a duty on the part of the defendant to use due care to avoid economic injury to the plaintiff.' [Citation.] Whether such a special relationship and duty of care exists presents a question of law for the court. [Citation.]" (Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal.App.4th 1194, 1228.)

Appellant would claim such a negligence-based, enforceable duty was owed to her by both Scripps and ASMG, stemming from her special relationship with Scripps (holding of privileges there, as did ASMG members). She claims it was **[*52]** foreseeable that if those duties were negligently breached, it would interfere with her prospective economic advantage (from those surgeons who wished to employ her). Such alleged breaches of duty included the creation and enforcement of "an unwritten policy" at Scripps that surgeons were prohibited "from requesting a specific anesthesiologist," along with the enactment of call duty rules and utilization rules. The trial court rejected this approach, noting that Appellant had not explained how these rules or policies are wrongful or unwise.

In the arena of hospital disputes over staffing matters, most courts have not accepted physicians' claims of possessing the type of vested property rights in hospital staff membership that could overcome or preclude "a hospital's ability to change its procedures" or to "manage and control its legitimate business." (Redding, supra, 208 Cal.App.3d 98, 105-106.) "It would be highly detrimental to patient care and other identifiable social interests to hold that a hospital could not make reasonable management decisions to change its format, presumably for the purposes of improving it, without exposing itself to the claim that it was interfering with **[*53]** the vested interests of staff physicians." (*Ibid.*)

To support her claim such duties of care existed specifically toward her, stemming from her privileges at Scripps, Appellant would have to show that there was no justification or rationale for making the challenged staffing or administrative decisions at that hospital, through its use of a group practice to which she chose not to belong. We again refer to the policies of judicial deference to normal hospital staffing decisions, as they have been applied in the antitrust context. (See Mateo-Woodburn, supra, 221 Cal.App.3d 1169, 1185.) Here too, the relevant rulemaking and administrative decisions took place in the context of highly regulated and specialized professions that serve the patient population. Respondents' decisions in this respect have not been pled to violate an existing duty owed to Appellant, or to be so unduly individualized or unjustified, as to negligently or wrongfully target her in particular.

We cannot agree with Appellant that even if this conduct allegedly interfering with her prospective economic advantage was negligent in nature, as opposed to intentional, there existed some nexus between the conduct and the risk **[*54]** of injury to Appellant as would support the imposition of a duty of care toward her, arising out of the grant of hospital privileges to her. We are reluctant to say on this set of allegations that the hospital or ASMG, when considering, requesting or enacting rules, regulations, or staffing policies, came under a duty to consider her particular economic interests, above those of other anesthesiologists who choose to practice differently. (See Redding, supra, 208 Cal.App.3d 98, 105-106.) The court did not err in sustaining the demurrers to the cause of action for negligent interference with prospective economic advantage, due to Appellant's insufficient allegations of an enforceable type of duty that was owed by Respondents to her in this respect.

VII

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Rulings; Legal Principles

The rulings on the IIED claims on appeal include the claim against Scripps (pled only in the SAC), and the claim against ASMG (pled only in the TAC). "In order to state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the **[*55]** probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Trerice v. Blue Cross of California (1989) 209 Cal.App.3d 878, 883* (*Trerice*).)

"'The law limits claims of intentional infliction of emotional distress to egregious conduct *toward plaintiff* proximately caused by defendant.' [Citation.] The only exception to this rule is that recognized when the defendant is aware, but acts with reckless disregard, of the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff." (*Christensen, supra, 54 Cal.3d 868, 905-906*.)

To define tortious behavior in this context, the plaintiff must plead such conduct by the defendant that is "outrageous," and "so extreme as to exceed all bounds of that usually tolerated in a civilized society. [Citation.] While the outrageousness of a defendant's conduct normally presents an issue of fact to be determined by the trier of fact [citation], the court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme **[*56]** and outrageous as to permit recovery." (*Trerice, supra, 209 Cal.App.3d 878, 883*.)

IIED can be alleged and proven in the business context if a potential plaintiff is unfairly singled out for punishment or improperly penalized for personal activities. (*Trerice, supra, 209 Cal.App.3d 878, 884-885*.) However, where an employer or entity holding a special relationship to an employee is pursuing its own economic interests and is asserting its legal rights appropriately, an IIED claim based on those actions is not supported. (*Ibid.*)

B. FAC/SAC Rulings and Analysis: Scripps

With respect to the FAC's cause of action for IIED, the trial court determined Appellant had not alleged any behavior by Scripps personnel in the workplace that was properly characterized as "extreme and outrageous," so she had not stated facts sufficient to constitute that cause of action. Leave to amend was granted as to that claim.

Scripps again demurred to the SAC's IIED claim, arguing that it was based only on Scripps' adoption of medical staff regulations and manner of applying them to Appellant. The trial court heard argument and discussed with counsel the allegations of conspiracy to try to get rid of Appellant. One **[*57]** such allegation was that the ASMG members, who made up the Scripps anesthesiology department, had maneuvered to have her health insurance canceled, as part of the efforts to pressure her.

The court sustained Scripps' demurrer without leave to amend. This was proper. As a matter of law, the conduct alleged against Scripps in this case does not amount to "outrageous" conduct directed primarily at her, nor was it calculated to cause her severe emotional distress. The only allegations against the Scripps administrators were the making of staffing decisions, in cooperation with a provider, ASMG, and the implementation of rules and regulations about taking emergency calls, attending meetings, and complying with utilization requirements. Such Scripps activities were apparently designed toward pursuing its own institutional and economic interests and asserting its legal rights. These allegations do not support conclusions they were performed with substantial certainty that Appellant in particular would suffer severe emotional injury from them. (*Christensen, supra, 54 Cal.3d 868, 905-906*.)

C. FAC/TAC Rulings and Analysis: ASMG

ASMG argued on demurrer that the remaining IIED claim against it was **[*58]** supported only by allegations of a business dispute, which did not qualify as the kind of "outrageous conduct" not to be tolerated in civilized society. The trial court determined Appellant had not successfully amended to cure the defects identified in the previous pleadings. Rather, the alleged conduct (e.g., "conspiring" to interfere with her performance of anesthesiology services at Scripps, or mistakenly notifying Appellant that her insurance would be canceled, although it was not) did not support this claim. Specifically, the trial court ruled: "The fact Plaintiff's practice was called 'unfair' and she was called 'disruptive' and 'adversarial' which prevented her from working at Scripps and ruined her relationships with physicians and staff is not conduct which cannot be tolerated in a civilized community."

In evaluating whether these allegations met pleading standards, we are mindful that this dispute took place in a business and professional setting, in which the implementation of professional rules and standards unfortunately gave rise to significant difficulties and conflicts. Nevertheless, it is comparable to the kinds of personnel administrative activity by an employer (e.g., **[*59]** nondiscriminating instructions to an employee) that have been held to be insufficient to support a claim for IIED damages. (*Garamendi v. Golden Eagle (2005) 128 Cal.App.4th 452, 480*.)

To the extent that Appellant relies on ASMG's notification to her that her health insurance would be canceled, the undisputed fact that this did not occur and that it was claimed to be a mistake undermines her claims that she was specifically targeted by "egregious conduct." (*Christensen, supra, 54 Cal.3d 868, 905-906*.) Appellant's contentions that ASMG acted toward her with reckless disregard of the probability of causing her severe emotional distress are not supported, as a matter of law, under all the circumstances revealed by the pleadings.

DISPOSITION

Judgment is affirmed as to Scripps.

Judgment is reversed as to ASMG with directions to the trial court to allow further proceedings to enable Appellant to file an amended complaint versus ASMG only, if desired, to plead a theory of intentional interference with prospective economic advantage, and/or to reassert her breach of contract claim.

Scripps is to receive its costs on appeal. Appellant and ASMG shall both bear their own costs.

HUFFMAN, Acting P. J.

WE **[*60]** CONCUR:

McDONALD, J.

O'ROURKE, J.

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Miller v. Wright

United States District Court for the Western District of Washington

October 6, 2011, Decided; October 6, 2011, Filed

No. 3:11-cv-05395 RBL

Reporter
2011 U.S. Dist. LEXIS 116533 *; 2011-2 Trade Cas. (CCH) P77,630; 2011 WL 4712245

DANIEL T. MILLER, AMBER LANPHERE, and PAUL M. MATHESON, Plaintiffs, v. CHAD WRIGHT, HERMAN DILLON, SR., and THE PUYALLUP TRIBE OF INDIANS, Defendants.

Subsequent History: Affirmed by *Miller v. Wright, 699 F.3d 1120, 2012 U.S. App. LEXIS 23295 (9th Cir. Wash., Nov. 13, 2012)*

Affirmed by *Miller v. Wright, 705 F.3d 919, 2013 U.S. App. LEXIS 985 (9th Cir. Wash., Jan. 14, 2013)*

Prior History: *Matheson v. Gregoire, 139 Wn. App. 624, 161 P.3d 486, 2007 Wash. App. LEXIS 1937 (July 10, 2007)*

Core Terms

Tribe, sovereign immunity, tribal, cigarette, res judicata, immunity, waived, motion to dismiss, taxes, tribal court, Discovery, retail, anti trust law, non-member, litigate, parties, privity

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Subject Matter Jurisdiction, Federal Questions**

A complaint must be dismissed under *Fed. R. Civ. P. 12(b)(1)* if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of *U.S. Const. art. III, § 2*; (2) is not a case or controversy within the meaning of the United States Constitution; or (3) is not one described by any jurisdictional statute. *28 U.S.C.S. §§ 1331*, *1346*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

When considering a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1)*, a court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN3[] **Jurisdiction, Subject Matter Jurisdiction**

A federal court is presumed to lack subject matter jurisdiction until a plaintiff establishes otherwise. Therefore, a plaintiff bears the burden of proving the existence of subject matter jurisdiction.

Governments > Native Americans > Tribal Sovereign Immunity

HN4[] **Native Americans, Tribal Sovereign Immunity**

As a matter of law, Indian tribes are not subject to suit unless a tribe waives its sovereign immunity or the United States Congress expressly authorizes the action. Tribes maintain sovereign immunity without distinction between governmental or commercial activity and without consideration of where the activity took place. Tribal sovereign immunity, as with other types of sovereign immunity, applies to officers acting within the scope of their authority. A waiver of immunity must be expressed unequivocally and cannot be implied.

Governments > Native Americans > Tribal Sovereign Immunity

HN5[] **Native Americans, Tribal Sovereign Immunity**

Tribal sovereign immunity is not waived by implication.

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

HN6[] **Sherman Act, Scope**

Activity by government entities, which would be prohibited if performed by private parties, is not regulated under the Sherman Act.

Antitrust & Trade Law > General Overview

Governments > Native Americans > Tribal Sovereign Immunity

HN7[] **Antitrust & Trade Law**

Sovereign entities are not intended to be regulated under federal antitrust laws. Federal ***antitrust law*** does not apply to Indian tribes.

Governments > Native Americans > Taxation

Governments > Native Americans > Tribal Sovereign Immunity

HN8[] Native Americans, Taxation

The power of taxation is an essential attribute of Indian sovereignty. Tribes have the power to tax non-tribal purchasers in transactions occurring on trust lands and significantly involving a tribe or its members. Where tribal officials carry out their duty of imposing and collecting a lawful tax, sovereign immunity shields them.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN9[] Preclusion of Judgments, Res Judicata

Res judicata is a legal doctrine incorporating claim and issue preclusion. Claim preclusion is a principle of law whereby a prior judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN10[] Preclusion of Judgments, Res Judicata

There is a three-prong inquiry for the application of res judicata: first, whether the issues presented in the case at bar are substantially the same as those decided against the plaintiffs in the previous actions; second, whether controlling facts or legal principles have significantly altered since the prior judgments; and finally, whether special circumstances warrant an exception to the doctrine. An exception exists for cases concerning unmixed questions of law in successive actions where claims are substantially unrelated. The England Reservation provides an exception where a litigant invokes federal jurisdiction but is nonetheless forced to accept a state court's adjudication of the claims. There is one other exception where the proceedings in the other venue were unfair or inadequate and where the moving party did not have a full and fair opportunity to litigate the issues.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN11[] Preclusion of Judgments, Res Judicata

Unless an exception applies, a court will employ res judicata whenever there is (1) an identity of claims; (2) a final judgment on the merits; and (3) privity between parties.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN12[] Preclusion of Judgments, Res Judicata

For the purpose of res judicata, privity exists where substantial identity between parties supports a sufficient commonality of interest. Where interests of new parties to a suit were amply represented in prior actions, privity exists.

Governments > Native Americans > Tribal Sovereign Immunity

HN13[] Native Americans, Tribal Sovereign Immunity

Until a court resolves the question of tribal sovereign immunity, discovery should not proceed.

Counsel: **[*1]** For Daniel T. Miller, Amber Lanphere, Paul M. Matheson, Individually, and on behalf of others similarly situated, Plaintiffs: Robert E Kovacevich, SPOKANE, WA.

For Chad Wright, Puyallup Tribe Tax Department, Enforcement Officer, Defendant: James H Jordan, Jr, MILLER NASH (SEA), SEATTLE, WA; John Howard Bell, PUYALLUP TRIBE OF INDIANS, TACOMA, WA.

For Herman Dillion Sr, Chairman Puyallup Tribe of Indians, Puyallup Tribe of Indians, a Federally recognized American Indian Tribe, Defendants: Andrea D George, John Howard Bell, PUYALLUP TRIBE OF INDIANS, TACOMA, WA.

Judges: HONORABLE RONALD B. LEIGHTON, UNITED STATES DISTRICT JUDGE.

Opinion by: RONALD B. LEIGHTON

Opinion

ORDER

INTRODUCTION

THIS MATTER comes before the Court upon Defendants' Motion to Dismiss under *Rule 12(b)(1)* for lack of jurisdiction. The Court has reviewed the materials submitted in support of and in opposition to the motion. The Court GRANTS Defendants' Motion to Dismiss.

BACKGROUND

Defendant Puyallup Tribe of Indians is a federally recognized American Indian tribe. The Puyallup Tribe (the Tribe) was established by the Treaty of Medicine Creek in 1854 and is located within Pierce County, Washington. Defendant Chad Wright is the CEO of the Tribe's wholly-owned **[*2]** economic development corporation, responsible for paying and collecting from consumers the cigarette taxes at issue here. Defendant Herman Dillon, Sr. is the Chairman of the Puyallup Tribe of Indians.

The Tribe and the State of Washington entered into an agreement on April 20, 2005, whereby the Tribe agreed to collect and maintain a tax on cigarettes sold on tribal lands— purchased by tribal members and non-members alike. The agreement ensured that the tribal tax would increase at a concomitant rate with state cigarette taxes. In exchange for receipt of 30% of tribal cigarette tax revenue, the State waived its right to collect sales tax on cigarettes purchased on tribal lands. The agreement went into effect immediately. *See* *Wash. Rev. Code § 43.06.465* (2005).

Under the agreement, the Tribe and the State shared enforcement jointly. The state enforced the agreement against non-tribal and non-member wholesalers, while the Tribe enforced against tribal member retailers.

Plaintiff Paul M. Matheson is an enrolled Puyallup Indian, licensed by the Tribe to sell tobacco products. He owns and operates a retail store on Puyallup tribal land that sells, among other things, commercially-packaged cigarettes. **[*3]** Plaintiff Daniel T. Miller is a non-member, non-Indian residing in Spokane Valley, Washington. Miller purchased cigarettes at Matheson's retail store. Plaintiff Amber Lanphere is a non-member, non-Indian residing in

Tacoma, Washington, outside the boundaries of the Puyallup Indian Reservation. Lanphere also purchased cigarettes at Matheson's retail store.

On May 26, 2011, Plaintiffs filed the current suit against Defendants Wright, Dillon, and the Tribe. In their complaint, Plaintiffs allege price-fixing, antitrust, and unfair competition by Defendants in violation of the Sherman and Clayton Antirust Acts, *15 U.S.C. §§ 1 - 26*, by imposing taxes on all purchases of cigarettes within the boundaries of the Puyallup Indian Reservation. Plaintiff seeks an injunction against Defendants to bar them from collecting taxes or any other additional fees on cigarette purchases by non-member, non-Indian buyers from Matheson's retail store. Plaintiff alleges that Defendant Wright, as Tax Enforcement Officer of the Tribe, acted beyond the scope of his authority by agreeing to "force Plaintiffs to charge and pay higher prices" at the same time he was CEO of Tahoma Market, a competitor of Matheson's **[*4]** store. Plaintiff alleges that Defendant Dillon, as Chairman of the Tribe, acted beyond the scope of his authority by knowingly violating federal antitrust and price control laws and by signing the Tribe-State tax agreement in 2005.

Plaintiff Matheson has previously filed suit in two other venues seeking relief from the imposition of tribal cigarette taxes. On May 10, 2005, Matheson filed a complaint in Thurston County Superior Court against state and tribal defendants for injunctive relief, declaratory judgment, and damages. The Tribe filed a motion to dismiss, joined by State defendants, arguing that tribal and state sovereign immunity barred the action against the Tribe, State, and their respective officials. The court dismissed the case against both the Tribe and the State on the basis of sovereign immunity. The Washington Court of Appeals upheld the Superior Court's dismissal. *Matheson v. Gregoire, 139 Wash. App. 624, 633, 161 P.3d 486 (2007)*, *rev. denied*, *163 Wn.2d 1020, 180 P.3d 1292 (2008)*, *cert. denied*, *555 U.S. 881, 129 S. Ct. 197, 172 L. Ed. 2d 140 (2008)*.

On September 28, 2006, Matheson and Lanphere filed a second lawsuit in Puyallup Tribal Court against the Tribe and Defendant **[*5]** Chad Wright, seeking injunctive relief, declaratory judgment, and damages. On Defendants' motion, the Tribal Court dismissed the case on the grounds that sovereign immunity protected the Tribe and its officers from suit. The Puyallup Tribal Court of Appeals affirmed the dismissal.

This action ensued. Defendants filed their Motion to Dismiss, arguing that this Court lacks jurisdiction to hear the case based upon the Tribe's sovereign immunity and the *res judicata* effect of prior rulings of Washington courts and Puyallup Tribal Courts. Defendants argue that a combination of plaintiffs in the instant case have already fully litigated the issue of tribal sovereign immunity and lost. Defendants argue that new plaintiffs do not lift the *res judicata* effect as all plaintiffs are in privity with one another and thus bound by previous sovereign immunity rulings. Defendants also argue that the Tribe's sovereign immunity remains a bar to suit, because no waiver of or exception to immunity is alleged in Plaintiffs' complaint.

Plaintiffs, in their response to Defendants' motion argue that the Tribe waived sovereign immunity by dealing in wholesale or retail cigarette marketing and by ceding price-setting **[*6]** control of wholesale and minimum prices to the State.

DISCUSSION

HN1[] A complaint must be dismissed under *Rule 12(b)(1)* if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of *Article III, Section 2, of the Constitution*; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*; *D.G. Rung Indus., Inc. v. Tinnerman, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986)*; *see* *28 U.S.C. §§ 1331* (federal question jurisdiction) and 1346 (United States as a defendant). ***HN2***[] When considering a motion to dismiss pursuant to *Rule 12(b)(1)*, the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)*, *cert. denied*, *489 U.S. 1052, 109 S. Ct. 1312, 103 L. Ed. 2d 581 (1989)*; *Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983)*. ***HN3***[] A federal court is presumed to lack subject matter jurisdiction **[*7]** until plaintiff establishes otherwise.

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of subject matter jurisdiction. Stock West, 873 F.2d at 1225; Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

1. Sovereign Immunity

HN4[] As a matter of law, Indian tribes are not subject to suit unless a tribe waives its sovereign immunity or Congress expressly authorizes the action. Kiowa Tribe of Oklahoma v. Manuf. Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Tribes maintain sovereign immunity without distinction between governmental or commercial activity and without consideration of where the activity took place. Id. at 754 - 55. Tribal sovereign immunity, as with other types of sovereign immunity, applies to officers acting within the scope of their authority. Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 728 (9th Cir. 2008). A waiver of immunity must be expressed unequivocally and cannot be implied. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

In this action, the Puyallup Tribe **[*8]** has not expressly waived its sovereign immunity, and thus it remains shielded from suit. In arguing that the Tribe has waived sovereign immunity, Plaintiffs ignore the clear requirement that such waiver be made expressly. Instead, Plaintiffs rely on innuendo as a basis for waiver of immunity. In their complaint, Plaintiffs allege that by "ceding" authority over price-setting to the State, the Tribe waived immunity. Plaintiffs insist the Tribe has no immunity defense against Miller's claims, because he has no "nexus" with the Tribe. Plaintiffs erroneously cite Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 154, 103 S. Ct. 1011, 74 L. Ed. 2d 882 (1983), for the proposition that the Tribe's dealing in cigarette marketing constitutes a waiver of immunity. That case is inapplicable here. It dealt with a narrowly-tailored question of whether government activity in the marketplace was exempted from regulation under the Robinson-Patman Act. It has no bearing whatsoever on Indian sovereign immunity. Plaintiffs list of purported waivers of immunity runs on. However, it fails to show that the Tribe *expressly* waived its sovereign immunity. ***HN5***[] Sovereign immunity is not waived by implication. Santa Clara Pueblo, 436 U.S. at 58. **[*9]** Plaintiff has, in this regard, failed its burden of showing that sovereign immunity has been waived and that this Court has jurisdiction to hear the matter.

Plaintiffs contend that federal antitrust laws apply to the Tribe and its officers as federal laws of general applicability. This argument is flawed because Congress expressed no intention to apply the antitrust acts to Tribes and did not expressly abrogate the Tribes' sovereign immunity. The Supreme Court has noted that the Sherman Act "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 352, 63 S. Ct. 307, 87 L. Ed. 315 (1943). Defendants correctly point out that this principle applies equally to tribal sovereignty. The Court suggests that sovereign entities are immune from the Sherman Act. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) (holding that municipalities are not immune from application of antitrust laws because they are not themselves sovereign). Furthermore, our case law clearly recognizes that ***HN6***[] activity by government entities, which would be prohibited if performed by private parties, is not regulated under the **[*10]** Sherman Act. Parker, 317 U.S. at 352.

Plaintiffs argue that Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) makes the Sherman and Clayton Acts applicable to the Tribe. In *Donovan*, the Court of Appeals held that Indian tribes are subject to laws of general applicability, not "only to those laws of the United States expressly made applicable to them." 751 F.2d at 1116. However, the Donovan Court recognized an exception that applies here: proof that the law was intended not to apply to Indians on their tribal lands. *Id*. As noted above, the Supreme Court has held that the ***HN7***[] sovereign entities were not intended to be regulated under federal antitrust laws. The Tribe, therefore benefits from the *Donovan* exception. Federal ***antitrust law*** does not apply to the Puyallup Tribe.

Plaintiffs allege Defendant tribal officials are not protected by sovereign immunity because they acted outside the scope of their authority by signing and/or enforcing the Tribe-State agreement to impose cigarette taxes. This challenge fails because the Tribe has legally-recognized authority to impose taxes. ***HN8***[] The power of taxation "is an essential attribute of Indian sovereignty. . . ." *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)*. **[*11]** Furthermore, tribes have the power to tax non-tribal purchasers in transactions occurring "on trust lands and significantly involving a tribe or its members." *Washington v. Confed. Tribes of the Colville Indian Reservation, 447 U.S. 134, 152, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)*. Where, as here, tribal officials carried out their duty of imposing and collecting a lawful tax, sovereign immunity shields them. *Cook, supra, 548 F.3d at 728*. Plaintiffs' argument that tribal officials exceeded their authority in agreeing to and enforcing the cigarette tax is rejected.

Insofar as Plaintiffs assert tort claims against tribal officials, those claims do not lift sovereign immunity. Their tort claims have not raised a federal question and, therefore, this Court does not have jurisdiction to adjudicate them.

The Tribe and its officials retain sovereign immunity from suit.

2. Res Judicata

Two previous court actions have dealt with challenges to the Puyallup Tribe's cigarette tax regime by a combination of the Plaintiffs in this case. And two previous courts systems have determined that the Tribe and its officers are immune from such suit. Accordingly, we address the *res judicata* principle here.

HN9[] *Res judicata* is a legal doctrine incorporating **[*12]** claim and issue preclusion. *Taylor v. Sturgell, 553 U.S. 880, 892 n.5, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)*. Claim preclusion is a principle of law whereby "a prior judgment [forecloses] successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine, 532 U.S. 742, 748, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)*. Issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." *Id*. ***HN10***[] There is a three-prong inquiry for the application of *res judicata*: first, whether the issues presented in the case at bar are substantially the same as those decided against the Plaintiffs in the previous actions; second, whether controlling facts or legal principles have significantly altered since the prior judgments; and finally, whether special circumstances warrant an exception to the doctrine. *Montana v. United States, 440 U.S. 147, 155, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)*. An exception exists for cases concerning unmixed questions of law in successive actions where claims are substantially unrelated. *Id. at 162* (quoting *United States v. Moser, 266 U.S. 236, 242, 45 S. Ct. 66, 69 L. Ed. 262 (1924))*. **[*13]** The England Reservation provides an exception where a litigant invokes federal jurisdiction but is nonetheless forced to accept a state court's adjudication of the claims. *England v. Medical Examiners, 375 U.S. 411, 415, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)*. The Court has illuminated one other exception where the proceedings in the other venue were unfair or inadequate and where the moving party did not have a "full and fair opportunity" to litigate the issues. *Montana, 440 U.S. at 154*. In short, ***HN11***[] unless an exception applies, a court will employ *res judicata* "whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Stratosphere Litigation, L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137, 1143 (9th Cir. 2002)*.

Plaintiffs' case meets the criteria to apply the *res judicata* principle to the question of whether the Defendants' are subject to suit. The issues presented here are substantially similar to *Matheson v. Gregoire* and *Matheson v. Wright*. Controlling facts and legal principles giving rise to dismissal on sovereign immunity grounds remain unchanged. None of the exceptions can be reasonably applied to this case. The claims remain substantially the same; the Plaintiffs **[*14]** chose to litigate in state and tribal courts prior to this action and were not forced into those venues; and Plaintiffs have had a full and fair opportunity to litigate these matters. Plaintiffs have twice received a final judgment. Furthermore, plaintiffs are in privity with one another. The parties are two purchasers and one seller, whose interests are aligned. ***HN12***[] Privity exists where substantial identity between parties supports a sufficient "commonality of interest." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1081 (9th Cir. 2003)*. Where interests of new parties to the suit were amply represented in prior actions, privity exists. *Pedrina v. Chun, 97 F.3d 1296, 1301 (9th Cir. 1996)*. The interests presented in this case are no different than those represented in the previous two actions. As they have in state and tribal courts, Plaintiffs here challenge the cigarette tax regime imposed by the Tribe pursuant to its agreement with the State. While they might raise novel arguments about violations of federal antitrust laws, those are claims that could have been raised at state court and are, therefore, not available in this action as a means to do **[*15]** an end-run around *res judicata* application of the prior courts' holdings.

On the question of whether or not the Tribe and its officers are protected from suit by the doctrine of sovereign immunity, this case is *res judicata*. Plaintiffs' action is barred.

3. Discovery

Plaintiffs seek discovery prior to judgment on this Motion to Dismiss. Discovery is inappropriate here. ***HN13***[] Until a court resolves the question of sovereign immunity, discovery should not proceed. *DiMartini v. Ferrin, 889 F.2d 922, 926 (9th Cir. 1989)*, *cert. denied*, *501 U.S. 1204, 111 S. Ct. 2796, 115 L. Ed. 2d 970 (1991)* (citing *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396, (1982))*. Plaintiffs have not cited persuasive authority to justify granting a discovery period. Additionally, they have given no indication that they require further information in order to challenge the Tribe's defense of sovereign immunity. Discovery is unnecessary in ruling on Defendants' Motion to Dismiss.

CONCLUSION

The Puyallup Tribe of Indians and its officers retain sovereign immunity from suit. Application of *res judicata* principles affirms that judgment. Accordingly, Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

DATED this 6th day of October, 2011.

/s/ Ronald B. Leighton

RONALD **[*16]** B. LEIGHTON

UNITED STATES DISTRICT JUDGE

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In2 Networks, Inc. v. Honeywell Int'l

United States District Court for the District of Utah, Central Division

October 11, 2011, Decided; October 12, 2011, Filed

Case No. 2:11-cv-6-TC

Reporter

2011 U.S. Dist. LEXIS 117589 *; 2011 WL 4842557

IN2 NETWORKS, INC., Plaintiff, vs. HONEYWELL INTERNATIONAL, et al., Defendants.

Core Terms

cause of action, alleges, motion to amend, products, Sherman Act, proposed amended complaint, skis, trade secret, monopoly power, misappropriate, relevant market, covenant, economic relations, rental, fails, light most favorable, motion to dismiss, antitrust claim, third party, disparagement, environmental, conditioned, conclusory, interfered, antitrust, secret, rent

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[] **Amendment of Pleadings, Leave of Court**

Although *Fed. R. Civ. P. 15(a)* provides that leave to amend shall be given freely, the district court may deny leave to amend where amendment would be futile. A proposed amendment is futile if the complaint, as amended, would be subject to dismissal.

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

Evidence > Inferences & Presumptions > Inferences

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

HN2[] **Motions to Dismiss, Failure to State Claim**

When reviewing a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. Conclusory allegations are allegations that do not allege the factual basis for the claim. The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. And although all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains enough facts to state a claim to relief that is plausible on its face. Stating a claim under *Fed. R.*

Civ. P. 8 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.

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

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Contracts > Intentional Interference > Elements

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

HN3[] **Complaints, Requirements for Complaint**

Under Utah law, the tort of interference with economic relations protects both existing contractual relationships and prospective relationships of economic advantage not yet reduced to a formal contract. A plaintiff must prove: (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations; (2) for an improper purpose or by improper means; (3) causing injury to the plaintiff. In pleading a claim for interference with economic relations, a plaintiff cannot rest on conclusory allegations that it has existing or potential economic relations. Rather, a plaintiff must allege facts showing either an existing contract or business relationship with a third party, or a potential contract or business opportunity with a third party or identifiable class of persons.

Torts > Business Torts > Trade Libel > Elements

HN4[] **Trade Libel, Elements**

For a plaintiff to recover under a claim of business disparagement, it must prove: (1) falsity of the statement made; (2) malice by the party making the statement; and (3) special damages.

Torts > Business Torts > Unfair Business Practices > Elements

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

A claim for misappropriation of trade secrets requires: (1) existence of a trade secret; (2) communication of the trade secret; and (3) that defendant's use of the trade secret injures the plaintiff.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN6[] **Contract Interpretation, Good Faith & Fair Dealing**

Under both Utah and New York law, an implied covenant of good faith and fair dealing inheres in every contract. This implied covenant ensures that neither party does anything that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

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

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

Evidence > Inferences & Presumptions > Inferences

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

HN7[] Actual Monopolization, Claims

To state a monopolization claim under *15 U.S.C.S. § 2*, the plaintiff must plead: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development of a consequence of a superior product, business acumen, or historic accident. Monopoly power requires proof of both power to control prices and power to exclude competition. This power may be inferred when a company has a predominant share of the market.

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

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

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

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

HN8[] Conspiracy to Monopolize, Elements

To state a claim for a *15 U.S.C.S. § 1* violation, the plaintiff must allege facts which show the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market. A conspiracy involves two or more entities that previously pursued their own interests separately combining to act as one for their common benefit.

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

HN9[] Sherman Act, Scope

The Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

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

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Evidence > Inferences & Presumptions > Inferences

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

HN10[] Actual Monopolization, Claims

In the context of a monopolization claim, a plaintiff must specifically define the product market by reference to the reasonable interchangeability of use or the cross-elasticity of demand between the product in question and substitutes for it. And where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN11[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product. In order to establish the existence of an illegal tying arrangement, plaintiffs must adequately plead the existence of: (1) two separate products; (2) a tie- or conditioning of the sale of one product on the purchase of another; (3) sufficient economic power in the tying market; and (4) a substantial volume of commerce affected in the tied product market. A "negative tie" can be the basis of a tying claim if the buyer agrees that he will not purchase the tied product from any other supplier. But even a negative tying claim requires the existence of two separate and distinct products.

Counsel: **[*1]** For In2 Networks, a Utah limited liability company, Plaintiff: John H. Bogart, LEAD ATTORNEY, TELOS VENTURES GROUP, SALT LAKE CITY, UT; R. Lee Saber, SALT LAKE CITY, UT.

For Honeywell International, a Delaware company, ADI, a Delaware corporation, Defendants: Michael Anthony Lindsay, LEAD ATTORNEY, PRO HAC VICE, DORSEY & WHITNEY (MN), MINNEAPOLIS, MN; Milo Steven Marsden, LEAD ATTORNEY, Jennie B. Garner, DORSEY & WHITNEY (UT), SALT LAKE CITY, UT.

Judges: TENA CAMPBELL, United States District Judge.

Opinion by: TENA CAMPBELL

Opinion

ORDER AND MEMORANDUM DECISION

In2 Networks, Inc. (In2) brought suit against Defendants Honeywell International, Inc. (Honeywell) and ADI, alleging breach of contract, state law tort claims, and state and federal antitrust claims. On May 31, 2011, the court granted Defendants' motion to dismiss. In2 was given three weeks to file a motion to amend its complaint. In accordance with the court's order, In2 filed a motion to amend with a supporting memorandum and proposed amended complaint. Defendants oppose In2's motion and contend that the proposed amended complaint fails to state a claim upon which relief can be granted. For the reasons set forth below, In2's motion to amend (Dkt. No. 29) **[*2]** is GRANTED IN PART AND DENIED IN PART.

BACKGROUND[1]

In2 develops software and hardware products, technology and services for internet controllable home security and environmental control systems. Two such products are at issue in this case: In2's Vista ICM and Energy ICM systems. These products enable owners to control their security and environmental control systems through a web-based interface. Both of these systems are compatible with the Honeywell series of security and environmental control systems.

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[1] The factual allegations are contained in In2's proposed amended complaint (Dkt. No. 30-1). The court will refer to specific factual allegations as necessary.

The two ICM products were the subject of several contracts between In2 and Honeywell, including the OEM Supply and License Agreement (OEM Agreement), the Bailment and Service Agreement (Bailment Agreement), and the Non-Disclosure Agreement. In2 alleges that the Defendants breached various provisions of the Bailment Agreement, the Non-Disclosure Agreement, and oral agreements made in connection with those agreements.

Further, In2 alleges that the Defendants interfered with In2's existing and prospective economic relationships; made **[*3]** false and disparaging statements about In2, its products and services; misappropriated In2's trade secrets; and engaged in various forms of anti-competitive behavior, in violation of federal and Utah ***antitrust law***.

ANALYSIS

Standard of Review

HN1[] "Although *Federal Rule of Civil Procedure 15(a)* provides that leave to amend shall be given freely, the district court may deny leave to amend where amendment would be futile. A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Bradley v. Val-Mejias, 379 F.3d 892, 901 (10th Cir. 2004)* (quoting *Jefferson Cty. Sch. Dist. v. Moody's Investor's Servs., 175 F.3d 848, 859 (10th Cir. 1999))*. Consequently, the court will analyze Defendants' objection to In2's proposed amended complaint as it would a motion to dismiss.

HN2[] When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. *Tal v. Hogan, 453 F.3d 1244, 1252 (2006)*; *Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976)*. Conclusory allegations are allegations that "do **[*4]** not allege the factual basis" for the claim. *Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995)*. See also *Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)* ("conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based" (emphasis added)). The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. And although all reasonable inferences must be drawn in the non-moving party's favor, *Tal, 453 F.3d at 1252*, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face," *Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)* (quoting *Twombly, 550 U.S. at 570*). Stating a claim under *Rule 8* "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*).

Tort Claims

Interference with Economic Relations (Cause of Action [*5] 1) and Interference with Prospective Economic Advantage (Cause of Action 2)

HN3[] Under Utah law, the tort of interference with economic relations "protects both existing contractual relationships and prospective relationships of economic advantage not yet reduced to a formal contract." *St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991)*. A plaintiff must prove: "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Langille v. Logan City, 9 Fed. App'x 892, 900 (10th Cir. 2001)* (quoting *St. Benedict's, 811 P.2d at 200*).

In pleading a claim for interference with economic relations, "[a] plaintiff cannot rest on conclusory allegations that it has existing or potential economic relations. . . . [Rather, a plaintiff must] allege facts showing either an existing contract or business relationship with a third party, or a potential contract or business opportunity with a third party or identifiable class of persons." *Purco Fleet Servs. v. Towers, 38 F. Supp. 2d 1320, 1325 (D. Utah 1999)* (quoting *Proctor & Gamble Co. v. Haugen, 947 F. Supp. 1551, 1556-57 (D. Utah 1996))*. **[*6]** The court in Purco Fleet dismissed the plaintiff's claim for interference with contractual relationship because the plaintiff failed to allege the existence of a present contract or relationship. The plaintiff had merely alleged that there were "current and potential customers" who were affected. *Purco Fleet, 38 F. Supp. 2d at 1325-26*. This was insufficient even under the pre-Twombly/Iqbal pleading standards.

In its proposed amended complaint, In2 alleges that Honeywell intentionally interfered with "existing economic relations between In2 and In2's customers, distributors, and vendors" and "also threatened dealers and wholesalers, including Ridgeline Mechanical, who had been doing business with In2." (Compl. ¶ 44.) [2] Rather than merely alleging that In2 had "current and potential customers," In2 alleges that it was "actively engaged with outside sales rep firms including Ridgeline Mechanical and EDOS to assist In2 in marketing and selling the In2 branded Energy ICM." (Id. ¶ 30.) Further, In2 alleges that Honeywell interfered with its relationship with EDOS: "In April 2010, John Tyhacz told the owner of EDOS that Honeywell would terminate their representation agreement if they engaged **[*7]** with In2." (Id. ¶ 30.) Viewed in the light most favorable to In2, these allegations make it plausible that Defendants interfered with existing or potential relationships with Ridgeline Mechanical and EDOS.

Because In2 has sufficiently pled its interference with economic advantage claim, In2's motion to amend is GRANTED for causes of action 1 and 2. But these causes of actions are limited to In2's relationships with Ridgeline Mechanical and EDOS, as those are the only two parties that In2 identifies in its proposed amended complaint.

Business Disparagement [3] (Cause of Action 3)

HN4[] For a plaintiff to recover under a claim of business disparagement, it must prove (1) falsity of the statement made; (2) malice by the party making the statement; and (3) special damages. *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co., 505 F. Supp. 2d 1178, 1191 (D. Utah 2007)* **[*8]** (quoting *Direct Imp. Buyers Ass'n v. KSL, Inc., 538 P.2d 1040, 1042 (Utah 1975))*.

In2 alleges that the Defendants made two disparaging statements in a letter sent to dealers who purchased Vista ICM: (1) that Vista ICM was obsolete (Compl. ¶ 13) and (2) that Defendants had concerns regarding In2's ability to continue to provide long-term support for the product (id. ¶ 14). In2 also alleges that the statements were false; that the Vista ICM was fully functional and not obsolete (id. ¶ 13) and that Defendants did not actually have concerns about In2's ability to provide long term support (id. ¶ 14). Finally, In2 alleges that Defendants made these statements intentionally and with the purpose of injuring and extinguishing In2's business. (Id. ¶¶ 13, 14.)

Defendants contend that the statements made in the letter, when viewed in context, cannot be defamatory. This argument is based largely on Defendants' interpretation of the words and phrases used in the letter—interpretations that In2 disputes. At this stage, the court must view all allegations in the light most favorable to In2. In doing so, the court finds that In2 sufficiently states a claim for business disparagement. Accordingly, In2's **[*9]** motion to amend is GRANTED for cause of action 3.

Misappropriation of Trade Secrets (Cause of Action 8) and Violation of Uniform Trade Secret Act (Cause of Action 15)[4]

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[2] "Compl.," as used throughout, refers to In2's proposed amended complaint (Dkt. No. 30-1).

[3] Business disparagement is merely a different name for the tort of injurious falsehood. *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co., 505 F. Supp. 2d 1178, 1191 (D. Utah 2007)* (quoting *Bankwest v. Fid. & Deposit Co., 63 F.3d 974, 980 (10th Cir. 1995))*.

HN5[] A claim for misappropriation of trade secrets requires (1) existence of a trade secret; (2) communication of the trade secret; and (3) that defendant's use of the trade secret injures the plaintiff. Farm Bureau, 505 F. Supp. 2d at 1184-85.

In its proposed amended complaint, In2 alleges, in a conclusory fashion, that "[a]ll or a portion of the documents and information comprising In2's confidential and proprietary business and trade secret information constitute 'trade secrets' under the Utah Uniform Trade Secrets Act." (Compl. ¶ 66.) In2 does not identify the information or even provide a general description of the information that it contends is a "trade secret."

Further, In2 does not allege how Honeywell used this trade secret information to In2's detriment. It appears that In2 believes that Gordon Hope, who works for Honeywell, used In2's trade secrets to copy their product. But In2 does not specify any information **[*10]** that Mr. Hope used to create a copy of In2's product. It also is unclear if In2 alleges that Defendants did misappropriate In2's trade secrets or only that they could misappropriate them. The proposed amended complaint alleges that Defendants "received all review information from the diligence team enabling Honeywell to misappropriate valuable In2 intellectual property and unfairly plot internal development strategies to work around currently filed and in process product patents." (Compl. ¶ 33 (emphasis added).) But In2 does not allege that Defendants actually took any actions.

Even viewed in a light most favorable to In2, these allegations fail to state a claim for misappropriation. Accordingly, In2's motion to amend is DENIED for causes of action 8 and 15.

Injunctive Relief (Cause of Action 16)

In2 seeks an injunction

> ordering Honeywell and ADI to immediately return all In2 Confidential Information, intellectual property and business and trade secret information . . . and restraining Honeywell and ADI acting in concert with them from using, copying, publishing, disclosing, transferring, and/or selling In2's confidential and proprietary business and trade secret information, and from **[*11]** obtaining any commercial advantage or unjust enrichment from their respective misappropriation of that information.

(Compl. ¶ 88.) Because In2's claim for injunctive relief is based on In2's eighth and fifteenth causes of action and the court has denied leave to amend those causes of action, In2's motion to amend is DENIED for cause of action 16.

Contract Claims

Breach of Contract (Cause of Action 10)

In2 alleges that "Honeywell breached the Bailment Agreement and Non-Disclosure Agreement by misappropriating In2 confidential information . . . , and by refusing to provide essential consideration . . . in the form of volume of sales and orders. Honeywell breached its promise to permit In2 to offer its products for sale through ADI and market In2 branded products." (Compl. ¶ 72.) These breaches are based in part on alleged oral agreements that In2 and Defendants had.

Defendants contend that the terms of the agreements themselves bar In2's claim. In2 disputes the meaning Defendants give to the terms of the contracts. At this stage in the proceedings, the court will not interpret the various contract provisions. Viewing the allegations in the light most favorable to In2, In2 sufficiently identifies

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[4] The Utah Uniform Trade Secrets Act displaces the common law misappropriation claim. Utah Code Ann.§ 13-24-8(1).

[*12] the agreements and alleged oral agreements, and a breach of those agreements. Accordingly, In2's motion to amend is GRANTED for cause of action 10.

Breach of the Covenant of Good Faith and Fair Dealing (Cause of Action 11)

HN6[] Under both Utah and New York law, [5] "[a]n implied covenant of good faith and fair dealing inheres in every contract." *Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 47, 194 P.3d 956*; see also *Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 663 N.E.2d 289, 291, 639 N.Y.S.2d 977 (N.Y. 1995)* ("Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance."). This implied covenant ensures that neither party does anything that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Oman, 2008 UT 70, ¶ 47, 194 P.3d 956*; *Dalton, 663 N.E.2d at 291*.

In2 alleges that "Honeywell failed to deal with In2 fairly and abused and exploited its dominant position in the security marketplace" and "acted with intent to deprive In2 of the value of its Agreements with Honeywell." (Comp. ¶ 75.) In addition, "Honeywell **[*13]** induced In2 to enter agreements and accept promises when Honeywell intended to ensure that the value of the agreements and the promises would not be realized." (Id. ¶ 75.) When considered as a whole, with the other allegations in the Complaint, In2 sufficiently alleges a cause of action for breach of the implied covenant of good faith and fair dealing. Accordingly, In2's motion to amend is GRANTED for cause of action 11.

Antitrust Claims

As an initial matter, Defendants contend that all of In2's antitrust claims fail in light of *Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188 (10th Cir. 2009)*. Christy Sports involved an antitrust claim brought by Christy Sports, a ski rental business, against Deer Valley Resort Company (Deer Valley), the owner of a destination ski resort. Originally, Deer Valley owned all of the property at the resort's mid-mountain village, but over time, it sold parcels to third parties. One such parcel was sold to people who then built a commercial building that was leased to Christy Sports' predecessor. The parcel was subject to a restrictive covenant that prohibited the owners from renting skis on the property without Deer Valley's consent. At **[*14]** some point, Deer Valley allowed Christy Sports' predecessor to rent skis in return for fifteen percent of the rental revenue. Later, after Christy Sports began operating at Deer Valley's mid-mountain village, Christy Sports stopped paying the fifteen percent, with no objection from Deer Valley. But in 2005, Deer Valley opened its own mid-mountain ski rental business and notified Christy Sports that the following year the restrictive covenant would be enforced and Christy Sports could no longer rent skis. Christy Sports argued that Deer Valley's decision to begin enforcing the restrictive covenant violated *§ 2* of the Sherman Act by either actual or attempted monopolization.

The Tenth Circuit affirmed the district court's dismissal of Christy Sports' Sherman Act claim and held that "the creator of a resort has no obligation under the antitrust laws to allow competitive suppliers of ancillary services on its property." *Id. at 1193*. The court found that its conclusion could be reached one of two ways: by reference to the proper definition of a market or by reference to the absence of anticompetitive conduct. First, Christy Sports' definition of the product market as "rental skis" was too **[*15]** narrow. Deer Valley offered "a cluster of products that combine to create a destination ski experience; rental skis [were] only one small component." *Id. at 1194*. Alternatively, the court reasoned that Deer Valley's conduct was not anticompetitive. "Deer Valley [was] not required to invite competitors onto its property to rent skis to its patrons, even if a failure to do so would mean it [was] the sole supplier of rental skis at the ski area." Id. Under either line of reasoning, Christy Sports had failed to plead a plausible claim for monopolization under *§ 2* of the Sherman Act.

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[5] The Bailment Agreement contains an applicable law provision that designates New York law as the applicable law. (Dkt. No. 6-2.)

Christy Sports might be determinative if In2 were to simply allege that the Defendants prevented In2 from selling Honeywell compatible products (requiring Honeywell intellectual property). But when the allegations in the proposed amended complaint are viewed in the light most favorable to In2, this is not all that In2 alleges. In2 alleges that "Honeywell's action and directions to third parties prevented In2 from entering the markets for security and environmental control systems, and in particular, the internet submarkets, and prevented In2 from developing a competing product." (Comp. ¶ 36.) From this and similar **[*16]** allegations, the court must draw the inference that In2 had either a competing product that did not require use of Honeywell's intellectual property or that it had the potential to create such a product. While the antitrust laws would not require Honeywell to allow In2 to use its property, like Deer Valley was not required to invite competitors onto its property to rent skis, they would prevent anticompetitive activity affecting In2's independent products. Accordingly, the court must evaluate each of In2's antitrust claims to determine if it has sufficiently plead those claims.

Sherman Act § 2 Monopolization (Cause of Action 4)

HN7[] To state a monopolization claim under Sherman Act *§ 2*, the plaintiff must plead "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development of a consequence of a superior product, business acumen, or historic accident." *Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999)*. Monopoly power "requires proof of both power to control prices and power to exclude competition." *Id. at 757*. This power may be inferred when a company has a predominant **[*17]** share of the market. *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

In2 alleges that Honeywell "has monopoly power in the Home Systems market, manufacturing in excess of 50% of all such systems in the United States," "has monopoly power in the submarkets of home security systems as the manufacturer of more than 50% of such systems in the United States," "is believed to have control [sic] between 75% and 90% of the internet controllable systems," "has monopoly power in the home environmental systems submarket as the manufacturer of more than 50% of such systems in the United States," and "is believed to have control [sic] between 75% and 90% the internet capable systems." (Compl. ¶¶ 34-35.) From In2's allegation that Honeywell has a predominant share of the relevant markets (between 50 and 90%), the court can infer, for purposes of this motion, that Honeywell had monopoly power. [6]

But, even liberally reading the allegations, In2 has failed to properly plead that any such monopoly power was willfully acquired and is not the result of a superior product, business acumen, or historic accident. The only allegation pertaining to this second element states that "Honeywell has undertaken improper and illegal steps to obtain and maintain its monopoly power." (Compl. ¶ 70.) There are no factual allegations that support this conclusion. Because In2's proposed amended complaint does not contain "enough facts to state a claim to relief that is plausible on its face," *Ridge at Red Hawk, 493 F.3d at 1177*, In2's motion to amend is DENIED for cause of action 4.

Sherman Act § 1 Unfair Competition (Cause of Action 5)

HN8[] To state a claim for a Sherman Act § 1 violation, "the plaintiff must allege facts which show: the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market." *Full Draw, 182 F.3d 745, 756 (10th Cir. 1999)*. A conspiracy involves "two or more entities that previously pursued their own

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[6] The court notes that "market share alone is insufficient to establish market power." *Bright v. Moss Ambulance Serv., Inc., 824 F.2d 819, 824 (10th Cir. 1987)*. But at this stage in the proceedings and when the allegations are viewed in the light most favorable to In2, the allegations that Honeywell **[*18]** controlled between 50 and 90% of the relevant markets make it plausible that Honeywell had monopoly power.

interests separately . . **[*19]** . combining to act as one for their common benefit." *Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1256 (10th Cir. 2006)*.

Here, In2 only generally alleges that Honeywell: "directed wholesalers and retailers to refuse to sell . . . In2 products" (Compl. ¶ 36); "threaten[ed] potential customers and business partners of In2" (id. ¶ 73); and "force[d] or induce[d] third parties to terminate and/or refuse to do business with In2" (id.). Nowhere in its proposed amended complaint does In2 identify any specific person with whom Honeywell agreed. The closest it comes is the allegation that Honeywell directed its own (unspecified) wholesalers and retailers to refuse to sell In2 products. As in Twombly, In2's "complaint leaves no doubt that [In2] rest[s] [its] § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement." *Twombly, 550 U.S. at 564*. And, like in Twombly, In2 has not pled a "specific time, place, or person involved in the alleged conspiracies." *Id. at 565 n.10*. This does not meet the pleading requirement, and In2's cause of action fails for this reason. See *Compliance Mktg., Inc. v. Drugtest, Inc., 2010 U.S. Dist. LEXIS 34315, 2010 WL 1416823, at *6 (D. Colo. April 7, 2010)* **[*20]** (dismissing Sherman Act § 1 claim because the complaint did not "provide sufficient factual basis to demonstrate concerted action between each [company using the service] and [the company offering the service]").

Accordingly, In2's motion to amend is DENIED for cause of action 5.

Sherman Act § 2 Refusal to Deal by a Monopolist (Cause of Action 6)

This cause of action fails because In2 hasn't adequately pled that Honeywell willfully acquired and maintained monopoly power, as discussed above for cause of action 4 (the Sherman Act § 2 monopoly claim). Additionally, Honeywell's alleged refusal to deal with In2 cannot support a claim under the Sherman Act. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109, 1118, 172 L. Ed. 2d 836 (2009)*; see also *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (***HN9***[] the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he **[*21]** will deal"). And In2 has not added any facts or allegations that Honeywell's conduct falls outside of this "general rule."

Further, to the extent that In2 pleads an exclusive dealing arrangement, In2 must plead a relevant market, which includes both a relevant product market and a relevant geographic market. "[T]he United States" is a sufficient geographic market. See *Compliance Mktg., 2010 U.S. Dist. LEXIS 34315, 2010 WL 1416823, at * 7* (finding geographic market of "the United States" sufficient"). ***HN10***[] In2 must also "specifically define the product market by reference to the 'reasonable interchangeability of use or the cross-elasticity of demand between the product [in question] and substitutes for it.'" *Compliance Mktg., 2010 U.S. Dist. LEXIS 34315, 2010 WL 1416823, at *7* (quoting *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. And where the plaintiff "fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss **[*22]** may be granted." *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008)*. In2 has not so defined its alleged relevant product market.

For these reasons, In2's motion to amend is DENIED for cause of action 6.

Sherman Act § 1 Concerted Refusal to Deal (Cause of Action 7)

This cause of action, like cause of action 5 discussed above, fails because In2 has not pled an agreement between Honeywell and another specified entity. Stating a claim under *§ 1* requires "a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 550 U.S. at 556*. Accordingly, In2's motion to amend is DENIED for cause of action 7.

Sherman Act § 1 Illegal Tying (Cause of Action 9)

HN11[] "In cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Compliance Mktg., 2010 U.S. Dist. LEXIS 34315, 2010 WL 1416823, at *9*. Because In2 has failed to plead the relevant market adequately, as discussed above, any argument that Defendants' conduct constitutes an illegal tying arrangement necessarily fails under a rule of reason analysis.

In2, therefore, could only plead a *per se* illegal tying arrangement. In order to establish the existence **[*23]** of an illegal tying arrangement, "Plaintiffs must adequately plead the existence of: (1) two separate products; (2) a tie- or conditioning of the sale of one product on the purchase of another; (3) sufficient economic power in the tying market; and (4) a substantial volume of commerce affected in the tied product market." *2010 U.S. Dist. LEXIS 34315, [WL] at *10* (internal citations and quotations omitted).

Here, In2 does not allege that Honeywell conditioned the sale of its product on the purchase of another ("tied") product. Rather, In2 alleges that Honeywell conditioned the sale of its products on the third-party not buying In2 products. This type of "negative tie" can be the basis of a tying claim if the buyer "agrees that he will not purchase [the tied product] from any other supplier." *Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. But even a negative tying claim requires the existence of two separate and distinct products. See *id. at 462*; *Compliance Mktg., 2010 U.S. Dist. LEXIS 34315, 2010 WL 1416823, at *9*.

In2 only generally alleges that Honeywell conditioned the sale of its product on the buyer not buying any In2 product. In2 has not made clear that there is a second product that buyers were prohibited from **[*24]** purchasing from In2. For a similar reason, In2 fails to allege that Honeywell has sufficient economic power in the tying market—it is unclear what the tying market would be other than the home security system market. And finally, In2 does not allege the existence of an agreement between Honeywell and any third-party (as discussed above) or that a substantial volume of commerce in the tied market was affected.

For all of these reasons, In2 fails in its proposed amended complaint to state a claim for tying. Accordingly, In2's motion to amend is DENIED for cause of action 9.

Utah Antitrust Statute - Utah Code § 76-10-914(a) (Causes of Action 12-14)

Both parties agree that the interpretation of Utah's Antitrust Statute is guided by federal case law interpreting the Sherman Act. Because In2's proposed amended complaint does not state a claim under the Sherman Act, In2's motion to amend is DENIED for causes of action 12, 13, and 14.

CONCLUSION

For the foregoing reasons, In2's motion to amend (Dkt. No. 29) is GRANTED IN PART AND DENIED IN PART:

- In2 may file its proposed amended complaint for causes of action 1, 2, 3, 10, and 11, as more fully discussed above;

- In2's motion to amend causes of **[*25]** action 4 through 9 and 12 through 16 is DENIED.

DATED this 11th day of October, 2011.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

United States District Judge

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Fitzgerald v. Am. Sav. Bank, F.S.B.

United States District Court for the District of Hawaii

October 13, 2011, Decided; October 13, 2011, Filed

CV. NO. 11-00199 DAE-RLP

Reporter

2011 U.S. Dist. LEXIS 118541 *; 2011-2 Trade Cas. (CCH) P77,685; 2011 WL 4899939

TIMOTHY J. FITZGERALD AND VIRGINIA PARSONS, Plaintiffs, vs. AMERICAN SAVINGS BANK, F.S.B,; MERSCORP, INC.,' MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; MARC IOANE, ASSISTANT VP OF AMERICAN SAVINGS BANK, FSB AND CERTIFYING OFFICER OF MERS; SUSAN TILDEN LAU, SR. VP PRESIDENT OF AMERICAN SAVINGS BANK FSP AND CERTIFYING OFFICER OF MERS; AND DOES 1 THROUGH 20 INCLUSIVE, Defendants.

Subsequent History: Judgment entered by, Complaint dismissed at, Without prejudice *Fitzgerald v. Am. Sav. Bank, F.S.B., 2012 U.S. Dist. LEXIS 33344 (D. Haw., Mar. 13, 2012)*

Core Terms

mortgage, Plaintiffs', antitrust, Lender, monopolize, loans, deed, anti trust law, allegations, summary judgment motion, notice, unjust enrichment, sua sponte, Borrower, misrepresentation, factual allegations, injunctive relief, Defendants', fraudulent, foreclose, recording, unfair, split, restraint of trade, slander of title, summary judgment, bankruptcy case, cause of action, nonmoving party, district court

Counsel: **[*1]** For Timothy J. Fitzgerald, Virginia Parsons, Plaintiffs: Ramon J. Ferrer, LEAD ATTORNEY, Kahului, HI.

For Dane S. Field, Real Party in Interest and Chapter 7 Trustee for Plaintiff Virginia Parsons [reference: doc no. 28] on behalf of Virginia Parsons, Plaintiff: Enver W. Painter, Jr., LEAD ATTORNEY, Honolulu, HI.

For American Savings Bank F.S.B., Mortgage Electronic Registration Systems, Marc Ioane, Assistant VP President of American Savings Bank, FSB and Certifying Officer of MERS, Susan Tilden Lau, Sr. VP President of American Savings Bank, FSB and Certifying Officer of MERS, MERScorp, Inc., also known as MERSCORP, Inc., Defendants: Cheryl A. Nakamura, Susan A. Tius, LEAD ATTORNEYS, Rush Moore LLP A Limited Liability Law Partnership, Honolulu, HI.

Judges: David Alan Ezra, United States District Judge.

Opinion by: David Alan Ezra

Opinion

ORDER: (1) DISMISSING PLAINTIFFS' COMPLAINT WITHOUT PREJUDICE AS TO ALL DEFENDANTS; (2) DENYING AS MOOT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND (3) VACATING THE HEARING

Pursuant to *Local Rule 7.2(d)*, the Court finds this matter suitable for disposition without a hearing. After reviewing the motions and the supporting and opposing memoranda, the Court **DISMISSES WITHOUT PREJUDICE** **[*2]** Plaintiffs' Complaint against all Defendants, **DENIES AS MOOT** Defendants' Motion for Summary Judgment (Doc. # 9), and **VACATES** the Hearing on this matter set for October 14, 2011.

BACKGROUND

On March 28, 2011, Plaintiffs Timothy J. Fitzgerald and Virginia Parsons (collectively "Plaintiffs") filed a Complaint in this Court against Defendants American Savings Bank, F.S.B., Merscorp, Inc., Mortgage Electronic Registration Systems ("MERS"), Marc Ioane, and Susan Tilden (collectively "Defendants"), alleging that Plaintiffs had been lured into a predatory mortgage loan. ("Compl.," Doc # 1.) Specifically, Plaintiffs' Complaint alleges the following Counts:

- Count I: Violations of the Sherman/Clayton Anti-Trust Acts. (FAC ¶¶ 173-98.)
- Count II: Violations of the Hawaii Anti-Trust/Anti-Monopoly Acts. (Id. ¶¶ 199-203.)
- Count III: Misrepresentation. (Id. ¶¶ 204-19.)
- Count IV: Unfair and Deceptive Acts or Practices. (Id. ¶¶ 220-35.)
- Count V: Breach of Fiduciary duty. (Id. ¶¶ 236-45.)
- Count VI: Unjust Enrichment. (Id. ¶¶ 246-50.)
- Count VII: Slander of Title (Id. ¶¶ 251-61.)
- Count VIII: Injunctive Relief. (Id. ¶¶ 262-67.)

Plaintiffs reside in the State of Hawaii. (Id. ¶ 5.) On or about July 2007, **[*3]** Plaintiffs began researching a lender to purchase a parcel of property located at 2276 W. Vineyard Street, Wailuku, Hawaii (the "Subject Property"). On December 17, 2007, Plaintiffs executed a promissory note agreeing to pay $800,775.00 to American Savings Bank, F.S.B. ("ASB") as Lender. (Id. ¶ 63.) The note states the interest rate is "six and one-quarter percent (6.625%)." (Id.; see also, "Note," Compl., Ex. 1, at 1). The note included funds for the construction of Plaintiffs' residence on the Subject Property. (Compl. ¶ 64.) On the same day Plaintiffs entered into a mortgage, which was recorded in the Bureau of Conveyances on December 26, 2007. (Id. ¶ 66; see also "Mortgage," Compl., Ex. 2.) ASB is listed on the mortgage as the originating lender and MERS is the mortgagee "acting solely as a nominee for Lender and Lender's successors and assigns." (Mortgage at 2.)

Sometime around 2009, Plaintiffs defaulted. (Doc. # 10-1 ¶ 12.) Defendants thereafter initiated a non-judicial foreclosure sale. (Compl., Ex. 7.) Plaintiffs received notice of the foreclosure sale and an auction was scheduled for December 15, 2009. (Doc. # 10-1 ¶ 13.)

The day before the scheduled auction, on December 14, **[*4]** 2009, Plaintiff Parsons filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the District of Hawaii. ("DCSF," Doc. # 10, Ex. G.) On May 3, 2010, Defendant MERS was granted relief from the automatic stay in Plaintiff Parson's bankruptcy case. (DCSF, Exs. H, I.) On June 15, 2011, Plaintiff Fitzgerald filed for Chapter 13 bankruptcy. (DCSF, Ex. J.)

On November 8, 2010, Plaintiff Parsons's bankruptcy case was converted from Chapter 11 to Chapter 7, and Dane S. Field was appointed as the bankruptcy Trustee. (DCSF, Ex. K.) On February 8, 2011, a Discharge of Debtor was filed in Plaintiff Parsons's bankruptcy case. (DCSF, Ex. L.)

On January 13, 2011, Defendant ASB was granted relief from the automatic stay in Plaintiff Fitzgerald's bankruptcy case. (DCSF, Ex. M.) On March 3, 2011, Defendant ASB was granted relief from the codebtor stay in Plaintiff Fitzgerald's bankruptcy case. (DCSF, Ex. N.)

On March 11, 2011, by assignment of mortgage, MERS assigned its rights, title and interest in the mortgage to ASB. ("Assignment," DCSF, Ex. F.)

On March 23, 2011, Plaintiffs filed their Complaint. Plaintiffs allege that Defendant ASB "was not forthcoming about the economic collapse or **[*5]** the overall securities fraud that caused the nation's economic decline." (Id. ¶ 91.) Plaintiffs also contend that Defendant BAS "has failed to provide a valid assignment from MERS of the mortgage that they split away from the note in [a] securitization scheme." (Id. ¶ 126.) Plaintiffs also complain that "ASB did not hold the note and mortgage in June 2010 when MERS was granted the relief from stay in Parsons's bankruptcy." (Id. ¶ 128.) This "deception" allegedly resulted in Plaintiffs' inability to modify their loan. (Id. ¶ 130.) Finally, Plaintiffs contend that MERS, as an entity, "circumvents the state's recording statutes." (Id. ¶ 140.)

On June 1, 2011, Defendants filed a Motion for Summary Judgment. ("MSJ," Doc. # 9.) On August 8, 2011, Plaintiffs filed their Opposition. ("Opp'n," Doc. # 24.) On August 15, 2011, Defendants filed their Reply. ("Reply," Doc. # 26.)

STANDARD OF REVIEW

I. Motion for Summary Judgment

Rule 56 requires summary judgment to be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; **[*6]** see also *Porter v. Cal. Dep't of Corr., 419 F.3d 885, 891 (9th Cir. 2005)*; *Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000)*. A main purpose of summary judgment is to dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See *id. at 323*. A moving party without the ultimate burden of persuasion at trial—usually, but not always, the defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000)*. The burden initially falls upon the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)* (citing *Celotex Corp., 477 U.S. at 323*).

Once the moving party has carried its burden under *Rule 56*, the nonmoving party "must set forth specific facts showing that there **[*7]** is a genuine issue for trial" and may not rely on the mere allegations in the pleadings. *Porter, 419 F.3d at 891* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. In setting forth "specific facts," the nonmoving party may not meet its burden on a summary judgment motion by making general references to evidence without page or line numbers. *S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003)*; *Local Rule 56.1(f)* ("When resolving motions for summary judgment, the court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."). "[A]t least some 'significant probative evidence'" must be produced. *T.W. Elec. Serv., 809 F.2d at 630* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968))*. "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu, 198 F.3d at 1134*. Further, the Ninth Circuit has "refused to find a 'genuine issue' where the only evidence presented is 'uncorroborated and self-serving' testimony." *Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002)* **[*8]** (citing *Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996))*. "Conclusory allegations unsupported by factual data cannot defeat summary judgment." *Rivera v. Nat'l R.R. Passenger Corp., 331 F.3d 1074, 1078 (9th Cir. 2003)*.

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv., 809 F.2d at 631*. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter, 419 F.3d at 891*. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. Id.; see also *Nelson v. City of Davis, 571 F.3d 924 (9th Cir. 2009)* ("[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") (citations omitted). However, inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv., 809 F.2d at 631*.

II. **[*9]** Federal Rules of Civil Procedure 8 and 12

The court may dismiss a complaint pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)* on its own motion. See *Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987)* ("A trial court may dismiss a claim sua sponte under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief."); *Ricotta v. California, 4 F. Supp. 2d 961, 968 n.7 (S.D. Cal. 1998)* ("The Court can dismiss a claim sua sponte for a Defendant who has not filed a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*."); see also *Baker v. Dir., U.S. Parole Comm'n, 916 F.2d 725, 727, 286 U.S. App. D.C. 310 (D.C. Cir. 1990)* (holding that district court may dismiss cases sua sponte pursuant to *Rule 12(b)(6)* without notice where plaintiff could not prevail on complaint as alleged). Additionally, a paid complaint that is "obviously frivolous" does not confer federal subject matter jurisdiction and may be dismissed sua sponte before service of process. *Franklin v. Murphy, 745 F.2d 1221, 1227 n.6 (9th Cir. 1984)*; see also *Fed. R. Civ. P. 12(h)(3)*; *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 593, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* ("[I]t is the obligation of both district **[*10]** court and counsel to be alert to jurisdictional requirements."); *Branson v. Nott, 62 F.3d 287, 291 (9th Cir. 1995)* ("[D]ismissal of Branson's complaint was required because the district court lacked subject matter jurisdiction . . . .").

The court may also sua sponte dismiss a complaint for failure to comply with *Federal Rule of Civil Procedure ("Rule") 8*. *Rule 8* mandates that a complaint include a "short and plain statement of the claim," *Fed. R. Civ. P. 8(a)(2)*, and that "each allegation must be simple, concise, and direct." *Fed. R. Civ. P. 8(d)(1)*. A complaint that is so confusing that its "'true substance, if any, is well disguised'" may be dismissed sua sponte for failure to satisfy *Rule 8*. *Hearns v. San Bernardino Police Dep't, 530 F.3d 1124, 1131 (9th Cir. 2008)* (quoting *Gillibeau v. City of Richmond, 417 F.2d 426, 431 (9th Cir. 1969)*; *Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995)* (stating that a district court has the power to sua sponte dismiss a complaint for failure to comply with *Rule 8* where the complaint is so confused, ambiguous, or unintelligible that its true substance is well disguised); see also *McHenry v. Renne, 84 F.3d 1172, 1180 (9th Cir. 1996)* ("Something **[*11]** labeled a complaint but written . . . , prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint."); *Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981)* ("A complaint which fails to comply with [*Rule 8*] may be dismissed with prejudice[.]").

Put slightly differently, a district court may dismiss a complaint for failure to comply with *Rule 8* where it fails to provide the defendants fair notice of the wrongs they have allegedly committed. See *McHenry, 84 F.3d at 1178-80* (affirming dismissal of complaint where "one cannot determine from the complaint who is being sued, for what relief, and on what theory, with enough detail to guide discovery"); cf. *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1105 n.4 (9th Cir. 2008)* (finding dismissal under *Rule 8* was in error where "the complaint provide[d] fair notice of the wrongs allegedly committed by defendants and [did] not qualify as overly verbose, confusing, or rambling"). *Rule 8* requires more than "the-defendant-unlawfully-harmed-me accusation[s]" and "[a] pleading that offers labels and conclusions **[*12]** or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citations and quotations omitted). "The propriety of dismissal for failure to comply with *Rule 8* does not depend on whether the complaint is wholly without merit." *McHenry, 84 F.3d at 1179*.

The court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal, 129 S. Ct. at 1950*. Legal conclusions must be supported by factual allegations. Id. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id.

DISCUSSION

For the reasons set forth below, the Court sua sponte concludes that the Complaint should be dismissed. The Court is cognizant that Defendants have filed a Motion for Summary Judgment, but finds that it is premature to rule on the merits of that Motion as Plaintiffs have not yet stated a claim upon which relief can be granted.

I. Counts I: Violation of the Sherman/Clayton Antitrust Acts

In Count I, Plaintiffs allege violations of Sections 1 and *2* of the Sherman Antitrust **[*13]** Act and seek relief for these violations pursuant to Section 4 of the Clayton Antitrust Act. (Compl. ¶¶ 194, 196.) Plaintiffs have failed to plead these counts with sufficient specificity.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. To state a claim under Section 1, "'claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce . . . (3) which actually injures competition.'" *William O. Gilley Enters., Inc. v. Atlantic Richfield Co., 588 F.3d 659, 669 (9th Cir. 2009)* (per curiam) (quoting *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008))*; see also *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 501-02 (9th Cir. 2010)* (same).

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with **[*14]** any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. Monopolization and attempted monopolization are the two traditional claims asserted under *Section 2*. To state a claim for monopolization, the plaintiff must sufficiently allege: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009)* (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*; *Alaska Airlines v. United Airlines, Inc., 948 F.2d 536, 540-41 (9th Cir. 1991)* (same); see also *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004)* (listing the elements of a monopolization claim).

Sections 1 and *2* of the Sherman Act thus "focus on different problems." See *Alaska Airlines v. United Airlines, Inc., 948 F.2d 536, 540-41 (9th Cir. 1991)*. Whereas "concerted conduct is subject to sanction [under Section 1] if it merely restrains trade, unilateral **[*15]** conduct is subject to sanction [under *Section 2*] only if it either actually monopolizes or threatens monopolization." *Id. at 541* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*; see also *Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2208-09, 176 L. Ed. 2d 947 (2010)* (stating that although Section 1 applies only to concerted action that restrains trade, *Section 2* covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category which is narrower than restraint of trade).

Regardless of the provision purportedly violated, an antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick, 429 U.S. at 489*. Indeed, the antitrust laws "were enacted for 'the protection of competition, not competitors.'" *Id. at 488* (quoting *Brown, 370 U.S. at 320*); see also *Cascade Health Solutions, 515 F.3d at 901* (recognizing the Supreme Court's "long and consistent adherence to the principle that the antitrust laws protect the process of competition, and not the pursuits of any particular competitor").

A plaintiff seeking damages pursuant **[*16]** to Section 4 of the Clayton Act must show causal antitrust injury, and to obtain injunctive relief pursuant to Section 16 of the Clayton Act, a plaintiff must allege threatened antitrust injury. [1] *Cargill, 479 U.S. at 109-13*. The purpose of the antitrust injury requirement is to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." *Atlantic Richfield Co. v. USA Petroleum, Inc., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. As such, "[t]o show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior [because] it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* (citing *Atlantic Richfield, 495 U.S. at 334*); see also *Cascade Health Solutions, 515 F.3d at 902* ("'Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to **[*17]** prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'") (quoting *Brunswick, 429 U.S. at 489*).

Plaintiffs have failed to adequately allege causal antitrust injury and Count I therefore fails. The crux of Defendants' argument is that MERS and ASB, as well as other "large private banking institutions within the United States" agreed to establish a scheme "by which they would and did set up a private system of recording interests." (Compl. ¶ 175.) Subsequently, these banks "used their combined market power in the financial industry to take control of the market for private securitization of mortgages." (Id. ¶ **[*18]** 176.) Plaintiffs complain that "subsequent to the creation of MERS, the Big Banks and MERS used their control over the residential mortgage market by inflating the market for residential properties . . . ." (Id. ¶ 179.) Plaintiffs allege that "[b]ecause larger loans generated larger fees, the originators would steer customers toward larger loans with promises of real estate investment growth." (Id. ¶ 184.) Finally, Plaintiffs contend that establishing MERS as a "nominee" serves to "protect and insulate Defendant ASB from otherwise valid claims and defenses by mortgagors and borrowers. . . ." (Id. ¶ 193(a).) Plaintiffs contend that this conduct "violates the Sherman Anti-Trust Act." (Id. ¶ 194.)

The Complaint is utterly devoid of any factual allegations which support these contentions. For instance, there is no explanation or allegations to how these banks "used their combined market power in the financial industry to take control of the market." Nor do Plaintiffs explain how, exactly, "subsequent to the creation of MERS, the Big Banks and MERS used their control over the residential mortgage market by inflating the market for residential properties . . . ." Finally there simply is no **[*19]** allegation, beyond conclusory statements, that Defendants engaged in any sort of anticompetitive conduct. Without sufficiently alleging antitrust injury, this count of the Complaint cannot survive. Accordingly the Court **DISMISSES** Count I of the Complaint.

II. Count II: Violation of the Hawaii Antitrust and Anti-Monopoly Acts

Plaintiffs, relying on their factual allegations with respect to Count I, allege a violation the Hawaii Monopolization Act, *Hawaii Revised Statutes § 480-9*. (TAC ¶ 115.) The act provides that "[n]o person shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State." *Haw. Rev. Stat. § 480-9*.

The close relationship between federal ***antitrust law*** and Hawaii ***antitrust law*** has long been established. See, e.g., *Robert's Hawaii Sch. Bus v. Laupahoehoe Transp. Co., Inc., 91 Haw. 224, 982 P.2d 853, 881 n.29 (Haw. 1999)* (noting the similarities between *Section 2* of the Sherman Antitrust Act and *Haw. Rev. Stat. § 480-9*.) Indeed, the "[l]egislative history of Hawaii's ***antitrust law*** clearly indicates that the state laws are to be interpreted and construed in harmony with **[*20]** analogous federal antitrust laws." *Island Tobacco Co., Ltd. v. R. J. Reynolds Indus., Inc., 513 F. Supp. 726, 738 (D. Haw. 1981)*. Similar to federal law, therefore, Hawaii courts require plaintiffs in antitrust proceedings to plead the "nature of the competition" to "ensure that the injury results from a competition-

[1] Section 4 of the Clayton Act provides treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. Section 16 of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*.

reducing aspect of the defendant's behavior." *Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 228 P.3d 303, 325 (Haw. 2010)* (citing and relying on federal law). Thus, Plaintiffs' failure to sufficiently allege any anticompetitive conduct as discussed with respect to Count I is applicable to Count II as well. Accordingly the Court **DISMISSES** Count II of the Complaint.

III. Count III: Misrepresentation

The Third Count alleges that "Defendant ASB did not disclose to plaintiffs that MERS would be their mortgagee essentially separating the mortgage from the note and creating an inability to effectively communicate or negotiate." (Compl. ¶ 212.) Plaintiffs claim that "ASB intentionally misrepresented the actual mortgagee and mortgage by creating an ambiguous document." (Id. ¶ 213.) Plaintiffs contend that had they "known of Defendant ASB's true intention to arbitrarily deny them the opportunity **[*21]** to refinance or modify their loans . . . , Plaintiffs would not have entered into the loan transactions." (Id. ¶ 216.) As a result of these alleged fraudulent misrepresentation, Plaintiffs claim to be entitled to damages. (Id. ¶ 218.)

The Court finds that Plaintiffs' allegations are insufficient to satisfy the more rigorous pleading requirements of *Rule 9* that apply to allegations of fraud or mistake. See *Fed. R. Civ. P. 9(b)* (requiring a party to state with particularity the circumstances constituting fraud or mistake). The claim must "be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Kearns, 567 F.3d at 1120*. A plaintiff "must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1393 (9th Cir. 1988)*.

The allegations of misconduct related to this Count are over broad and general in nature. Specifically, Plaintiffs do not detail what specific conduct resulted in the fraudulent misrepresentation to survive Iqbal-Twombly. (See, e.g., FAC ¶¶ 125, 126.) For instance, Plaintiffs claim that ASB "intentionally misrepresented" **[*22]** the actual mortgagee and mortgage by creating an "ambiguous document." But there is no accompanying facts describing the "who, what, when, where, and how" of this allegation. *Kearns, 567 F.3d at 1120*. Further, it does not seem to the Court that Defendants engaged in any misrepresentation. The mortgage itself plainly states the role that MERS would play in Plaintiffs' home loan. Plaintiffs signed the mortgage. How this apparent disclosure somehow qualifies as a misrepresentation is unclear to the Court. See *Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 2011 U.S. App. LEXIS 18569, 2011 WL 3911031, at *5. (9th Cir. Sept. 7, 2011)* (concluding similarly).

Accordingly, the Court **DISMISSES** Plaintiffs' Complaint with respect to Count III.

IV. Count IV: Unfair and Deceptive Acts or Practices

Plaintiffs claim that Defendants engaged in unfair or deceptive acts and practices ("UDAP") in violation of *HRS §§ 480-2(a)* and *481A-3*. (Compl. ¶¶ 220-35.)

Hawaii Revised Statute section 480-2(a) provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." *Haw. Rev. Stat. § 480-2(a)*. "Two distinct causes of action have emerged under *[section] 480-2(a)*: **[*23]** (1) claims alleging unfair methods of competition; and (2) claims alleging unfair or deceptive acts or practices." [2] *Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Haw. 77, 148 P.3d 1179, 1207 (Haw. 2006)*; see also *Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Haw. 1996)*. *HRS § 481A-3* similarly prohibits "deceptive trade practice[s]."

[2] Although "[a]ny person" may bring an action for unfair methods of competition in violation of *section 480-2*, only consumers, the attorney general, or the director of the office of consumer protection may bring an action for unfair or deceptive acts or practices in violation of *section 480-2*. *Haw. Rev. Stat. § 480-2(d)*, *(e)*; see also *Davis v. Four Seasons Hotel, Ltd., 122 Haw. 423, 228 P.3d 303, 307 (Haw. 2010)*. A "consumer" is a "natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." *Haw. Rev. Stat. § 480-1*.

Plaintiffs contend that Defendants violated these statutes by: (1) targeting financially unsophisticated and otherwise vulnerable consumers for inappropriate credit products; (2) offering **[*24]** a credit line as bait and then failing to address the promise after the loan was completed; (3) failing to adequately disclose the true costs and risks of the subject loan and its inappropriateness for Plaintiffs; (4) failing to protect the Plaintiffs' construction loan funds; (5) falsely representing MERS as a holder of the note in a position to foreclose; (6) falsely using Fannie Mae and Freddie Mac mortgage loan forms; (7) making false statements regarding the documents in the possession of MERS and/or ASB; (8) making a property loan at the time when the bank was experiencing high losses due to the sale of risky and deflated mortgage backed securities; and (9) continuing to use MERS to hold/hide the mortgage while the bank collected cash down payments and closing costs from the Plaintiffs. (Compl. ¶ 145.)

Plaintiffs have again failed to allege sufficiently this count of the Complaint. Plaintiffs have alleged no facts which suggest that any of the Defendants were targeting financially unsophisticated or otherwise vulnerable consumers. Nor have Plaintiffs proffered facts with respect to Defendants' failure to adequately disclose "the true nature of MERS." [3] There are no factual allegations **[*25]** which suggest that the lender failed to disclose that it approved loans based on certain documents.

Plaintiffs' allegation that Defendants falsely represented or failed to fully and completely disclose information to Plaintiffs is also insufficient. These are fraudulent allegations and Plaintiffs have failed to satisfy the "who, what, where, when, and how" requirement of *Rule 9(b)*. *Kearns, 567 F.3d at 1120*.

In sum, there is simply no factual premise or basis alleged in the complaint that supports Plaintiffs' UDAP claim. Plaintiffs have utterly failed to allege facts that could give rise to this cause of action. See *Iqbal, 129 S. Ct. at 1949* ("[A Complaint] demands more than an unadorned, the defendant-unlawfully-harmed-me accusation."); *Twombly, 550 U.S. at 555* ("Factual allegations must be enough to raise a right to relief above the speculative level."). The Court therefore **DISMISSES** Plaintiffs' Complaint with respect to Count IV.

V. Count V: Breach of Fiduciary Duty

Plaintiffs allege that Defendants owed and breached to Plaintiffs a fiduciary duty in connection with their loan. **[*26]** (See Compl. ¶¶ 236-45.) Generally there exists no fiduciary duty between borrowers and lenders. Unless a special relationship exists between a borrower and lender that elevates the lender's responsibility, the standard "arms-length business relationship" applies. *Giles v. General Motors Acceptance Corp., 494 F.3d 865, 883 (9th Cir. 2007)*; see also *Pension Trust Fund for Operation Engineers v. Federal Ins. Co., 307 F.3d 944, 954 (9th Cir. 2002)*.

In the instant Complaint, Plaintiffs make no allegations suggesting that their relationship to Defendants is anything other than an ordinary, arms-length, lender-borrower relationship. Plaintiffs claim that ASB was a fiduciary because they provided a loan and loan services to them which would "allow them to satisfy their obligations without risk of losing their property." Plaintiffs here have effectively described a simple arms-length, lender-borrower relationship. Without more, the Court cannot conclude that Defendants owed Plaintiffs a fiduciary duty. The Court therefore **DISMISSES** Count V of the Complaint.

VI. Count VI: Unjust Enrichment

Plaintiffs next allege that they are entitled to unjust enrichment. Plaintiffs specifically claim that "Defendant **[*27]** ASB has been unjustly enriched at the expense of the Plaintiffs [] and maintenance of the enrichment would be contrary to the rules and principles of equity." (Compl. ¶ 250.)

To prevail on an unjust enrichment claim, a plaintiff must show that: 1) it has conferred a benefit upon the defendant, and 2) that the retention of the benefit was unjust. *Wadsworth v. KSL Grant Wailea Resort, Inc., __ F. Supp. 2d __, No. 08-00527, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *11 (D. Haw. December 10, 2010)*.

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[3] Indeed, as discussed, Defendants seemingly completely disclosed the role MERS would play in their home loan.

As a general rule, "[a]n action for unjust enrichment cannot lie in the face of an express contract." Porter v. Hu, 116 Haw. 42, 169 P.3d 994 (Haw. App. 2007); see also Goodwin v. Executive Trustee Servs., LLC, 680 F. Supp. 2d 1244, 1255 (D. Nev. 2010) ("An action 'based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement.'" (quoting Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975, 113 Nev. 747, 942 P.2d 182, 187 (Nev. 1997))); MacDonald v. Hayner, 43 Wn. App. 81, 715 P.2d 519, 522 (Wash. App. 1986) ("A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an **[*28]** action on an implied contract relating to the same matter, in contravention of the express contract.") Here both the note and the mortgage were express agreements that Plaintiffs executed in connection with their loan which govern the parties rights and obligations. Plaintiffs cannot, therefore, pursue an unjust enrichment claim.

Accordingly the Court **DISMISSES** Count VI of the Complaint.

VII. Count VII: Slander of Title

Count VII of the complaint alleges Slander of Title. Specifically, Plaintiffs allege that "[t]he recording of the ambiguous mortgage document by MERS, as mortgagee and nominee for ASB directly impairs the vendibility of the property on the open market." (Compl. ¶ 256.) This alleged recording of an ambiguous mortgage was, according to Plaintiffs, motivated by "fraud and malice" because ASB and MERS "knew or should have known that bifurcation of the mortgage and the note invalidates the transaction [and] MERS has no written authority to assign any such documents . . . ." (Id. ¶ 261.)

Slander of title is "a tortious injury to property resulting from unprivileged, false, malicious publication of disparaging statements regarding the title to property owned by plaintiff, to plaintiff's **[*29]** damage." Southcott v. Pioneer Title Co., 203 Cal. App. 2d 673, 21 Cal. Rptr. 917, 919 (Cal. App. 1962) (citations omitted). "To establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." B & B Inv. Group v. Gitler, 229 Mich. App. 1, 581 N.W.2d 17, 20 (Mich. App. 1998); see also Manhattan Loft, LLC v. Mercury Liquors, Inc., 93 Cal. Rptr. 3d 457, 464, 173 Cal. App. 4th 1040 (Cal. App. 2009) (establishing elements as "(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.").

Plaintiffs have once more run afoul of Twombly-Iqbal. There is no allegation as to why the assignment was false aside from conclusory allegations. Further the Court finds that Plaintiffs have insufficiently alleged that any false publication was done with malice. First, the Court notes again that, to the extent its malice claim is based on fraudulent conduct, Plaintiffs have failed to satisfy the heightened pleading standard of Rule 9. (See Compl. ¶ 261.) A claim based on fraudulent conduct must "be accompanied **[*30]** by the 'who, what, when, where, and how' of the misconduct charged." Kearns, 567 F.3d at 1124. Plaintiffs have made no such showing. In any event, having failed sufficiently to allege that the recording itself was false, it cannot be that Plaintiffs sufficiently alleged that BAC knew the assignment was false as suggested by the FAC.

The Court therefore **DISMISSES** Plaintiffs' Complaint with respect to Count VII.

VIII. Count VIII: Injunctive Relief

Count VIII of the Complaint asserts a claim for injunctive relief to prevent Defendants from foreclosing on the Subject Property. (Compl. ¶¶ 262-67.) Plaintiffs' request for injunctive relief appears to be a request for relief derivative of their other claims and not a standalone claim. Because the Court finds that all of Plaintiffs' claims should be dismissed, and because Plaintiffs fail to allege any facts showing that they are entitled to this equitable remedy, the Court finds that Plaintiffs' claim for injunctive relief should be dismissed as well.

Accordingly, the Court **DISMISSES** Count VIII of the Complaint.

IX. Cervantes v. Countrywide Home Loans, Inc.

In addition to failing to allege sufficiently the causes of actions as outlined supra, the **[*31]** Court has grave doubts about the validity of the factual predicate underlying most, if not all, of Plaintiffs' claims in light of Cervantes. There, plaintiffs argued that they could amend their complaint to illustrate that certain "aspects of the MERS system are fraudulent." *2011 U.S. App. LEXIS 18569, 2011 WL 3911031 at *1*. The Ninth Circuit disagreed.

The Ninth Circuit first outlined how the MERS system functions. (*2011 U.S. App. LEXIS 18569, [WL] at *1-2*.) The court next described plaintiffs' theory of the case as follows:

> One of the main premises of the plaintiffs' lawsuit here is that the MERS system impermissibly "splits" the note and deed by facilitating the transfer of the beneficial interest in the loan among lenders while maintaining MERS as the nominal holder of the deed.
>
> The plaintiffs' lawsuit is also premised on the fact that MERS does not have a financial interest in the loans, which, according to plaintiffs, renders MERS's status as a beneficiary a sham. MERS is not involved in originating the loan, does not have any right to payments on the loan, and does not service the loan. MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS . . . As a **[*32]** result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans.

*2011 U.S. App. LEXIS 18569, [WL] at *2*. Ultimately the Ninth Circuit rejected plaintiffs' arguments. The court first found that plaintiffs had "not identified any representations made to them about the MERS system and its role in their home loans that were false and material." *2011 U.S. App. LEXIS 18569, [WL] at *4*. Nor did the plaintiffs allege with specificity that they "were misinformed about MERS's role as a beneficiary, or the possibility that their loans would be resold and tracked through the MERS system." Id. The plaintiffs also "failed to show that the designation of MERS as a beneficiary caused them any injury by, for example, affecting the terms of their loans, their ability to repay the loans, or their obligations as borrowers." Id.

Moreover, the Ninth Circuit also found that plaintiffs' claims were

> undercut by the terms in [the] standard deed of trust, which describe MERS's role in the homeloan. For example the plaintiffs allege they were defrauded because MERS is a "sham" beneficiary without a financial interest in the loan, yet the disclosures in the deed indicate that MERS is acting **[*33]** "solely as nominee for Lender and Lender's successors and assigns" and holds "only legal title to the interest granted by Borrower in this Security Instrument." Further, while the plaintiffs indicate that MERS was used to hide who owned the loan, the deed states that the loan or a partial interest in it "can be sold one or more times without prior notice to Borrower," but that "[i]f there is a change in Loan Servicer, Borrower will be given written notice of the change" as required by consumer protection laws. Finally, the deed indicates that MERS has "the right to foreclose and sell the property." By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents. . . . In light of the explicit terms of the standard deed signed by [plaintiffs] it does not appear that the plaintiffs were misinformed about MERS's role in their home loans.

*2011 U.S. App. LEXIS 18569, [WL] at *5*.

The Ninth Circuit in Cervantes also considered and rejected the "splitting of the note" theory of liability:

> Even if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs' conclusion that, as a necessary consequence, no **[*34]** party has the power to foreclose. The legality of MERS's role as a beneficiary may be at issue where MERS initiates a foreclosure in its own name, or where the plaintiffs allege a violation of state recording and foreclosure statutes based on the designation. . . .
> Further, the notes and deeds are not irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds are not agents of the lenders.

*2011 U.S. App. LEXIS 18569, [WL] at *7*.

The mortgage at issue in the instant case contains identical language to the mortgage at issue in Cervantes. Specifically, the mortgage put Plaintiffs on notice that MERS had "the right to foreclose and sell the Property." (Mortgage at 3.) The mortgage also provided that MERS was acting "solely as nominee for Lender and Lender's successors and assigns" (id. at 2) and holds "only legal title to the interest granted by Borrower in this Security Instrument" (id. at 3). Accordingly, per the mortgage, MERS was granted the right to foreclose on the property on behalf of the lenders in the event of Plaintiffs' default. Plaintiffs were aware of MERS's role as they signed the mortgage. See *Cervantes, 2011 U.S. App. LEXIS 18569, 2011 WL 3911031 at *5*. Therefore, **[*35]** it seems that Plaintiffs' theories of liability are not tenable in light of *Cervantes*.

X. Dismissal without Prejudice

Pursuant to *Rule 15(a)(2)*, courts should "freely give leave [to amend] when justice so requires." Further, "requests for leave should be granted with extreme liberality." *Moss v. U.S. Secret Service, 572 F.3d 962, 972 (9th Cir. 2009)*. "Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by an amendment." Id. "However, 'liberality in granting leave to amend is subject to several limitations.'" *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1058 (9th Cir. 2011)* (quoting *Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989))*. "Those limitations include undue prejudice to the opposing party, bad faith by the movant, futility, and undue delay." Id. (citing *Ascon Props, 866 F.2d at 1160*). "Further, '[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.'" Id. (quoting *Ascon Props, 866 F.2d at 1160*).

The Court recognizes that it may be possible for Plaintiffs to state a claim if provided the opportunity to amend **[*36]** their Complaint. The Complaint is therefore **DISMISSED WITHOUT PREJUDICE** as against all Defendants in this action with leave to amend no later than thirty (30) days from the filing of this Order. [4] Failure to do so and to cure the pleading deficiencies will result in dismissal of this action with prejudice. Plaintiffs are advised that the amended complaint must clearly state how each of the named defendants have injured them, and it must also clearly identify the statutory provisions under which Plaintiffs' claims are brought consistent with this Order. In granting leave to amend the Court does not here limit Plaintiffs' amended pleading only to the causes of action presently contained in the Complaint—Plaintiffs may allege new theories of liability if they so choose.

CONCLUSION

For these reasons the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' Complaint against all Defendants, **DENIES AS MOOT** Defendants' Motion for Summary Judgment (Doc. # 9), and **VACATES** the Hearing on this matter set for October 14, 2011.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 13, 2011.

/s/ David Alan Ezra

David Alan Ezra **[*37]**

United States District Judge

End of Document

[4] Plaintiffs are advised, however, to take a close look at Cervantes before refiling their Complaint.

In re Photochromic Lens Antitrust Litig.

United States District Court for the Middle District of Florida, Tampa Division

October 13, 2011, Decided; October 14, 2011, Filed

Case No. 8:10-MD-2173-T-27EAJ; 8:10-cv-2040-T-27EAJ

Reporter

2011 U.S. Dist. LEXIS 119257 *; 2011-2 Trade Cas. (CCH) P77,688; 2011 WL 4914997

IN RE: PHOTOCHROMIC LENS ANTITRUST LITIGATION. This order relates to the following case(s): 8:10-cv-2040-T-27EAJ

Prior History: *In re Photochromic Lens Antitrust Litig., 2011 U.S. Dist. LEXIS 162772 (M.D. Fla., June 7, 2011)*

Core Terms

allegations, tortious interference, motion to dismiss, antitrust, anti trust law, statute of limitations, factual allegations, antitrust claim, anticompetitive, customers, discounts, bundled, argues

LexisNexis® Headnotes

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

HN1[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a)(2) requires that a complaint provide a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Although a complaint need not include detailed factual allegations, it must contain sufficient factual allegations, which, when taken as true, state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not "shown" -- that the pleader is entitled to relief. A well-pleaded complaint, however, may survive a motion to dismiss even if it appears that recovery is very remote and unlikely.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

While the court must accept all factual allegations as true in evaluating a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the tenet does not apply to legal conclusions. Similarly, a court may dismiss a complaint on a dispositive issue of law.

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

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > General Overview

HN4[] **Motions to Dismiss, Failure to State Claim**

A statute of limitations bar is an affirmative defense, and plaintiffs are not required to negate an affirmative defense in their complaint. Thus, a motion to dismiss based on the statute of limitations is appropriate only if it is apparent from the face of the complaint that the claim is time-barred.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Extensions & Revivals

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

HN5[] **Sherman Act, Defenses**

An action for damages under federal ***antitrust law*** must be commenced within four years of accrual. *15 U.S.C.S. § 15b*. An antitrust cause of action accrues, and the limitations period begins to run, when a defendant commits an act that causes injury to the plaintiff. In the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and as to those damages, the statute of limitations runs from the date of commission of the act.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Standing, Requirements**

An antitrust claimant must do more than make allegations of consequential harm resulting from a violation of the antitrust laws, and that is true even when the complaint is buttressed by an allegation of intent to harm the claimant. Antitrust standing ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Standing, Requirements**

Several factors are relevant to whether a plaintiff has standing to bring a federal antitrust claim including: (1) the nature of the plaintiffs alleged injury, that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Standing, Requirements**

An antitrust claimant must show more than merely an injury causally linked to a competitive practice; it must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. At a minimum, this requirement means that one competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

New Jersey courts have refused to extend the Consumer Fraud Act to indirect purchasers' claims based on antitrust violations.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

A deceptive act or practice is, in essence, a material representation, practice or omission likely to mislead reasonable consumers to their detriment. The Tennessee Consumer Protection Act does not apply to anticompetitive conduct.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN11[] **Deceptive & Unfair Trade Practices, State Regulation**

The Arkansas Deceptive Trade Practices Act makes illegal any trade practice which is unconscionable, with includes conduct violative of public policy or statute.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN12[] **Intentional Interference, Elements**

To establish a claim for tortious interference with a prospective business relationship, a plaintiff must prove the defendant intentionally committed a wrongful act which improperly interfered with the prospective relationship. A plaintiff may properly bring a cause of action alleging tortious interference with present or prospective customers, but no cause of action exists for tortious interference with a business's relationship to the community at large. While a plaintiff need not identify by name a specific existing or prospective customer, the plaintiff must allege interference with a specific existing or prospective relationship.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN13[] **Intentional Interference, Elements**

An action for tortious interference under Florida law requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN14[] **Intentional Interference, Elements**

The mere general loss of possible unspecified customers does not establish the tort of intentional interference with prospective economic relations under Minnesota law.

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For Essilor International SA, Defendant: Wilson, Jonathan M Jacobson, LEAD ATTORNEY, Sonsini, Goodrich & Rosati, PC, New York, NY.

For Essilor of America, Inc., Defendant: Edward Martin Waller, Jr., Julie S. Sneed, LEAD ATTORNEYS, Fowler White Boggs, Tampa, FL; John M. Majoras, Julie E. McEvoy, Sean Thomas Boyce, LEAD ATTORNEYS, Jones Day, Washington, DC; Jonathan M Jacobson, LEAD ATTORNEY, Sonsini, Goodrich & Rosati, PC, New York, NY.

For Essilor Laboratories of America, Inc., Defendant: Edward Martin Waller, Jr., Julie S. Sneed, **[*11]** LEAD ATTORNEYS, Fowler White Boggs, Tampa, FL; John M. Majoras, Julie E. McEvoy, Sean Thomas Boyce, LEAD ATTORNEYS, Jones Day, Washington, DC; Jonathan M Jacobson, LEAD ATTORNEY, Sonsini, Goodrich & Rosati, PC, New York, NY.

Judges: JAMES D. WHITTEMORE, United States District Judge.

Opinion by: JAMES D. WHITTEMORE

Opinion

ORDER

BEFORE THE COURT is Defendant Transitions Optical, Inc.'s Motion to Dismiss the Complaint of Insight Equity A.P. X, LP, d/b/a Vision-Ease Lens Worldwide, Inc. (Dkt. 73). For the reasons discussed below, the motion will be **GRANTED** in part and **DENIED** in part. Insight Equity A.P. X, LP, d/b/a Vision-Ease Lens Worldwide, Inc. ("Vision-Ease") will be granted leave to file an amended complaint within **twenty (20) days** from the date of this Order.

Applicable Standard

HN1[] *Rule 8(a)(2) of the Federal Rules of Civil Procedure* requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

HN2[] Although a complaint need not include detailed factual **[*12]** allegations, it must contain sufficient factual allegations, which, when taken as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556U.S.662 , 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint as alleged-but it has not 'show[n] '-'that the pleader is entitled to relief.'" *Id. at 1950* (quoting *Fed. R. Civ. P. 8(a)(2)*). A well-pleaded complaint, however, may survive a motion to dismiss even if it appears "that recovery is very remote and unlikely." *Bell Atlantic Corp., 550 U.S. at 555* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974))*.

HN3[] While the Court must accept all factual allegations as true in evaluating a motion to dismiss under *Rule 12(b)(6)*, the tenet does not apply to legal conclusions. *Ashcroft, 129 S. Ct. at 1949 (2009)*. **[*13]** Similarly, a court may dismiss a complaint on a dispositive issue of law. *Marshall County Bd. of Educ, v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993)*.

Discussion

The Complaint asserts claims against Transitions Optical, Inc. ("Transitions") for (1) monopolization under *15 U.S.C. § 2* [1] (Count I), (2) unlawful agreements in restraint of trade under *15 U.S.C. § 1* [2] (Count II), (3) exclusive dealing under *15 U.S.C. § 14* [3] (Count III), (4) violations of various state laws prohibiting unfair or unconscionable practices (Count IV), and (5) tortious interference under Florida and/or Minnesota law (Count V).

Transitions moves to dismiss the Complaint arguing, *inter alia*, that (1) the federal antitrust claims and certain state law claims are barred by the applicable statutes of limitation, (2) Vision-Ease lacks antitrust standing to pursue its federal antitrust claims, (3) Vision-Ease has failed to allege plausible antitrust claims based on tying or bundling discounts, and (4) certain of Vision-Ease's state law claims fail to state claims upon which relief may be granted.

Statute of Limitations [*14] (Counts I, II, III and IV)

Transitions argues that Vision-Ease's federal and state antitrust claims are barred by the applicable statutes of limitations. ***HN4***[] "A statute of limitations bar is an affirmative defense, and plaintiffs are not required to negate an affirmative defense in their complaint." *La Grasta v. First Union Securities, Inc., 358 F.3d 840, 845 (11th Cir. 2004)* (internal citations and quotations omitted). Thus, a motion to dismiss based on the statute of limitations is appropriate only if it is "apparent from the face of the complaint" that the claim is time-barred. *Omar v. Lindsey, 334 F.3d 1246, 1251 (11th Cir. 2003)*.

HN5[] An action for damages under federal ***antitrust law*** must be commenced within four years of accrual. *15 U.S.C. § 15b*. An antitrust cause of action accrues, and the limitations period begins to run, when a defendant commits an act that causes injury to the plaintiff. *See Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. The Supreme Court has recognized that in the context of a continuing conspiracy to violate the antitrust laws, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages **[*15]** caused by that act and ... as to those damages, the statute of limitations runs from the date of commission of the act." *Zenith, 401 U.S. at 338-39*; *Poster Exchange, Inc. v. National Screen Service Corp. 517 F.2d 117, 128 (5th Cir. 1975)*(continuing antitrust conduct resulting in a continued invasion of a plaintiffs rights may give rise to continually accruing rights of action).

The Complaint alleges that Transitions engaged in a pattern of anticompetitive activity beginning in 1999 and continuing through at least 2010 when Transitions entered into a consent degree with the Federal Trade Commission. *See* Complaint, ¶¶ 24, 46; *see also* Complaint, ¶¶ 33 ("[i]n 2005 ... Transitions began an exclusionary agreement campaign to lock up the other key distribution channels for photochromic lenses"), 34 ("[a]fter terminating Vision-Ease... Transitions entered into exclusive contracts with over 50 retailers"), 51 ("Transitions ... maintains this monopoly power through its anticompetitive conduct"). That Transitions may have adopted an anticompetitive policy as early as 1999, does not preclude proof that Transitions engaged in anticompetitive conduct (*e.g.*, new exclusive dealing agreements, tying **[*16]** arrangements, or bundled discounts) between 2006 and 2010. [4] As a result, and notwithstanding the absence of express allegations of similar conduct on the part of

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[1] *Section 2* of the Sherman Act.

[2] *Section 1* of the Sherman Act.

[3] *Section 3* of the Clayton Act.

[4] To the extent Vision-Ease's antitrust claim in Count I can be read to rely solely on Transitions' termination of its contract with Vision-Ease and its refusal to deal with Vision-Ease after June 2005, *see*, e.g., Complaint, ¶ 44 ("Vision-Ease lost all of the customers it had earned as of June 2005"), that claim, and any alleged damages flowing from theat conduct, is likely barred by the applicable federal and state statutes of limitations. *See Klehr v. A.O. Smith Corp., 521 U.S. 179, 190, 117 S. Ct. 1984, 138 L.*

Transitions within the limitation period, the expiration of the statute of limitations is not apparent on the face of the complaint. *See* Omar, 334 F.3d at 1252 (affirming district court's denial of motion to dismiss based on statute of limitations when resolution of the issue "would depend either on facts not yet in evidence or on construing factual ambiguities in the complaint in Defendants' favor"). [5]

Standing

Transitions argues that the Complaint lacks allegations sufficient to establish that Vision-Ease has standing to sue under federal ***antitrust law***. ***HN6***[] An antitrust claimant must do more than make "allegations of consequential harm resulting from a violation of the antitrust laws," and that is true even when the complaint is "buttressed by an allegation of intent to harm the [claimant]." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. [6] Antitrust standing "ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlanta Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

HN8[] An antitrust claimant must show more than merely an "injury causally linked" to a competitive practice; it "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "At a minimum, this requirement means that one competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition." *NicSand, Inc. v. 3M Company, 507 F.3d 442, 450 (6th Cir. 2007)*.

The **[*20]** Complaint alleges that Transitions engaged in anticompetitive conduct that "hindered or prevent[ed]" Vision-Ease from competing in the photochromic lens market. *See, e.g.*, Complaint, ¶ 3; *see also* Complaint, ¶ 31, 34-39,45. In addition, the Complaint alleges that Transitions' conduct harmed consumers. *See, e.g.*, Complaint, ¶¶ 3, 41-42. These allegations, together with supporting factual allegations elsewhere in the Complaint, are sufficient

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Ed. 2d 373 (1997) (holding that a plaintiff cannot "use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier **[*17]** predicate acts that took place outside the limitations period"); *Zenith, 401 U.S. at 340* ("We must now determine whether Zenith could have recovered [future] damages if it had brought suit for them in 1954, for if it could not, it would follow ... that it must be permitted to recover them now."); *see also* *Imperial Point Colonnades Condominium, Inc., 549 F.2d 1029, 1035 (5th Cir. 1977)* ("where a defendant commits an act injurious to plaintiff outside the limitations period, and damages continue to result from that act within the limitations period, no new cause of action accrues for damages occurring within the limitations period because no act committed by the defendant within that period caused harm"); *Poster Exchange, Inc. v. National Screen Service Corp. 517 F.2d at 128* ("It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.").

This issue, however, is not appropriate for resolution on a motion to dismiss. *See* *Rite Aid Corp. v. American Express Travel Related Services Co., Inc., 708 F.Supp.2d 257, 266-67 (E.D.N.Y. 2010)* **[*18]** (refusing to dismiss claims for damages flowing from anticompetitive agreements entered into outside limitations period, but only as to damages plaintiff suffered within the limitations period); *see also* *Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F. 3d 823, 828 (11th Cir. 1999)* ("commencement of the statute of limitations is a question of fact");

[5] For the same reason, Transitions' motion to dismiss certain state law claims in Count IV based on state statutes of limitations also fails.

[6] In **[*19]** *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the Supreme Court identified ***HN7***[] several factors relevant to whether a plaintiff has standing to bring a federal antitrust claim including: (1) the nature of the plaintiffs alleged injury; that is, whether it was the type the antitrust laws were intended to forestall, (2) the directness of the injury, (3) the speculative measure of the harm, (4) the risk of duplicative recovery, and (5) the complexity in apportioning damages. Transitions focuses its argument in the motion to dismiss on the nature of the alleged injury suffered by Vision-Ease.

to establish an antitrust injury and that Vision-Ease is an efficient enforcer. *See Palmyra Park Hosp. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1303 (11th Cir. 2010)* (allegations that exclusivity arrangements forced insurers to deal with single competitor when they would otherwise prefer to deal with two or more competitors established antitrust injury); *see also* *NicSand, Inc., 507 F.3d at 454* (recognizing that the law is clear that "exclusive agreements" that "create impermissible barriers for new entrants to market ... and permit a supplier to charge monopoly prices" may violate federal ***antitrust law***) (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*. [7]

Allegations Relating to Tying Arrangements and Bundled Discounts

Transitions argues that to the extent the Complaint purports to assert claims based on alleged tying agreements and bundled discounts, the Complaint lacks factual allegations to support those claims. [8] The Court agrees that the allegations in the Complaint do not state an independent claim for "tying" under federal ***antitrust law***, and does not contain sufficient factual allegations supporting an independent claim based on bundled discounts. *See Palmyra Park Hosp. Inc. v. Phoebe Putney Memorial Hosp., 604 F.3d 1291, 1296 n.4 (11th Cir. 2010)*. [9] Nonetheless, the related allegations are relevant to Vision-Ease's overarching antitrust claims. [10] When these allegations, together **[*22]** with the other allegations in the Complaint, are taken as true with reasonable inferences drawn in favor of Vision-Ease, the Complaint states antitrust claims that are plausible on their face as required to survive a motion to dismiss under *Rule 12(b)(6)*. *See* *Blue Sky the Color of Imagination, LLC v. MeadWestvaco Corp., No. CV 10-02175 DDP, 2010 U.S. Dist. LEXIS 118946, 2010 WL 4366849, at *4 (C.D. Cal. Sept. 23, 2010)* (refusing to apply *Cascade Health* in considering *Rule 12(b)(6)* motion to dismiss). [11]

Failure to State a Claim Under State Statutes (Count IV)

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[7] Transitions' reliance on *NicSand, Inc.* and similar case law is **[*21]** misplaced given the allegations in the Complaint. For example, the Complaint does not indicate that the *wholesalers* or *retailers* of photochromic lenses mandated price discounts and exclusivity nor does this case involve a competitor seeking to recoup lost market share in a market it used to dominate. *Id. at 454* ("NicSand has not sued 3M because it wants to share shelf space with its competitor; it sued 3M because it wants that shelf space all to itself...").

[8] The Complaint alleges the existence of exclusionary agreements, tying arrangements, *and bundled* discounts. *See* Complaint, ¶¶ 4, 36-37.

[9] Vision-Ease did not respond to Transitions' argument that a tying claim requires products from two different markets. In addition, contrary to Vision-Ease's representation in its opposition memorandum, the Complaint does not include an allegation that Transitions agreed to stop requiring customers to accept exclusive agreements conditioned on them purchasing the entire line of photochromic products.

[10] For example, these allegations may be relevant to Vision-Ease's monopolization claim under *§ 2* of the Sherman Act (Count I). *See, e.g.,* *LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003)* **[*23]** *(en banc)* (holding that bundled rebates and exclusivity arrangements that may not, standing alone, give rise to claims under *§ 1* of the Sherman Act and *§ 3* of the Clayton Act, but may nonetheless be relevant to claims under *§ 2* of the Sherman Act); *see also* *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 197 (3d Cir. 2005)* (holding that finding of no liability under stricter standards of *§ 3* of the Clayton Act did not preclude application of evidence of exclusive dealing to support claim under *§ 2* of the Sherman Act).

[11] Because the Complaint contains sufficient factual allegations to state antitrust claims regardless of the alleged "bundled discounts," the Court need not address under what circumstances a bundled discount or rebate standing alone would constitute an antitrust violation. *Compare* *LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003)* (*en banc*) (manufacturer's exclusionary conduct by bundling rebates could violate the Sherman Act's monopolization provisions) *with* ***Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 903 (9th Cir. 2008)*** (exclusionary conduct element of monopolization or attempted monopolization claim arising under the Sherman Act could not be satisfied **[*24]** by reference to bundled discounts unless they resulted in prices that were below appropriate measure of defendant's costs).

Transitions argues that the Complaint fails to state a claim under the unfair competition statutes of Arkansas, Maryland, New Jersey, Tennessee, and Utah. The Complaint alleges that "Transitions has engaged in unfair and unconscionable conduct by limiting and excluding competition in the photocrhomic ophthalmic lens market." Complaint, ¶ 65. The motion to dismiss will be granted as to Vision-Ease's claims under Maryland, [12] New Jersey, [13] Tennessee, [14] and Utah law, [15] but denied as to Vision-Ease's claim under Arkansas law. [16]

Tortious Interference (Count V)

Transitions argues that Vision-Ease has failed to state a claim for tortious interference under either Florida or Minnesota law, ***HN12***[] To establish a claim for tortious interference with a prospective business relationship, a plaintiff must prove the defendant intentionally committed a wrongful act which improperly interfered with the prospective relationship. *See* *Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla. 1985)*; *United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 633 (Minn. 1982)*. "[A] plaintiff may properly bring a cause of action alleging tortious interference with present or prospective customers[, but] no cause of action exists for tortious interference with a business's relationship to the community at large." *Southern Alliance Corp. v. Winter Haven, 505 So.2d 489, 496 (Fla. 2d DCA 1987)*. While a plaintiff need not identify by name **[*27]** a specific existing or prospective customer, the plaintiff must allege interference with a specific existing or prospective relationship. *See* *Ethan Allen v. Georgetown Manor, Inc., 647 So.2d 812, 815 (Fla. 1994)*; *International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1405 (8th Cir. 1993)*.

The Complaint alleges only that Vision-Ease had "a reasonable expectation of business advantage and benefit" and that but for Transition's allegedly wrongful conduct, "Vision-Ease would have realized its economic advantage and benefit by entering into agreements with specialty retailers, mass merchants, and retail and wholesale ophthalmic lens laboratories." Complaint, ¶¶ 68, 71. These allegations are insufficient to state a claim for tortious interference under Florida and Minnesota law. *See* *Ethan Allen, 647 So.2d at 813* (***HN13***[] "an action for tortious interference ... requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered"); *International Travel Arrangers, 991 F.2d at 1405* (***HN14***[] "the mere general loss of possible unspecified customers does not establish the tort of

[12] Vision-Ease did not respond to Transitions' argument that Vision-Ease's claim under Maryland law should be dismissed.

[13] *See* *Wilson v. General Motors Corp., 190 N.J. 336, 921 A.2d 414 (N.J. 2007)* (***HN9***[] refusing to extend Consumer Fraud Act to indirect purchasers' claims based on antitrust violations); *see also* *Sickles v. Cabot Corp., 379 N.J. Super. 100, 877 A.2d 267, 276 (N.Y. App. Div. 2005)* (recognizing that "capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice") (quoting *Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 371 A.2d 13, 16 (N.J. 1977))*.

[14] *See* ***[*25]*** *Fayne v. Vincent, 301 S.W.3d 162, 177 (Tenn. 2009)* (***HN10***[] "[a] deceptive act or practice is, in essence, a material representation, practice or omission likely to mislead ... reasonable consumers to their detriment") (internal citations and quotations omitted); *Bennett v. Visa, U.S.A., Inc., 198 S.W.3d 747, 755 (Tenn. Ct. App. 2006)* (holding that the Tennessee Consumer Protection Act does not apply to anticompetitive conduct); *Sherwood v. Microsoft Corp., No. M2000-01850-COA-R9-CV, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at * (Tenn. Ct. App. Jan. 31, 2003)* (holding Tennessee Consumer Protection Act did not apply to alleged antitrust violations). *But see* *Blake v. Abbott Laboratories, Inc., C.A. NO. 03A01 - 9509-CV-00307, 1996 Tenn. App. LEXIS 184, 1996 WL 134947, *6 (Tenn. Ct. App. March 27, 1996)* (concluding that, at least for purposes of motion to dismiss, allegations of price fixing were sufficient to state a claim under the Tennessee Consumer Protection Act).

[15] Vision-Ease conceded that its claim under Utah law cites the wrong statutory provision and should be dismissed without prejudice.

[16] *See* *Baptist Health v. Murphy, M.D., 365 Ark. 115, 226 S.W.3d 800, 811 (Ark. 2006)* (***HN11***[] "The Arkansas Deceptive Trade Practices Act ... makes illegal any trade practice **[*26]** which is unconscionable, with includes conduct violative of public policy or statute."); *see also* *Curtis Lumber Co., Inc. v. Louisiana Pacific Corp., 618 F.3d 762, 776-77 (8th Cir. 2010)* (holding that claims under the Arkansas Deceptive Trade Practices Act do not require knowing or intentional deception).

intentional **[*28]** interference with prospective economic relations under Minnesota law"); *see also* *Coach Services, Inc. v. 777 Lucky Accessories, Inc., 752 F.Supp.2d 1271, 1273-74 (S.D. Fla. 2010)* (finding that defendant's allegation that the plaintiff interfered with its plan to sell sunglasses with "various customers" was "too vague and abstract to satisfy the first element of a tortious interference claim" when it referred to the "community at large instead of [] 'identifiable customers'").

Accordingly, Defendant Transitions Optical, Inc.'s Motion to Dismiss the Complaint of Insight Equity A.P. X, LP, d/b/a Vision-Ease Lens Worldwide, Inc. (Dkt. 73) is **GRANTED** in part and **DENIED** in part. Count IV is **DISMISSED** to the extent it purports to state claims under Maryland, New Jersey, Tennessee, and Utah law. Count V of the Complaint is **DISMISSED** without prejudice. Insight Equity A.P. X, LP, d/b/a Vision-Ease Lens Worldwide, Inc. is granted leave to file an amended complaint within **twenty (20) days** from the date of this Order, or to communicate its intention not to file an amended complaint.

DONE AND ORDERED this 13th day of October, 2011.

/s/ James D. Whittemore

JAMES D. WHITTEMORE

United States District Judge

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Apple Inc. v. Samsung Elecs. Co.

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

October 18, 2011, Decided; October 18, 2011, Filed

Case No.: 11-CV-01846-LHK

Reporter

2011 U.S. Dist. LEXIS 120416 *; 101 U.S.P.Q.2D (BNA) 1125 **; 2011-2 Trade Cas. (CCH) P77,648; 2011 WL 4948567

APPLE INC., a California corporation, Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD., A Korean business entity; SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited liability company, Defendants.

Subsequent History: Injunction denied by *Apple, Inc. v. Samsung Elecs. Co., 2011 U.S. Dist. LEXIS 139049 (N.D. Cal., Dec. 2, 2011)*

Prior History: *Apple, Inc. v. Samsung Elecs. Co., 2011 U.S. Dist. LEXIS 110616 (N.D. Cal., Sept. 28, 2011)*

Core Terms

Counterclaims, patents, Reply, allegations, license, terms, motion to dismiss, technology, antitrust, failure to disclose, declarations, intellectual property rights, Sherman Act, anticompetitive, argues, declared-essential, holder's, effects, declaratory judgment, affirmative defense, motion to strike, monopoly, anticompetitive conduct, leave to amend, monopoly power, competitor, concerted, disclose, violates, parties

LexisNexis® Headnotes

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

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

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

A motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)* tests the legal sufficiency of a complaint. To withstand a motion to dismiss, a plaintiff must plead enough facts to state a claim to relief that is plausible on its face. On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is "plausible" in light of basic economic principles. All allegations of material fact are taken as true and interpreted in a manner most favorable to the non-moving party. However, the court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. Leave to amend should be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. If amendment would be futile, a dismissal may be ordered with prejudice.

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

HN2[] Heightened Pleading Requirements, Fraud Claims

A complaint must state with particularity the circumstances constituting fraud. *Fed. R. Civ. P. 9(b)*. Allegations of fraud must be stated with specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations. To survive a motion to dismiss, allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.

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

HN3[] Sherman Act, Scope

In order to state a claim under the Sherman Act, the plaintiff must allege that: (1) the defendant possessed monopoly power in the relevant market, and (2) that the defendant achieved or is maintaining monopoly power through anticompetitive conduct.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Patent Law > Infringement Actions > General Overview

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

HN4[] Regulated Practices, Intellectual Property

Courts have recognized that fraudulent declarations of fair, reasonable, and non-discriminatory terms (FRAND) that are used to induce standard setting organizations (SSOs) to adopt standards essential patents can be monopoly conduct for the purposes of establishing a claim under § 2 of the Sherman Act. The U.S. Court of Appeals for the Third Circuit recognized that an SSO can be used to obtain monopoly power and create anticompetitive effects on the relevant markets when (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an standard setting organization's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct. Thus, intentionally false promises to SSOs regarding licenses with FRAND terms can give rise to actionable claims under § 2 of the Sherman Act.

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

HN5[] Heightened Pleading Requirements, Fraud Claims

Where a plaintiff's allegations regarding the defendant's conduct sound in fraud, it is required to plead, with particularity, the circumstances constituting fraud or mistake. *Fed. R. Civ. P. 9(b)*. Plaintiffs must plead facts specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud so that they can defend against the charge.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Patent Law > Infringement Actions > General Overview

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

HN6[] **Regulated Practices, Intellectual Property**

Courts have been more reluctant to find antitrust violations based on the theory that a failure to disclose intellectual property rights in a declared essential patent created monopoly power for a member of the standard setting organization (SSO). In order to establish anticompetitive conduct, the plaintiff must show that the patent holder's failure to disclose its intellectual property rights induced the SSO to set the standard incorporating the essential patent. In other words, the plaintiff must allege that there was an alternative technology that the SSO was considering during the standard setting process and that the SSO would have adopted an alternative standard had it known of the patent holder's intellectual property rights.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Sherman Act, Claims**

In order for the plaintiff to properly plead that it has suffered an antitrust injury, it must allege injury to competition.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Regulated Practices, Intellectual Property**

Standards implemented by standard setting organizations, without the proper safeguards, are inherently anticompetitive. It follows that when an entity side-steps these safeguards in an effort to return the standard to its natural anti-competitive state, anti-competitive effects are inevitable.

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

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

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. The U.S. Supreme Court has explained that the plaintiff in a *§ 1* action must show a unity of common purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. In other words: The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the parties. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective. Unilateral activity by a defendant, no matter the motivation, cannot give rise to a *§ 1* violation.

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

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

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

A plaintiff cannot state a claim under *§ 1* of the Sherman Act absent an allegation that it acted in concert with another party; it is not sufficient to allege that it acted alone in a collaborative forum.

Torts > Business Torts > Unfair Business Practices > General Overview

HN11[] **Business Torts, Unfair Business Practices**

The California Supreme Court has explained that in order to establish a claim of unfair harm to competition, a plaintiff must show that the alleged conduct is tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. The California Supreme Court went on to elaborate that when a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *Cal. Bus. & Prof. Code § 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN12[] **Defenses, Demurrers & Objections, Motions to Strike**

The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *Fed. R. Civ. P. 12(f)*. On a motion to strike, the court must view the pleading under attack in the light most favorable to the pleader. Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN13[] **Defenses, Demurrers & Objections, Motions to Strike**

Numerous courts have used that discretion to dismiss counterclaims under *Fed. R. Civ. P. 12(f)* where they are either the "mirror image" of claims in the complaint or redundant of affirmative defenses. The court should focus on whether the counterclaims serve any useful purpose, and should dismiss or strike a redundant counterclaim only when it is clear that there is a complete identity of factual and legal issues between the complaint and the counterclaim. Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court.

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Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[1127]** ORDER GRANTING IN PART, AND DENYING IN PART, MOTION TO DISMISS AND STRIKE

Before the Court is Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC's (collectively "Samsung") Motion to Dismiss and Strike Plaintiff Apple, Inc.'s ("Apple") Counterclaims in Reply. *See* ECF No. 153. This case arises out of **[*4]** a dispute between Apple and Samsung regarding several utility and design patents related to both parties' mobile device technologies. Apple, in its complaint, alleges that Samsung's Galaxy cell phones and computer tablets infringe Apple's trade dress, trademarks, and utility and design patents. Complaint, April 15, 2011, ECF No. 1. Samsung brought counterclaims against Apple in response, alleging that Apple products infringe upon 12 of Samsung's own patents, including, among others, patents related to the Universal Mobile Telecommunications Standard ("UMTS"). *See* Answer and Counterclaims, ECF No. 80. In response to these counterclaims, Apple **[**1128]** filed its Answer, Defenses and Counterclaims in Reply to Samsung's Counterclaims ("Counterclaims in Reply") on July 21, 2011. *See* ECF No. 124. In its Counterclaims in Reply, Apple alleges that Samsung has violated both federal and state antitrust laws, as well as the California Unfair Competition Law, by defrauding the standards setting organization that set the UMTS standards, inducing the organization to adopt Samsung's declared-essential patents, and later refusing to license its declared-essential patents on fair, reasonable, and non-discriminatory **[*5]** terms ("FRAND" terms).

Samsung seeks to dismiss counts twenty-seven (violation of *Section 2* of the Sherman Antitrust Act), twenty-eight (violation of Section 1 of the Sherman Antitrust Act and *California Business and Professions Code §§ 16720*), and twenty-nine (California Unfair Competition Law). [1] Samsung seeks to strike counts thirty (Declaratory Judgment that Apple is Licensed to Samsung's Declared-Essential Patents), thirty-one (Declaratory Judgment of No Entitlement to Injunctive Relief), and thirty-two (Declaratory Judgment of Unenforceability). Counterclaims in Reply at ¶¶176-206. Pursuant to *Local Civil Rule 7-1(b)*, the Court concludes that this motion is appropriate for determination without oral argument and vacates the October 20, 2011 motion hearing. [2] For the foregoing reasons, Samsung's Motion to Dismiss and Strike is GRANTED in part, and DENIED in part.

I. RELEVANT FACTS

Unless otherwise noted, the following allegations are taken from Apple's Counterclaims in Reply and are presumed to be true for purposes of ruling upon Samsung's motions to dismiss and strike. Standards setting organizations ("SSOs") play an important role in the wireless communications industry. Mobile wireless carriers provide consumers with access to networks, which allows consumers to place and receive calls, access e-mail, and the internet. Counterclaims in Reply ¶ 19. The development of technical standards across the industry, including among cell phone carriers, device manufacturers, handset, and chipset manufacturers, facilitates compatibility across products and networks. Counterclaims in Reply ¶¶ 21-22. Technical standards may have pro-competitive benefits. Manufacturing volumes can increase because product lines can be sold to multiple purchasers, thus decreasing per unit costs. Counterclaims in Reply ¶ 22. Likewise, industry standards can create increased price competition among suppliers. Counterclaims in Reply ¶ 22.

Alternatively, the creation of **[*7]** technical industry standards presents the potential for anti-competitive effects. Establishing industry technical standards can create a "lock-in" effect and the risk of "patent hold-up." Counterclaims in Reply ¶ 23. This is because a patent owner can, when the SSO created standard includes patented technology, require other designers to use patented technology. In that situation, a patent owner can demand exorbitant licensing fees or other terms from designers. Counterclaims in Reply ¶ 24. In order to avoid the risks associated with the "lock-in" effect, standard setting organizations often employ policies designed to compel disclosure of an entity's intellectual property rights ("IPR") prior to adoption of a standard by the SSO. Alternatively, an SSO may require that an entity seeking to have its IPR incorporated into the industry standard commit to licensing its patents on fair, reasonable, and non-discriminatory terms ("FRAND") before the SSO agrees to incorporate the proposal. Counterclaims in Reply ¶ 27.

Apple and Samsung are both members of the European Telecommunications Standards Institute ("ETSI"), a standard setting organization involved in setting the standards for mobile **[*8]** wireless carrier technology, including the UMTS standard. Counterclaims in Reply ¶¶ 35. The UMTS standard was designed to support increased speeds and bandwidth capacity on mobile devices. Counterclaims in Reply ¶ 37. ETSI, and several other organizations, were involved in developing the UMTS standard. Counterclaims in Reply ¶ 38.

The SSOs responsible for developing the UMTS standard incorporated Samsung's patented technology into the standard. Under the terms of the ETSI policy, Samsung had a duty **[**1129]** to disclose its intellectual property rights [3] in the technology that was essential, or might be essential, for the standards it was proposing. Counterclaims in Reply ¶ 48. Apple alleges that Samsung failed to disclose its IPR during the standards-setting process and that the SSOs relied upon Samsung's failure to disclose in adopting the Samsung-proposed standards.

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[1] Samsung has not challenged counterclaims twenty-five (breach of contract), or twenty-six (promissory estoppel). These claims arise out of the same alleged conduct giving rise to the antitrust and UCL claims discussed herein.

[2] The Court postponed the hearing on this motion from September 22, 2011 to October 20, 2011 at the **[*6]** parties' request. The Court denies the parties' request of October 18, 2011, to postpone the hearing further.

[3] Intellectual Property Rights under ETSI's policies is defined as "any intellectual property right conferred by statute law including applications therefore other than trademarks." Counterclaims in Reply ¶ 48.

Apple also alleges that Samsung made a commitment to license its declared-essential patents on FRAND terms. Apple argues **[*9]** that these false FRAND declarations violated ETSI policy which requires an owner of an essential IPR to undertake a commitment to license on FRAND terms. If an IPR owner fails to make a FRAND commitment, ETSI "may suspend work on relevant parts of the standard or redesign the standard to render the IPR non-essential." Counterclaims in Reply ¶ 50. Apple alleges that by falsely agreeing to license its declared essential patents on FRAND terms, Samsung induced ETSI to adopt Samsung's patents into its proposed standard. Apple also alleges that Samsung has subsequently refused to license its declared essential patents on FRAND terms and has otherwise attempted to use its declared essential patents as leverage in litigation. Counterclaims in Reply ¶¶ 65-75.

Apple argues that by (1) failing to disclose its IPR in the declared-essential patents, as it was required to do under the policy terms of the SSO, and (2) making affirmative misstatements regarding its intent to license its declared essential patents on FRAND terms, Samsung obtained monopoly power which it has subsequently used to inhibit competition. Apple claims that, absent Samsung's fraudulent behavior, ETSI would not have adopted **[*10]** the standard proposed by Samsung.

II. LEGAL STANDARDS AND ANALYSIS

A. Motion to Dismiss

HN1[] A motion to dismiss for failure to state a claim under *Rule 12(b)(6)* tests the legal sufficiency of a complaint. To withstand a motion to dismiss, a plaintiff must "plead enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 501 (9th Cir. 2010)* (citing *Twombly, 550 U.S. at 556*). All allegations of material fact are taken as true and interpreted in a manner most favorable to the non-moving party. *Simon v. Hartford Life and Accident Ins. Co., 546 F.3d 661, 664 (9th Cir. 2008)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. Leave to amend should be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995)*. **[*11]** If amendment would be futile, a dismissal may be ordered with prejudice. *Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)*.

HN2[] A complaint must "state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*. Allegations of fraud must be stated with "specificity including an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (quoting *Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004))*. To survive a motion to dismiss, "'allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Id.* (quoting *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001))*.

1. Section 2 of the Sherman Act

a. Monopoly Conduct

Apple first claims that Samsung's failure to disclose its IPR in the patents essential to the UMTS standard, and alternatively its affirmative misrepresentations regarding Samsung's intent to license its UMTS patents on FRAND **[*12]** terms, and subsequent failure to do so, violates *Section 2* of the Sherman Act. Counterclaims in Reply ¶ 178. ***HN3***[] In order to state a **[**1130]** claim under the Sherman Act, Apple must allege that: (1) Samsung possessed monopoly power in the relevant market, and (2) that Samsung achieved or is maintaining monopoly power through anticompetitive conduct. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Samsung first argues that Apple has failed to state a claim under *Section*

2 of the Sherman Act because it has failed to adequately allege monopoly conduct. Apple's theory regarding false FRAND declarations will be discussed first, followed by Apple's theory regarding Samsung's IPR disclosure.

False FRAND Declaration Theory

HN4[] Courts have recognized that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim. For example, in Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007), Broadcom asserted that it had been the victim of "patent hold up" because the standards essential patent holder had allegedly promised the SSO to license its essential **[*13]** patents on FRAND terms. The SSO adopted the standards and thereby locked participants in to the standard, allowing the patent holder to extract supra-competitive royalties from the industry participants. Id. at 310-311. The Third Circuit recognized that an SSO can be used to obtain monopoly power and create anticompetitive effects on the relevant markets when "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an [standard setting organization's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct." 501 F.3d at 314. Thus, intentionally false promises to SSOs regarding licenses with FRAND terms can give rise to actionable claims under Section 2 of the Sherman Act. *See also* Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 796-97 (N.D. Tex. 2008) (denying motion to dismiss based on similar theories of liability regarding FRAND term misrepresentations).

Samsung first argues that Apple has failed to allege sufficient **[*14]** facts to establish that Samsung has engaged in monopolistic conduct. [4] HN5[] Because Apple's allegations regarding Samsung's conduct sound in fraud, it is required to plead, with particularity, "the circumstances constituting fraud or mistake." [5] Fed. R. Civ. Pro. 9(b). Plaintiffs must plead facts "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud . . . so that they can defend against the charge." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

Although there does not appear to be anything legally defective about Apple's theory of monopoly conduct arising from false FRAND licensing terms, the Court finds that Apple's allegations, as pled, have failed to meet the heightened pleading standard. Apple has identified two paragraphs in its Counterclaims in Reply that support its claim that false FRAND declarations were made. These allegations simply state that "Samsung has submitted declarations to ETSI committing to irrevocably license the Declared-Essential Patents on FRAND terms pursuant to Clause 6.1 of ETSI's IPR policy." Counterclaims in Reply ¶ 56. Apple has not set forth facts establishing when these declarations were made and by whom, and for *which patents* these FRAND declarations were **[*16]** made. [6] Apple

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[4] Samsung also appears to argue briefly in passing that Apple has not sufficiently alleged that Samsung possesses monopoly power in the relevant market. It appears, however, that Apple has sufficiently alleged monopoly power. *See* Counterclaims in Reply ¶¶ 81-86.

[5] Although it is theoretically an open question as to whether Rule 9(b) pleading standards are applicable in this situation, it appears that Apple should plead with particularity the allegations regarding the false FRAND declarations. First, the theory upon which the claim is based, is one that sounds in fraud, and Rule 9(b) itself requires a heightened pleading standard in these situations. Second, other fraud claims in the patent **[*15]** context, such as claims for inequitable conduct, must also be pled with particularity. *See, e.g.* Cent. Admixture Pharmacy Servs., Inc. v. Advanced Cardiac Solutions, 482 F.3d 1347, 1356 (Fed. Cir. 2007); *see also* In re Netflix Litig., 506 F. Supp. 2d 308, 315 (N.D. Cal. 2007) (applying Rule 9(b) to a fraud-based claim in another antitrust context). Moreover, Apple does not appear to contest that 9(b) is the proper standard to apply here.

[6] The requirement that Apple plead with particularity which patents FRAND declarations were made and when is important here because Apple also alleges that Samsung has declared essential many patents that are not, in fact, essential to practicing the UMTS standard. Counterclaims in Reply ¶ 58. If, as Apple alleges, some Samsung patents are not essential to the standard, it will likely be difficult for Apple to establish that Samsung's conduct has antitrust implications. If the patents at issue are non-

argues that **[**1131]** these documents are in Samsung's control, and therefore it has met its burden. Apple's allegations that Samsung submitted false FRAND declarations, however, are not sufficient to put Samsung on notice of the particular misconduct that creates the basis of the alleged fraud. *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Therefore, Apple's claim that Samsung misrepresented its intent to license its declared essential patents on FRAND terms is DISMISSED with leave to amend.

Failure to Disclose IPR Theory

HN6[] Courts have been more reluctant to find antitrust violations based on the theory that a failure to disclose intellectual property rights in a declared essential patent created monopoly power for a member of the SSO. In *Rambus Inc. v. FTC, 522 F.3d 456, 380 U.S. App. D.C. 431 (D.C. Cir. 2008)*, the D.C. Circuit overturned an FTC decision that Rambus violated the antitrust laws in failing to disclose its intellectual property rights to the standard setting organization. The Commission failed to show that but for Rambus's failure to disclose its intellectual property rights, the SSO would not have adopted the standard at issue. *Id. at 466*. The court held that in order to establish anticompetitive conduct, the plaintiff must show that the patent holder's failure to disclose its intellectual property rights induced the SSO to set the standard incorporating the essential patent. *Id.* In other words, Apple must allege that there was an alternative technology that the SSO was considering during the standard setting process and that the SSO would have adopted an alternative standard had it known of the patent holder's intellectual property rights.

Similarly, **[*18]** in *Townshend v. Rockwell Intl. Corp., 2000 U.S. Dist. LEXIS 5070 (N.D. Cal. 2000)*, the plaintiff also failed to allege that but for the failure to disclose, the SSO would have adopted an alternative standard that did not include the essential patent at issue. Neither *Townshend*, nor *Rambus, 522 F.3d 456, 380 U.S. App. D.C. 431* (discussed above), preclude Apple's claim based on failure to establish anticompetitive conduct. *Rambus* identified a failure of proof, not a failure of pleading, for a claim based on allegations that a patent holder had not disclosed intellectual property rights to a standard setting organization. Moreover, the court in *Townshend* granted plaintiff/counterdefendant's motion to dismiss, in part, because the plaintiff also failed to establish that but for the failure to disclose, the SSO would have adopted an alternative standard that did not include the essential patent at issue. At the pleading stage, Apple must allege that the standard setting organization would have adopted a different technology had the patent holder's rights been known at the time of the standard setting. The Court next turns to whether Apple has met the pleading requirements to establish monopoly conduct for its **[*19]** failure to disclose IPR theory.

The Court finds that Apple has pled with sufficient particularity facts supporting Samsung's alleged anticompetitive conduct with respect to non-disclosure of intellectual property rights, Apple has indicated which patents at issue were not disclosed to the SSO, when those patents were filed, and when Samsung allegedly gave presentations to the SSO regarding patents at issue. *See, generally*, Counterclaims in Reply ¶ 54. Apple has identified which provisions of the SSO policies Samsung's failure to disclose implicated. Counterclaims in Reply ¶ 48. Therefore under the heightened pleading standard of *Rule 9(b)*, Apple has met its burden of pleading anticompetitive conduct for Samsung's failure to disclose IPR in the standards essential patents.

Apple, however, has failed to allege sufficient facts to support a plausible inference that had Samsung disclosed its intellectual property rights to the SSO, a viable alternative technology performing the same functionality would have been incorporated into the UMTS standard, or the relevant functionality would not have been incorporated into the standard at all. Counterclaims in Reply ¶¶ 55, 178. Apple's allegations **[*20]** are merely conclusory statements that "[h]ad Samsung properly disclosed the existence of its IPR, the relevant SSO would have selected a viable alternative technology or would have decided not to incorporate that proposal into the standard." Counterclaims in Reply ¶ 55. Without more, for example, factual allegations that there were other technologies considered by the SSO at **[**1132]** the time of standard setting, Apple has not met its burden under the pleading standards set forth

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essential, then the "lock-in" effect of the standard setting does not exist. Thus, it is important to know which patents Apple is alleging are essential to the patent, and for which patents **[*17]** Samsung made FRAND declarations.

in *Fed. R. Civ. P. 8*. Therefore, Samsung's motion to dismiss Apple's Section 2 claim is GRANTED with leave to amend.

b. Antitrust Injury

Samsung also argues that Apple has not established a Section 2 claim because it fails to allege antitrust injury. Even though deficiencies in Apple's allegations of monopoly conduct have already been identified, the Court will address Samsung's alternative argument in the event that Apple chooses to amend its Counterclaims in Reply. ***HN7***[] In order for Apple to properly plead that it has suffered an antitrust injury, it must allege injury to *competition. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Samsung argues that Apple's allegations "describe harms to Apple as **[*21]** a competitor, and not harms to competition." Mot. to Dismiss and Strike Apple's Counterclaims at 9, August 15, 2011, ECF No. 153.

The Court disagrees. While Apple has alleged that it has suffered increased prices, and other effects, it has also clearly alleged harm to competition more broadly. Counterclaims in Reply ¶ 88. For example, Apple alleges that "Samsung's conduct more broadly has and continues to threaten unlawfully to exclude rivals from and increase royalties and other costs associated with the manufacture and sale of downstream wireless communications devices that implement the UMTS standard and chill competition to develop and sell innovative new UMTS-compliant products, resulting in increased prices and decreased quality and innovation in downstream product markets and complementary innovation markets." Counterclaims in Reply ¶ 88; *see also* Counterclaims in Reply ¶¶ 89-90. It is unclear what more Samsung believes Apple must allege to sufficiently plead harm to competition. At this stage in the litigation, Apple has alleged facts sufficient to support a plausible theory of anticompetitive harm. *See Research in Motion v. Motorola, Inc., 644 F. Supp. 2d 788, 794 (N.D. Tex. 2008)* **[*22]** (***HN8***[] "[S]tandards [implemented by standard setting organizations], without the proper safeguards, are inherently anticompetitive. It follows that when an entity side-steps these safeguards in an effort to return the standard to its natural anti-competitive state, anti-competitive effects are inevitable. Motorola's breach of the commitments to IEEE and ETSI, as a result, is harmful to competition.").

2. Section 1 of the Sherman Act

Samsung moves to dismiss Apple's twenty-eighth counterclaim in reply for violation of Section 1 of the Sherman Act as well as *California Business and Professions Code § 16720*. [7] ***HN9***[] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The Supreme Court has explained that the plaintiff in a Section 1 action must show "a unity of common purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. In other words:

> The correct standard is that there must be evidence that tends to exclude **[*23]** the possibility of independent action by [the parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). "Unilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation." *See InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003))*. Samsung argues that Apple's theory is incompatible with the requirements necessary to plead a cause of action pursuant to Section 1 of the Sherman Act because Apple's theory is predicated on a fraud on the SSO. Because Samsung allegedly defrauded the SSO, either by lying about offering FRAND licensing terms, or by failing to disclose its IPR in standard essential patents, Samsung acted

[7] The parties agree that Apple's Cartwright Act claims require the same showings as its § 1 Sherman Act claims. Apple's Opposition at 16 n.10, August 29, 2011, ECF No. 189 (citing *Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 392, 194 Cal. Rptr. 367, 668 P.2d 674 (Cal. 1983))*; **[*24]** Samsung Reply at 6 n.5, September 6, 2011, ECF No. 209.

unilaterally and thus there could not have been a common understanding or concerted action between the SSO and Samsung. **[**1133]**

The Court agrees. An allegation that Samsung unilaterally subverted a collaborative standard-setting process in order to restrain trade is not the equivalent of an allegation that Samsung contracted with, combined with, or conspired with other members of the collaborative body to restrain trade. ***HN10***[] A Plaintiff cannot state a claim under section 1 absent an allegation that it acted in concert with another party; it is not sufficient to allege that it acted alone in a collaborative forum. *See Monsanto Co., 465 U.S. at 764*. Under Apple's theory, the SSO did not intend to set a standard involving Samsung's undisclosed patents, or patents that it believed would be licensed on FRAND terms. Accordingly, Apple's theory necessarily fails to allege a concerted action between Samsung and the SSO necessary to state a claim under Section 1.

Apply relies principally on two cases to establish that the second party need not be a "willing" participant in the alleged conspiracy. *See Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1322 (9th Cir. 1975)*; *Spectators' Commun. Network Inc. v. Colonial Country Club, 253 F.3d 215, 222 (5th Cir. 2001)*. **[*25]** Both cases, however, are distinguishable from the allegations put forth by Apple here.

In *Helix* plaintiff's mill burned down in a fire, and plaintiff sought to buy a replacement. *Id. at 1319*. Building a new mill was considered too costly for the plaintiff, and the defendant sold the replacement mill to an existing competitor, effectively putting plaintiff out of business. *Id.* The District Court found that in order for there to be a combination to exclude plaintiff from the mill market, there must have been an agreement, explicit or implicit, between the other mill owners to not sell any mill to the plaintiff. *Id. at 1321-22*. The Ninth Circuit rejected this conclusion, instead holding that if a plaintiff's exclusion is a necessary consequence of a defendant's actions, then there exists a Section 1 combination. *Id. at 1322*. Thus, the Ninth Circuit confirmed that concerted action may have unintended anticompetitive *effects*, even if the parties to a contract, combination, or conspiracy do not intend those anticompetitive effects. This rule does not address the unique situation presented here in which the SSO was allegedly defrauded, and thus necessarily did not, or could not, have known **[*26]** it was engaging in the specific conduct alleged to harm competition.

Similarly, a party may be liable for a combination or conspiracy entered under coercion, even though the party did not intend the anticompetitive effects of its acts. *See, e.g., Spectators' Commun. Network Inc., 253 F.3d at 222* (concluding that a competitor coerced into knowingly curtailing competition by another conspirator is liable under Section 1). Thus, "[c]onspirators who are not competitors of the victim may have no interest in curtailing competition in a market in which they do not compete; nevertheless, when they have been enticed or coerced to share in an anticompetitive scheme, there is still a combination within the meaning of the Sherman Act." *Spectators' Commun. Network, Inc., 253 F.3d at 221*. This rule, however, does not speak to whether the unilateral and fraudulent actions of an individual may be sufficient to establish a concerted action between two parties as is required for a Section 1 claim.

Based on Apple's allegations and theory of monopoly conduct, the Court finds that Apple has not sufficiently alleged a "unity of common design and understanding, or a meeting of minds in an unlawful arrangement" **[*27]** and thus Samsung's motion to dismiss counterclaim in reply twenty-eight is GRANTED with leave to amend.

3. California Unfair Competition Law

Samsung moves to dismiss counterclaim in reply twenty-nine, which includes allegations that Samsung has violated the California Unfair Competition Law. In order to state a claim under *Cal. Bus. & Prof. Code § 17200*, Apple must allege that Samsung's conduct violates a predicate statute or law, is fraudulent, or unfairly harms competition. Samsung argues that Apple has failed to allege a violation of the UCL separate and apart from its antitrust allegations and that Apple has failed to allege harm to competition.

HN11[] The California Supreme Court has explained that in order to establish a claim of unfair harm to competition, a plaintiff must show that the alleged conduct is "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." The California Supreme Court went on to elaborate that "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section **[**1134]** means conduct that threatens an incipient violation of an **[*28]** ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 186-187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

Based on the complaint, it is unclear how Apple's UCL claim is materially different than its claims for violations of the predicate antitrust laws discussed above. Therefore, Samsung's motion to dismiss counterclaim in reply number twenty-nine is GRANTED with leave to amend.

B. Motion to Strike

HN12[] "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. On a motion to strike, the court must view the pleading under attack in the light most favorable to the pleader. *See* *Equine Legal Solutions, Inc. v. Buntrock, C 07-04976 CRB, 2008 U.S. Dist. LEXIS 9182, 2008 WL 111237, at *2 (N.D. Cal. Jan. 9, 2008)*; *State of Cal. v. United States, 512 F.Supp. 36, 39 (N.D. Cal. 1981)*. "Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as **[*29]** a delaying tactic." *Greenwich Ins. Co. v. Rodgers, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010)* (quoting *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D.Cal.2002))*.

HN13[] "Numerous courts have used that discretion to dismiss counterclaims under *Fed. Rule Civ. Pro. 12(f)* where they are either the 'mirror image' of claims in the complaint or redundant of affirmative defenses." *Stickrath v. Globalstar, Inc., No. 07-1941, 2008 U.S. Dist. LEXIS 95127, 2008 WL 2050990 (N.D. Cal. May 13, 2008)*. "The court should focus on whether the counterclaims serve any useful purpose, and should dismiss or strike a redundant counterclaim only when "it is clear that there is a complete identity of factual and legal issues between the complaint and the counterclaim." *2008 U.S. Dist. LEXIS 95127, [WL] at *4* (internal quotations and citations omitted). "Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court." *Alco Pac., 217 F. Supp. 2d at 1033* (citing *Fantasy, Inc., 984 F.2d at 1528*). Samsung moves to strike Counterclaims Thirty, Thirty-One, and Thirty-Two as being duplicative and unnecessary in light of the affirmative defenses and other counterclaims contained in Apple's Counterclaims **[*30]** in Reply.

The Thirtieth Counterclaim seeks a declaratory judgment that Apple is licensed to Samsung's declared-essential patents. Further, Apple alleges that "as a result of Samsung's refusal to make disclosures relating to FRAND or provide Apple with any information it would need to determine whether any purportedly FRAND license offer is in fact fair, reasonable, and non-discriminatory, Apple and Samsung have been unable to agree on FRAND terms for Samsung's Declared-Essential Patents, Apple is further entitled to a declaratory judgment setting forth the FRAND terms and conditions for a license to the Declared-Essential Patents, including the applicable royalty rate." Counterclaims in Rely ¶198. The Court agrees with Apple that at this stage of the proceedings, dismissing the Thirtieth Counterclaim is premature. In the Thirtieth Counterclaim Apple seeks a declaration of its rights, and a determination of the applicable royalty rate of the licenses, both of which may not necessarily be determined in the course of adjudicating other claims. As a result, Samsung's motion to strike the Thirtieth Counterclaim is DENIED.

Apple's Thirty-First and Thirty-Second Counterclaims in Reply appear **[*31]** to offer no useful purpose, separate and apart from the "mirror image" affirmative defenses already contained elsewhere in Apple's Counterclaims. For example, the Thirty-First Counterclaim seeks a declaratory judgment that Samsung is not entitled to injunctive relief if it prevails on any of its patent infringement claims. Counterclaims in Rely ¶ 200. This Counterclaim appears to mirror Apple's Sixth Affirmative Defense of no injunctive relief. The issue presented in the Thirty-First Counterclaim will necessarily be determined in the course of the litigation, and Apple has raised the issue sufficiently in its Affirmative Defense. Therefore, Samsung's motion to strike the Thirty-First Counterclaim in Reply is GRANTED.

Finally, Apple's Thirty-Second Counterclaim is also duplicative of its Affirmative Defense and does not appear to offer any additional relief. The Thirty-Second Counterclaim requests a declaration that Samsung's asserted patents are unenforceable "by virtue of estoppel, laches, waiver, unclean hands, patent exhaustion, **[**1135]** implied license, and/or other equitable doctrines applicable to such misconduct." Counterclaims in Rely ¶ 206. The Thirty-Second Counterclaim appears to **[*32]** be entirely duplicative of Apple's Fifth Affirmative Defense. Although Apple argues against striking this Counterclaim, it is unclear what Apple hopes to gain from the declaratory judgment that it seeks. Ultimately, the Thirty-Second Counterclaim appears to be redundant, and therefore Samsung's motion to strike is GRANTED.

III. CONCLUSION

For the forgoing reasons, Samsung's motion to dismiss Apple's counterclaims in reply and Samsung's motion to strike Apple's counterclaims in reply is GRANTED, in part, and DENIED, in part. Apple may amend its pleadings to cure the deficiencies identified in this Order. To the extent it seeks to do so, Apple shall file an amended set of counterclaims in reply within 21 days of the date of this Order.

IT IS SO ORDERED.

Dated: October 18, 2011

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

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In re Magnesium Oxide Antitrust Litig.

United States District Court for the District of New Jersey

October 20, 2011, Decided; October 20, 2011, Filed

Civ. No. 10-5943 (DRD)

Reporter

2011 U.S. Dist. LEXIS 121373 *; 2012-1 Trade Cas. (CCH) P77,878

IN RE MAGNESIUM OXIDE ANTITRUST LITIGATION

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by, in part, Motion denied by, in part *In re Magnesium Oxide Antitrust Litig., 2012 U.S. Dist. LEXIS 48427 (D.N.J., Apr. 5, 2012)*

Core Terms

conspiracy, allocate, allegations, domestic, Plaintiffs', Defendants', Indirect, prices, fraudulent concealment, concealment, antitrust, alleged conspiracy, fix prices, price-fixing, quotations, purchaser, shares, markets, due diligence, products, circumstances, class certification, self-concealing, competitors, consumer protection, antitrust claim, increased price, named plaintiff, particularity, motion to dismiss

LexisNexis® Headnotes

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

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

The standard of review applicable to requests for dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*, which permits a court to dismiss a complaint for failure to state a claim upon which relief can be granted, is that the court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. The court's inquiry, however, is not whether plaintiffs will ultimately prevail in a trial on the merits but whether they should be afforded an opportunity to offer evidence in support of their claims.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Factual allegations in a complaint must be enough to raise a right to relief above the speculative level. Thus, the assertions in the complaint must be enough to state a claim to relief that is plausible on its face, meaning that the facts alleged allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged. In order to survive a motion to dismiss, the factual allegations in a complaint must raise a reasonable expectation that discovery will reveal evidence of the necessary elements, thereby justifying the advancement of the case beyond the pleadings to the next stage of litigation.

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

HN3[] Motions to Dismiss, Failure to State Claim

When assessing the sufficiency of a complaint, the court must distinguish factual contentions, which allege behavior on the part of the defendant that, if true, would satisfy one or more elements of the claim asserted, from threadbare recitals of the elements of a cause of action supported by mere conclusory statements. Although for the purposes of a motion to dismiss the court must assume the veracity of the facts asserted in the complaint, it is not bound to accept as true a legal conclusion couched as a factual allegation. Thus, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] Motions to Dismiss, Failure to State Claim

When a claim is dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)*, leave to amend and reassert that claim is ordinarily granted. A claim may be dismissed with prejudice, however, if amending the complaint would be futile. "Futile," as used in this context, means that the complaint could not be amended to state a legally-cognizable claim.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN5[] Justiciability, Standing

Standing is a jurisdictional prerequisite under Article III of the United States Constitution. Under Article III, the federal judiciary is vested with the "power" to resolve not questions and issues but "cases" or "controversies." To state a case or controversy under Article III, a plaintiff must establish standing. The elements of standing are as follows. First, the plaintiff must have suffered an "injury in fact" which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent rather than conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. The injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Clayton Act, Claims**

As a general matter, direct purchaser plaintiffs' allegation that they were injured by having paid more than they otherwise would have paid absent defendants' unlawful conduct is sufficient to establish antitrust standing.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN7[] **Clayton Act, Claims**

Standing to sue under § 4 of the Clayton Act is determined by a five-factor test: (1) the causal connection between the antitrust violation and the harm to the plaintiff; (2) whether the plaintiff's alleged injury is of the type that the antitrust laws were intended to redress; i.e., did the plaintiff suffer antitrust injuries; (3) the directness of the injury; (4) the existence of more direct victims of the violation; and (5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN8[] **Clayton Act, Claims**

Plaintiffs that seek solely injunctive relief under Section 16 of the Clayton Act must allege (1) a threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Clayton Act, Claims**

In determining whether an injury was proximately caused by an antitrust violation for Article III standing purposes, courts should look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy. In doing so, they should consider whether the plaintiff's injury is inextricably intertwined with the injury that the conspirators sought to inflict, or, put another way, whether the injury alleged is so integral an aspect of the conspiracy alleged that there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Interpretation

HN10[] **Private Actions, State Regulation**

State antitrust claims under the laws of twenty-four states, including Arizona, California, Iowa, Kansas, Maine, Michigan, Minnesota, North Carolina, South Dakota, Vermont, West Virginia, Wisconsin, Hawaii, Illinois, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Tennessee, and Utah, and claims under the local ***antitrust law*** of the District of Columbia, are construed in accordance with federal antitrust principles.

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

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN11[] **Class Members, Named Members**

A named plaintiff in a class action lawsuit is required to establish Article III standing.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN12[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Arizona's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Ariz. Rev. Stat. § 44-1402*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN13[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of the local ***antitrust law*** of the District of Columbia if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in the District of Columbia. *D.C. Code § 28-4502*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN14[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Hawaii's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Haw. Rev. Stat. § 480-4*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN15[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Maine's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. 10 *Me. Rev. Stat. Ann. tit. 10, § 1101*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN16[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of South Dakota's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *S.D. Codified Laws § 37-1-3.1*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN17[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of the Kansas ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Kan. Stat. Ann. § 50-101*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN18[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Michigan's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Mich. Comp. Laws §§ 445.771*, *445.772*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN19[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Minnesota's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Minn. Stat. § 325D.54*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN20[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Nebraska's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. Neb. Rev. St. § 59-801.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN21[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Nevada's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Nev. Rev. Stat. § 598A.060*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN22[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of New Mexico's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *N.M. Stat. Ann. § 57-1-1*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN23[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of West Virginia's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *W.Va. Code § 47-18-3*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN24[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of New York's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *N.Y. Gen. Bus. Law § 340*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN25[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of North Carolina's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *N.C. Gen. Stat. § 75-1*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN26[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of North Dakota's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *N.D.C.C. § 51-08.1-01*, *02*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN27[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Oregon's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Or. Rev. Stat. § 646.705*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN28[] **Private Actions, Standing**

Plaintiffs lack Article III standing to assert violations of Tennessee's ***antitrust law*** if they fail to allege a causal connection between their injuries and the conduct prohibited by the law, which requires a showing that such conduct occurred, or whose effect was felt, in-state. *Tenn. Code Ann. § 47-25-101*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN29[] **Private Actions, Standing**

Utah's antitrust laws have a citizenship or residency requirement. Utah Code Ann. § 76-10-919 provides that a person who is a citizen of the state or a resident of the state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN30[] **Private Actions, State Regulation**

The Illinois antitrust laws do not allow a private right of action. *740 ILCS 10/7*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN31[] **Private Actions, Standing**

Mississippi's ***antitrust law*** provides a private right of action and has no discernible requirement of in-state conduct or effect, or residency. *Miss. Code Ann. §§ 75-21-1*, 9.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN32[] **Private Actions, Standing**

New Hampshire's ***antitrust law*** provides a private right of action and has no discernible requirement of in-state conduct or effect, or residency. *N.H. RSA § 356:1*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN33[] **Private Actions, Standing**

Vermont's ***antitrust law*** provides a private right of action and has no discernible requirement of in-state conduct or effect, or residency. *Vt. Stat. Ann. tit. 9 §§ 2453*, *2465*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN34[] **Private Actions, Standing**

Wisconsin's ***antitrust law*** provides a private right of action and has no discernible requirement of in-state conduct or effect, or residency. *Wis. Stat. §§ 133.03*, *133.18*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

HN35[] **Class Actions, Certification of Classes**

In cases where a court is presented with class certification and Article III standing issues simultaneously and the class certification issues are dispositive in that they pertain to statutory standing; that is, whether a statute authorizes a given party to sue in the first place, the certification issues are logically antecedent to the standing issues and the court may therefore elect to address the certification issues first in the interest of judicial restraint. Under these circumstances, if a court finds that certification of a proposed class is improper, the issue of certain class members' standing would be moot.

Antitrust & Trade Law > Clayton Act > Claims

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

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN36[] **Clayton Act, Claims**

A plaintiff must demonstrate standing for each claim he seeks to press. The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject. Otherwise, a plaintiff would be able to bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states, thereby dragging defendants into expensive nationwide class discovery, potentially without a good-faith basis. In other words, the plaintiff would have to do no more than name the preserve on which he intends to hunt.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN37[] **Sherman Act, Claims**

The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. A seriatim examination of claims against each conspiracy defendant as if they were separate lawsuits overlooks the conspiracy itself.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN38[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *15 U.S.C.S. § 1*.

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

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

HN39[] **Regulated Practices, Price Fixing & Restraints of Trade**

The statutory language of *15 U.S.C.S. § 1* imposes two essential requirements on an antitrust plaintiff. First, the plaintiff must show that the defendant was a party to a contract, combination or conspiracy. This requires the plaintiff to demonstrate some form of concerted action indicating a unity of purpose or a common design and understanding or a meeting of the minds or a conscious commitment to a common scheme. Second, the plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade.

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

HN40[] **Per Se Rule & Rule of Reason, Sherman Act**

The usual standard applied under *15 U.S.C.S. § 1* to determine whether a challenged practice unreasonably restrains trade is the so-called rule of reason. Under a rule-of-reason analysis, the plaintiff bears the initial burden of showing that the alleged agreement produced an adverse, anticompetitive effect within the relevant geographic market. Successful attempts to meet this burden typically include a demonstration of defendants' market power, as a judgment about market power is a means by which the effects of the challenged conduct on the marketplace can be assessed. If the plaintiff carries this burden, the court will need to decide whether the anticompetitive effects of the practice are justified by any countervailing pro-competitive benefits. However, judicial experience has shown that some classes of restraints almost never have redeeming competitive benefits, and therefore a court need not apply the rule of reason analysis. Instead, they are subject to a "per se" standard. Paradigmatic examples are horizontal agreements among competitors to fix prices or to divide markets. If a plaintiff's allegations fall into one of the recognized classes, an unreasonable restraint on trade is conclusively presumed and therefore plaintiffs are relieved of the obligation to define a market and prove market power.

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

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

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

HN41[] **Cartels & Horizontal Restraints, Sherman Act**

Twombly does not require detailed allegations regarding the specific nature of a price-fixing or market allocation agreement; rather, stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Put another way, a complaint simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. Requiring plaintiffs to set forth the full details of an antitrust conspiracy at this stage of the litigation would present an onerous burden because in antitrust cases, the proof is largely in the hands of the alleged conspirators.

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

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

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

HN42[] **Cartels & Horizontal Restraints, Sherman Act**

At the pleading stage of an action under 15 U.S.C.S. § 1, plaintiffs need only set forth allegations that create an inference of an unlawful agreement; they need not set forth allegations tending to rule out potential alternative explanations. This is to be distinguished from the requirement to plead plus factors to rule out independent action when a plaintiffs' claims of conspiracy rest on parallel conduct.

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

HN43[] **Motions to Dismiss, Failure to State Claim**

A court deciding a motion to dismiss must not make any judgment about the probability of the plaintiff's success. The court must assume that all the allegations in the complaint are true (even if doubtful in fact).

Antitrust & Trade Law > Sherman Act > Claims

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

HN44[] **Sherman Act, Claims**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy. This is because seemingly anticompetitive conduct may be just as consistent with conspiracy as with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Accordingly, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. This is usually accomplished by pleading one or more "plus factors" that indicate the existence of an actionable agreement. While there is no finite set of such criteria, three such plus factors are: (1) evidence that the defendant had a motive to enter into a conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN45[] **Sherman Act, Claims**

At the pleading stage, a 15 U.S.C.S. § 1 claim of conspiracy predicated on parallel conduct should be dismissed if common economic experience or the facts alleged in the complaint itself show that independent self-interest is an obvious alternative explanation for defendants' common behavior. Plaintiffs' allegations need not rule out all potential alternative explanations.

Antitrust & Trade Law > Sherman Act > Claims

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

HN46[] **Sherman Act, Claims**

No authority requires a purchaser plaintiff under 15 U.S.C.S. § 1 to specifically establish, at the pleading stage, that the parties to a horizontal agreement to allocate a given market were competitors or potential competitors in that market.

Antitrust & Trade Law > Sherman Act > Claims

HN47[] **Sherman Act, Claims**

Where an upstream supplier participates in a 15 U.S.C.S. § 1 conspiracy involving horizontal competitors, it is proper to analyze the entire restraint as one of horizontal price-fixing.

Antitrust & Trade Law > Sherman Act > Claims

HN48[] **Sherman Act, Claims**

Although plaintiffs must show that each defendant had knowledge of an agreement as to the overall conspiracy alleged under 15 U.S.C.S. § 1, they need not show (1) evidence of a formal agreement, or (2) knowledge, on behalf of the defendant, of every detail of the alleged conspiracy. That a particular defendant may or may not have joined in a specific overt act in furtherance of the conspiracy does not affect its status as a conspirator. On the other hand, knowledge alone of the conspiracy is not sufficient to hold it liable. A party progresses from mere knowledge of an endeavor to intent to join it when there is informed and interested cooperation, stimulation, or instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy.

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

HN49[] **Purchasers, Direct Purchasers**

The well-settled proposition that only direct purchasers may recover damages in federal antitrust suits by no means indicates that only a seller of the product in question may be found liable in a *15 U.S.C.S. § 1* conspiracy.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN50[] **Antitrust & Trade Law, Clayton Act**

Actions brought under the Clayton Act are subject to a four-year statute of limitations. *15 U.S.C.S. § 15b*. In an antitrust conspiracy that continues over a period of years, each overt act in furtherance thereof that injures the plaintiff, as, for example, the selling of a price-fixed product, starts the statute of limitations period running for that particular act. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. However, the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.

Governments > Legislation > Statute of Limitations > Tolling

HN51[] **Statute of Limitations, Tolling**

The equitable doctrine of fraudulent concealment applies to every federal statute of limitations. To toll a statute of limitations through fraudulent concealment, a plaintiff must show (1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action.

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

Governments > Legislation > Statute of Limitations > Tolling

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

HN52[] **Heightened Pleading Requirements, Fraud Claims**

Allegations of fraudulent concealment must be pled with particularity in accordance with *Fed. R. Civ. P. 9(b)*. However, *Rule 9(b)* does not require plaintiffs to plead facts that, by the nature of the alleged fraud, are within the defendants' control. Indeed, courts must be sensitive to the fact that a rigid application of *Rule 9(b)* prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud. Thus, courts have relaxed the rule when factual information is peculiarly within the defendant's knowledge or control. Accordingly, under the more flexible application of *Rule 9(b)*, plaintiffs need not allege the specific information that is exclusively within defendants' knowledge or control. However, plaintiffs must allege facts suggesting fraudulent concealment and why additional information lies exclusively within the defendants' control.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN53[] Private Actions, State Regulation

The applicable statute of limitations for state ***antitrust law*** claims in Arizona is four years. *Ariz. Rev. Stat. § 44-1410(A)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN54[] Private Actions, State Regulation

The applicable statute of limitations for state ***antitrust law*** claims in California is four years. *Cal. Bus. & Prof. Code § 16750.1* (2011).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN55[] Private Actions, State Regulation

The applicable statute of limitations for local ***antitrust law*** claims in the District of Columbia is four years. *D.C. Code § 28-4511(b)* (2011).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN56[] Private Actions, State Regulation

The applicable statute of limitations for state ***antitrust law*** claims in Hawaii is four years. *Haw. Rev. Stat. § 480-24(a)* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN57[] Private Actions, State Regulation

The applicable statute of limitations for state ***antitrust law*** claims in Illinois is four years. *740 ILCS 10/7(2)* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN58[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Iowa is four years. *Iowa Code § 553.16* (2011).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN59[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Kansas is three years. *Kan. Stat. Ann. § 60-512(2)* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN60[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Maine is six years. *Me. Rev. Stat. Ann. tit. 14 § 752* (2008).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN61[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Michigan is four years. *Mich. Comp. Laws § 445.781* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN62[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Minnesota is four years. *Minn. Stat. § 325D.64, subdiv. 1* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN63[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Mississippi is three years. *Miss. Code Ann. § 15-1-49(1)* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN64[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Nebraska is four years. *Neb. Rev. Stat. § 25-206* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN65[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Nevada is four years. *Nev. Rev. Stat. § 598A.220(2)(a)* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN66[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in New Hampshire is four years. *N.H. Rev. Stat. Ann. § 356:12(II)* (1973).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN67[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in New Mexico is four years. *N.M. Stat. § 57-1-12(B)* (1978).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN68[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in New York is four years. *N.Y. Gen. Bus. Law § 340(5)* (2004).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN69[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in North Carolina is four years. *N.C. Gen. Stat. § 75-16.2* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN70[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in North Dakota is four years. *N.D.C.C. § 51-08.1-10(2)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN71[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Oregon is four years. *Or. Rev. Stat. § 646.800(2)* (1975).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN72[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in South Dakota is four years. *S.D. Codified Laws § 37-1-14.4* (1975).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN73[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Tennessee is three years. *Tenn. Code Ann. § 28-3-105(3)* (2011).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN74[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Utah is four years. Utah Code Ann. § 76-10-925(2) (1979).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN75[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Vermont is six years. *Vt. Stat. Ann. tit. 12, § 511* (2010).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN76[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in West Virginia is four years. *W. Va. Code § 47-18-11* (1978).

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN77[] **Private Actions, State Regulation**

The applicable statute of limitations for state ***antitrust law*** claims in Wisconsin is six years. *Wis. Stat. § 133.18(2)* (2011).

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN78[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Where fraudulent concealment of a federal antitrust claim has been shown, the four-year federal statute of limitations begins anew from the time the plaintiff knew or should have known of the existence of the federal claim.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN79[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Under certain circumstances, an antitrust conspiracy may depend on its own concealment to the point that any act in furtherance thereof can also be said to conceal it. The purpose of the fraudulent concealment doctrine is to prevent a defendant from concealing a fraud, or committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it. However, the court cannot find that conspiracies involving price-fixing are per se self-concealing, as such a finding would render them wholly exempt from the applicable statute of limitations.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN80[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Whether a particular price-fixing conspiracy or, more precisely, whether a particular announcement of a price increase necessarily conceals its true nature depends on the nature of the industry and the circumstances surrounding the announcement. In other words, a plaintiff must show circumstances indicating that a price increase carries with it a pretense of legitimacy or that it would necessarily be assumed that it was the result of legitimate market forces. To do so, a plaintiff may, for example, set forth allegations showing that price increases are not abnormal, that such increases are typically ascribed to market forces, that an openly collusive price increase would not be tolerated, and that there was nothing suspicious about the circumstances under which each of the pre-limitations period price announcements were made.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN81[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Implicit in the notion that a plaintiff's inquiry was misled or relaxed by an act of concealment is that the plaintiff relied on that act of concealment. That is, the plaintiff's inquiry would not have been misled or relaxed if it did not rely on the defendant's act of concealment.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN82[] Tolling of Statute of Limitations, Fraudulent Concealment

The due diligence prong of fraudulent concealment is rooted in the notion of inquiry notice; that is, an injury accrues when a reasonable plaintiff under the circumstances would have discovered it. A federal antitrust injury accrues when an overt act is committed that injures the plaintiff, thereby triggering the four-year statute of limitations; however, one or more affirmative acts of concealment may toll the statute of limitations if they mislead a plaintiff into thinking that he does not have a cause of action. Thus, to establish the due diligence prong of fraudulent concealment, a plaintiff must affirmatively show that he was not on inquiry notice of the alleged antitrust conspiracy.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN83[] Tolling of Statute of Limitations, Fraudulent Concealment

In the Third Circuit, inquiry notice that would defeat a fraudulent concealment contention is analyzed in two steps. First, the burden is on the defendants to show the existence of "storm warnings" or information or data that would alert a reasonable person of ordinary intelligence to potentially culpable conduct. Second, if the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries. This requires plaintiffs to show that (1) they investigated the storm warnings and (2) in their investigation, they exercised the due diligence expected of a reasonable person of ordinary intelligence.

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

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Tolling

HN84[] Heightened Pleading Requirements, Fraud Claims

Alleging that they did not discover nor could have discovered through reasonable diligence that defendants and their co-conspirators were violating the antitrust laws until shortly before the litigation was commenced because defendants and their co-conspirators were using deceptive and secret methods to avoid detection and affirmatively conceal their violations is too vague to satisfy *Fed. R. Civ. P. 9(b)*. To deem such an allegation sufficient would allow the allegations required to satisfy the first prong of fraudulent concealment to also satisfy the third prong.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN85[] State Regulation, Claims

Montana's consumer protection and unfair competition law requires that defendants' unlawful conduct affect trade and commerce in Montana. Mont. Code Ann. § 30-14-103 provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful, and Mont. Code Ann. § 30-14-102 provides that trade or commerce must directly or indirectly affect the people of the state.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN86[] State Regulation, Claims

The consumer protection and unfair competition law of Massachusetts requires that defendants' unlawful conduct affect trade and commerce in Massachusetts. Mass. Gen. Laws Ann. 93A, §§ 1, 2.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN87[] State Regulation, Claims

South Carolina's consumer protection and unfair competition law requires that defendants' unlawful conduct affect trade and commerce in South Carolina. S.C. Code Ann. §§ 39-5-10, 20 (1976).

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN88[] State Regulation, Claims

Nebraska's consumer protection and unfair competition law requires that defendants' unlawful conduct affect trade and commerce in Nebraska. Neb. Rev. St. § 59-1602 provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful, and Neb. Rev. St. § 59-1601 provides that trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN89[] State Regulation, Claims

New Hampshire's consumer protection and unfair competition law requires that defendants' unlawful conduct affect trade and commerce in New Hampshire. N.H. RSA § 358-A:2 provides that it shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within the state.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN90[] State Regulation, Claims

New York's consumer protection and unfair competition law requires that defendants' unlawful conduct affect trade and commerce in New York. N.Y. Gen. Bus. Law § 349.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN91[] **Trade Practices & Unfair Competition, State Regulation**

Out of state plaintiffs alleging out of state conduct do not have standing to sue under the Vermont Consumer Fraud Protection Act.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN92[] **State Regulation, Claims**

Florida's consumer protection and unfair competition law does not require that defendants' unlawful conduct affect trade and commerce in Florida. *Fla. Stat. Ann. §§ 501.204*, *501.211*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN93[] **State Regulation, Claims**

Hawaii's consumer protection and unfair competition law does not require that defendants' unlawful conduct affect trade and commerce in Hawaii. *Haw. Rev. Stat. §§ 480-2*, *480-13*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

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

HN94[] **State Regulation, Claims**

The consumer protection laws of Florida (the Florida Deceptive and Unfair Trade Practices Act, *Fla. Stat. Ann. § 501.204*) and Hawaii (Hawaii State Unfair and Deceptive Business Practices Act, *Haw. Rev. Stat. § 480-2*) require that plaintiffs plead the circumstances of any alleged fraudulent conduct with particularity in accordance with *Fed. R. Civ. P. 9(b)*.

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

HN95[] **Heightened Pleading Requirements, Fraud Claims**

Under *Fed. R. Civ. P. 9(b)*, a plaintiff must allege fraud with particularity by pleading the following: (1) a specific false representation or omission of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his or her] damage.

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Judges: DICKINSON R. DEBEVOISE **[*2]** , Senior United States District Judge.

Opinion by: DICKINSON R. DEBEVOISE

Opinion

DEBEVOISE, Senior District Judge

This matter arises out of the consolidation of five separate actions in this Court [1] alleging a conspiracy to fix prices in and allocate shares of the domestic Magnesium Oxide market from January 2002 to the present ("the Class Period"). On November 15, 2010, Direct Purchaser Plaintiffs ("DP Plaintiffs") Orangeburg Milling Company, Inc., Bar Ale, Inc., and Air Krete, Inc. filed a Class Action Complaint ("CAC") against Defendants Premier Chemicals, LLC ("Premier"), Sumitomo Corporation of America ("Sumitomo"), and YAS, Inc. ("YAS") pursuant to Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26*, alleging violations of Section 1 of the Sherman Act, *15 U.S.C. § 1*, and seeking class certification under *Federal Rule of Civil Procedure 23(b)(2)* and *(3)*, declaratory judgment, treble damages, costs and attorneys' fees, and an injunction. On December 30, 2010, DP Plaintiffs filed an Amended CAC to add additional factual allegations in support of their claims.

On October 7, 2010, Indirect Purchaser Plaintiffs ("IP Plaintiffs") Ronald Hayek, Daniel, Walker, Sue Walker, and John Bidart filed a CAC against Defendants under *Section 16* of the Clayton Act, alleging violations of *Section 1* of the Sherman Act, and under various state antitrust and consumer protection laws. IP Plaintiffs seek similar relief as DP Plaintiffs. [2] On December 31, 2010, IP Plaintiffs filed an Amended CAC to add similar factual allegations as those added by DP Plaintiffs in their Amended CAC.

On March 1, 2011, Defendants filed a Motion to Dismiss [3] all of Plaintiffs' claims pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons set forth below, Defendants' motion is granted. No Defendant is entitled to dismissal of Plaintiffs' federal and state antitrust claims on the merits because Plaintiffs sufficiently allege a meeting of the minds among all Defendants to fix prices in and allocate shares of the domestic **[*4]** Magnesium Oxide market. However, Defendants are entitled to dismissal of IP Plaintiffs' federal and state antitrust claims and the majority of their consumer protection claims for lack of standing. In addition, those consumer protection claims under which IP Plaintiffs have standing are dismissed to the extent they are based on allegations of fraud because those allegations do not comply with the requirements of *Federal Rule of Civil Procedure 9(b)*. Finally, Plaintiffs'

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[1] See Docket Nos. 10-cv-5174, 10-cv-5352, 10-cv-6095, and 10-cv-6093, and 10-cv-5943, all of which were consolidated under Docket **[*3]** No. 10-cv-5943.

[2] To be sure, IP Plaintiffs seek only injunctive relief for Defendants' alleged violations of federal antitrust laws, as only direct purchasers may bring federal antitrust actions for damages. *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

[3] In fact, Sumitomo, Premier, and YAS each filed separate motions to dismiss. However, each joined in the others' arguments. Therefore, for the sake of simplicity and brevity, the Court will treat them as a single motion.

federal and state antitrust claims are dismissed because they are time-barred by their respective statutes of limitations.

I. BACKGROUND

Magnesium Oxide ("MgO") is a solid, white, naturally occurring mineral that is used in producing a wide variety of products, including refractory products, animal feeds, fertilizers, electrical insulation, and pharmaceuticals. It is formed by an ionic bond between one magnesium atom and one oxygen atom. MgO can be mined from magnesite or processed from seawater or subterranean **[*5]** brines containing magnesium chloride. This case concerns the two most common forms of MgO: Caustic-calcined magnesia ("CCM") and dead-burned magnesia ("DBM"). DBM and CCM are produced differently and have different commercial applications. [4]

In 2000, according to the CACs, domestic consumption of DBM and CCM came from two sources: the United States and China. Roughly 50% of CCM "and a lesser amount of" DBM consumed in the United States were produced domestically, while the rest was imported from China. (Direct Purchasers' Consolidated Amended Class Action Complaint ("Direct CAC") ¶ 27; (Indirect Purchasers' Consolidated Amended Class Action Complaint ("Indirect CAC") **[*6]** ¶ 33.) At that time, Premier allegedly maintained control over the majority of DBM and CCM consumed in the United States by (1) purchasing imported CCM and DBM for resale to its customers in the United States, and (2) sourcing magnesite from China for production into DBM to be sold domestically.

"Sumitomo similarly purchased Chinese MgO but only [DBM] for resale to its U.S. customers" and "sourced magnesite from China for manufacture into [DBM] for sale in the U.S." (Direct CAC ¶ 27; Indirect CAC ¶ 34.) To do so, it enlisted the help of YAS to (1) "facilitate[] [its] purchases of Chinese magnesite" (Direct CAC ¶ 27; Indirect CAC ¶ 35), and (2) purchase Chinese DBM for resale in the United States.

This arrangement proved successful because Hideo Sumikawa, the current president of YAS, previously worked for Sumitomo and has since maintained relationships with certain Chinese magnesite mines. "In particular, Sumitomo, through Coy Akiyama—head of Sumitomo's inorganic chemicals unit—purchases [DBM] from Chinese mines that Sumikawa (YAS) has facilitated, thereby allowing Sumitomo and YAS to participate together in the U.S. MgO market." (Direct CAC ¶ 33; Indirect CAC ¶ 41.)

According to Plaintiffs, **[*7]** sometime before the Class Period, Premier "saw its share of MgO markets shrink due to increased Chinese competition." (Direct CAC ¶ 28; Indirect CAC ¶ 36.) Specifically, "cheaper imports, mainly from China ha[d] replaced some of the U.S. domestic production, notably affecting Premier." (Direct CAC ¶ 29; Indirect CAC ¶ 37.) Thus, during the Class Period, Premier and Sumitomo allegedly bought nearly all of the Chinese DBM available for purchase and resold it to their customers in the United States.

In addition, Plaintiffs allege that, "[d]uring the Class Period, with some limited exceptions, the MgO markets were considered to be fairly saturated, with limited potential for growth." (Direct CAC ¶ 30; Indirect CAC ¶ 38.) However, "[i]nstead of competing, representatives from Premier, Sumitomo, and YAS began meeting regularly to discuss fixing U.S. MgO prices and allocating MgO markets." (Direct CAC ¶ 31; Indirect CAC ¶ 39.) Specifically, Plaintiffs allege a conspiracy among Premier, Sumitomo, and YAS to (1) fix prices in and allocate shares of the domestic DBM market and (2) allocate the domestic CCM market to Premier so that it could fix prices in that market, which resulted in Plaintiffs' **[*8]** purchasing DBM and CCM at artificially high prices.

i. The DBM and CCM Agreements

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[4] CCM "is manufactured at lower temperatures than [DBM] and is used in products like animal feeds and fertilizers." (Direct CAC ¶ 25; Indirect CAC ¶ 31.) DBM, on the other hand, "is most often used in refractory applications." (Id.)

Plaintiffs allege that, during the Class Period, Cary W. Ahl, Sr. Premier's then-president, "regularly called" Mr. Sumikawa of YAS "to discuss fixing Premier's and Sumitomo's [DBM] prices and allocating their respective MgO accounts in the U.S." (Direct CAC ¶ 34; Indirect CAC ¶ 42.) These market allocation and price-fixing schemes were allegedly implemented by Mr. Ahl and his successors at Premier and Terry Wakisama at Sumitomo.

In the summer of 2004, Coy Akiyama of Sumitomo, Mr. Sumikawa of YAS, Gary Vannorsdel, an animal nutrition broker, and Mr. Vannorsdel's son, met at a Holiday Inn, in Tulsa, Oklahoma, to discuss plans for Sumitomo to enter the CCM market without upsetting Premier. Sumitomo had been shipping DBM to the United States on "partially empty barges and wanted to maximize efficiencies by filling these barges with [CCM] for sale to the western U.S." (Direct CAC ¶ 39; Indirect CAC ¶ 48.) Indeed, DBM shipments filled only half of Sumitomo's New Orleans barge capacity. Apparently, "Tulsa was the only port that could accommodate this barge, and Sumitomo had access to a very large storage facility **[*9]** in Tulsa." (Direct CAC ¶ 36; Indirect CAC ¶ 44.)

At the Tulsa meeting, "[i]n the course of discussing a strategy for Sumitomo to enter the U.S. [CCM] market, Akiyama (Sumitomo) recounted to Sumikawa (YAS) multiple discussions between him and Ahl where Ahl had called Akiyama to set [DBM] prices; to allocate [DBM] markets; and to ensure that Sumitomo was maintaining its agreement with Premier to fix [DBM] prices and allocate [DBM] markets." (Direct CAC ¶ 40; Indirect CAC ¶ 49.) At one point, Mr. Vannorsdel "expressed concern about compromising his relationship with Premier by helping facilitate Sumitomo and YAS's involvement" in the CCM market, to which Mr. Akiyama responded, "'Don't be concerned because we [Sumitomo] talk with Premier on a daily basis to set prices and to discuss what accounts they can have.'" (Direct CAC ¶ 41; Indirect CAC ¶ 50.)

Shortly after the Tulsa meeting, Mr. Ahl discovered Sumitomo's plan to enter the CCM market and retaliated by dropping DBM prices. [5] As a result, Sumitomo did not follow through with its plans to enter the CCM market. "Following the [CCM]-related message that Premier sent to Sumitomo and YAS via Premier's pre-market-entry retaliation, Sumitomo **[*10]** and YAS illegally agreed with Premier to remain out of the [CCM] market—a market Sumitomo, as a rational profit-seeking entity, was motivated to enter—thus allowing Premier to maintain its control over [CCM] pricing." (Direct CAC ¶ 43; Indirect CAC ¶ 52.)

ii. Fraudulent Concealment

Plaintiffs allege that the MgO conspiracy was "inherently self-concealing" and that Defendants took affirmative measures to conceal it. (Direct CAC ¶ 48-49; Indirect CAC ¶ 55-56.) Specifically, Plaintiffs allege that "[D]efendants met secretly and among themselves for the express purpose of fixing prices and allocating markets of domestically sold MgO." (Direct CAC ¶ 50; Indirect CAC ¶ 57.) In addition, Defendants allegedly explained increases in the price of MgO "by references to tight supply, thinning margins, and increased energy and freight costs." (Direct CAC ¶ 51; Indirect CAC ¶ 58.) As a result, Plaintiffs allege that "neither [P]laintiffs nor the class members had knowledge of any of the foregoing violations, and neither [P]laintiffs nor the class members, until recently, could have discovered through reasonable diligence that [D]efendants and their co-conspirators **[*11]** had engaged in the foregoing violations." (Direct CAC ¶ 49; Indirect CAC ¶ 56.)

iii. The Complaints

On November 15, 2010, DP Plaintiffs—i.e. those who purchased either DBM or CCM directly from one or more Defendants, their predecessors, subsidiaries, or co-conspirators during the Class Period—filed a CAC against Defendants under Sections 4 and 16 of the Clayton Act alleging violations of Section 1 of the Sherman Act, and seeking class certification under *Federal Rule of Civil Procedure 23(b)(2)* and *(3)*, declaratory judgment, treble damages, costs and attorneys' fees, and an injunction. On December 30, 2010, DP Plaintiffs filed an Amended CAC to add additional factual allegations in support of their claims.

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[5] These prices were later restored.

On October 7, 2010, IP Plaintiffs—i.e. those who purchased products containing DBM or CCM that was manufactured, distributed or sold by one or more Defendants, their predecessors, subsidiaries, or co-conspirators during the Class Period—filed a CAC against Defendants under Section 16 of the Clayton Act, alleging violations of Section 1 of the Sherman Act, and under various state antitrust and consumer protection laws, and seeking similar relief as the DP Plaintiffs. On December 31, **[*12]** 2010, IP Plaintiffs filed an Amended CAC to add similar factual allegations as those added by DP Plaintiffs in their Amended CAC.

II. DISCUSSION

Defendants now move to dismiss both Amended CACs pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. In doing so, Defendants argue that Plaintiffs (1) lack standing to assert their federal and state antitrust claims; (2) fail to allege a plausible antitrust conspiracy to fix DBM prices, allocate portions of the domestic DBM market, and allocate the domestic CCM market to Premier; and (3) fail to plead fraudulent concealment with particularity to equitably toll the applicable federal and state antitrust statutes of limitations. Defendants further argue that IP Plaintiffs' lack standing to assert their consumer protection and unfair competition claims, and that those claims are improperly pled.

A. Standard of Review

In assessing the parties' arguments, the Court must apply ***HN1***[] the standard of review applicable to requests for dismissal pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. That rule permits a court to dismiss a complaint for failure to state a claim upon which relief can be granted. When considering a *Rule 12(b)(6)* motion, the Court **[*13]** must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)*. The Court's inquiry, however, "is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims." *In re Rockefeller Ctr. Props., Inc., 311 F.3d 198, 215 (3d Cir. 2002)*.

The Supreme Court recently clarified the *Rule 12(b)(6)* standard in two cases: *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, and *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The decisions in those cases abrogated the rule established in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." In contrast, *Bell Atlantic, 550 U.S. at 545*, held that ***HN2***[] "[f]actual allegations must be enough to raise a right to relief above the speculative level." Thus, the assertions in the complaint must be enough to "state a claim to relief that **[*14]** is plausible on its face," *id. at 570*, meaning that the facts alleged "allow[] the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Iqbal, 129 S. Ct. at 1949*; see also, *Phillips v. County of Allegheny, 515 F.3d 224, 234-35 (3d Cir. 2008)* (In order to survive a motion to dismiss, the factual allegations in a complaint must "raise a reasonable expectation that discovery will reveal evidence of the necessary element," thereby justifying the advancement of "the case beyond the pleadings to the next stage of litigation.").

HN3[] When assessing the sufficiency of a complaint, the Court must distinguish factual contentions - which allege behavior on the part of the defendant that, if true, would satisfy one or more elements of the claim asserted - from "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 129 S. Ct. at 1949*. Although for the purposes of a motion to dismiss the Court must assume the veracity of the facts asserted in the complaint, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id. at 1950*. Thus, "a court considering a motion to dismiss can **[*15]** choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id.

HN4[] When a claim is dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, leave to amend and reassert that claim is ordinarily granted. *In re Burlington Coat Factory Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)*. A claim may be dismissed with prejudice, however, if amending the complaint would be futile. Id. "Futile," as used in this context, means that the complaint could not be amended to state a legally-cognizable claim. Id. (citing *Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996))*.

B. Plaintiffs' Standing to Bring Antitrust Claims

HN5[] Standing is a jurisdictional prerequisite under Article III of the United States Constitution. "Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian Sch. Tuition Org. v. Winn, 131 S.Ct. 1436, 1441, 179 L. Ed. 2d 523 (2011)*. "To state a case or controversy under Article III, a plaintiff must establish standing." *Id. at 1442* (citing *Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984))*. The Supreme Court explained the elements **[*16]** of standing in *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*:

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Defendants argue that Plaintiffs lack antitrust standing because they do not identify whether they purchased DBM or CCM. Specifically, Defendants contend that the alleged agreements regarding DBM and CCM, respectively, amount to "two conspiracies [that] are allegedly directed at different purchasers and encompass different time frames[,] and [n]othing indicates that anticompetitive activity in one market would have an effect on prices in the other market." (YAS Br., 9.) "Under these circumstances," according **[*17]** to Defendants, "a purchaser of [DBM] would suffer no redressable injury from anticompetitive conduct in the [CCM] market, and would accordingly lack standing to maintain claims based on such conduct (and vice versa)." (Id.).

This argument is unavailing because, as discussed fully below, Plaintiffs allege a single conspiracy in the domestic MgO market comprised of two agreements: one to fix prices in and allocate shares of the domestic DBM market, and one to allocate the domestic CCM market to Premier. These agreements are interdependent in that Defendants entered into the CCM agreement in order to maintain the DBM agreement. As a result, price-fixing in the DBM market has an effect on prices in the CCM market, and vice versa, because the absence of one agreement would eliminate the consideration for the other.

HN6[] As a general matter, DP Plaintiffs' allegation that they were "injured by having paid more for MgO [6] than they otherwise would have paid absent [D]efendants' unlawful conduct" (Direct CAC ¶ 56) is sufficient to establish antitrust standing. ***HN7***[] Standing to sue under Section 4 of the Clayton Act is determined by a five-factor test: [7] "(1) the causal connection between the antitrust **[*18]** violation and the harm to the plaintiff; (2) whether the plaintiff's alleged injury is of the type that the antitrust laws were intended to redress; i.e., did the plaintiff suffer antitrust injuries; (3) the directness of the injury; (4) the existence of more direct victims of the violation; and (5) the potential for duplicative recovery or complex apportionment of damages." *In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 399 (3d Cir. 2000)* (citing *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Here, there is little doubt that those who purchased DBM and/or CCM directly from Defendants at supracompetitive prices have standing to sue for damages under Section 4 and for injunctive relief under Section 16. See *id. at 401* ("It is difficult to imagine a more formidable demonstration of antitrust injury" than supra-competitive pricing.); *In re Mercedez Benz AntiTrust Litig., 157 F. Supp. 2d 355, 364 (D.N.J. 2001)* ("Where, as here, it is alleged that consumers paid a price higher than the price

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[6] MgO collectively refers to DBM and/or CCM. (Direct CAC ¶ 1.)

[7] As discussed further below, standing to assert claims for injunctive relief under Section 16 of the Clayton Act are analyzed under a more relaxed standard. See *In re Warfarin, 214 F.3d at 399*.

that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted."). **[*19]** Thus, DP Plaintiffs have standing to pursue their antitrust claims.

IP ***HN8***[] Plaintiffs, however, do not. While they seek solely injunctive relief under Section 16 of the Clayton Act—and therefore are not subject to the aforementioned five-factor test, see Note 7—they must still allege "(1) [a] threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury." *In re Warfin, 214 F.3d at 400*. In analyzing whether an antitrust injury proximately caused an alleged loss to an indirect purchaser, this Circuit has been guided by the Supreme Court's decision in *Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. [8] McCready explained that "an antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but . . . [i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action." *457 U.S. at 476*. **[*20]** Thus, ***HN9***[] in determining whether an injury was proximately caused by an antitrust violation for Article III standing purposes, courts should "look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy." *Id. at 478*. In doing so, they should consider whether the plaintiff's injury is "inextricably intertwined with the injury that the conspirators sought to inflict," *In re Warfarin, 214 F.3d at 400-01* (purchasers of prescription drug whose active ingredient was the subject of a price-fixing conspiracy maintained standing to sue as indirect purchasers because "the excess amount paid" for the drug was "inextricably intertwined with the injury [Defendant] aimed to inflict"), or, put another way, "whether the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations . . . would be likely to cause." *McCready, 457 U.S. at 479* **[*21]** (quotations and citations omitted) (alleged conspiracy among psychiatrists and Blue Shield to take patients away from psychologists by refusing to reimburse Blue Shield subscribers for psychotherapeutic services resulted in "clearly foreseeable" harm to Blue Shield subscribers and "was a necessary step in effecting the ends of the alleged illegal conspiracy.").

Here, IP Plaintiffs allege that "as a direct and proximate result of Defendants' and their co-conspirators' unlawful contract, combination and conspiracy, Plaintiffs and the Class members were injured and financially damaged in their business and property by having paid more for MgO Products than they would have absent Defendants' and their coconspirators' unlawful conduct." (Indirect CAC ¶ 54.) However, they fail to specify which MgO products— i.e. products containing DBM or CCM—they purchased. The mere fact that a product **[*22]** contains DBM or CCM does not necessarily mean that an increase in the price of that product is "inextricably intertwined" with, or an "a necessary step in achieving the ends" of, the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets. Indeed, the price of DBM and CCM would have a minimal foreseeable effect on the price of products containing trace amounts of them, but a significant foreseeable effect on the price of products in which they are major ingredients. Thus, without knowing which specific products IP Plaintiffs purchased, it is impossible to determine whether an increase in their price is the type of injury that furthers the object of the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets. Accordingly, IP Plaintiffs' federal antitrust claims are dismissed for lack of standing. [9] However, IP Plaintiffs are granted leave to amend in order to allege (1)

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[8] Although that decision analyzed proximate causation in the context of a Section 4 claim for damages, the Court of Appeals has applied its analysis to Section 16 claims because proximate cause is an element of standing under both. See *In re Warfin Sodium Antitrust Litig., 214 F.3d 395, 400-01 (3d Cir. 2000)*.

[9] IP Plaintiffs also lack **[*23]** standing to assert their ***HN10***[] state antitrust claims because those claims are construed in accordance with federal antitrust principles. See *In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 448 n.21 (S.D.N.Y. 2008)* (Arizona, California, District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, North Carolina, South Dakota, Vermont, West Virginia, Wisconsin), rev'd on other grounds by, *Starr v. Sony BMG Music Entm't., 592 F.3d 314 (2d Cir. 2010)*; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 635-36 (9th Cir. 1987)* (Hawaii); *Gutnayer v. Cendant Corp., 116 Fed. App'x 758, 761 (7th Cir. 2004)* (Illinois); *Monsanto Co. v. Swann, No. 4:00-CV-1481, 2001 U.S. Dist. LEXIS 25134, 2001 WL 34079480, at *3 (E.D. Mo. Sept. 19, 2001)* (Mississippi); *Neb. Rev. Stat. § 59-829* (2010) (Nebraska); *Nev. Rev. Stat. § 598A.050* (2011) (Nevada); *Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 637, 795 A.2d 833 (N.H. 2002)* (New Hampshire); *Clough v. Rush, 959 F.2d 182, 187 (10th Cir. 1982)* (New Mexico); *Fido's Fences v. Canine Fence Co., 672 F.*

the specific purchased products containing DBM or CCM and (2) the nexus between an increase in the price of those products and the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets.

Defendants further argue that IP Plaintiffs lack standing to assert their state law antitrust claims, with the exception of Iowa and California, because they only allege purchasing MgO products in Iowa and California. Specifically, Defendants contend that IP Plaintiffs "have no standing to bring claims based on violations of states in which they neither reside nor purchased any MgO products." (Sumitomo Br. (IP Pl.), 4.) IP Plaintiffs counter that "Defendants improperly confuse 'standing' with class certification issues," which, at this point, are premature. (IP Pl's Br., 30.) Specifically, IP Plaintiffs maintain that they "are not bringing claims in their own name in other states; rather they are seeking to *represent* similarly situated persons in other states," and that "[t]his issue, improperly raised by Defendants on a motion to dismiss will be addressed at class certification under *Rule 23*." (Id. at 31) (emphasis in original).

It is well-settled that ***HN11***[] a named plaintiff in a class action lawsuit is required to establish **[*25]** Article III standing. See *Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." (quotations and citations omitted)); *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* ("[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."); *O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)* ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." (citations omitted)); Winer Family Trust v. Queen, 503 F.3d, 319, 326 (3d Cir. 2007) ("The initial inquiry in either case is whether the lead plaintiff individually has standing.").

Less well-settled is whether, pre-class certification, named plaintiffs are required to establish standing for each and every **[*26]** claim set forth in a class action complaint, or whether it is sufficient to establish standing for a single claim because a court will determine if the named plaintiffs have standing to represent the unnamed class members seeking redress under the balance of asserted claims during the class certification process pursuant to *Federal Rule of Civil Procedure 23*. This issue typically arises in cases, such as this one, where named plaintiffs assert analogous causes of action under the laws of many states but cannot specifically tie their injuries to each state. Indeed, here, IP Plaintiffs, who allege that they purchased MgO products in Iowa and California, assert violations of twenty-five states' antitrust laws. [10]

Supp. 2d 303, 313 (E.D.N.Y. 2009) (New York); *Westgo Indus., Inc. v. W.J. King Co., Civil No. A3-75-82, 1981 U.S. Dist. LEXIS 9567, 1981 WL 2064, at *6 (D.N.D. Mar. 31, 1981)* (North Dakota); *Oregon Laborers-Employees Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 n.4 (9th Cir. 1999)* **[*24]** (Oregon); *In re Refalen Antitrust Litig., 221 F.RD. 260, 278-79 (D. Mass. 2004)* (Tennessee); *Am. Airlines v. Christensen, 967 F.2d 410, 414 (10th Cir. 1992)* (Utah).

[10] At this time, IP ***HN12***[] Plaintiffs lack Article III standing to assert violations of the following state antitrust laws because they fail to allege a causal connection between their injuries and the conduct prohibited by the laws of those states, which require a showing that such conduct occurred, or whose effect was felt, in-state. See *A.R.S. § 44-1402* (Arizona) ("A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, **[*27]** any part of which is within this state, is unlawful"); ***HN13***[] *DC ST § 28-4502* (District of Columbia) (same); ***HN14***[] *HRS § 480-4* (Hawaii) (same); ***HN15***[] *10 M.R.S.A. § 1101* (Maine) (same); ***HN16***[] *SDCL § 37-1-3.1* (South Dakota) (same); ***HN17***[] *K.S.A. § 50-101* (Kansas) ("A trust is a combination of capital, skill, or acts, by two or more persons," among other things, "[t]o fix any standard or figure, whereby such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state"); ***HN18***[] *M.C.L.A. §§ 445.771*, *445.772* (Michigan) ("A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful. . . . Relevant market means the geographical area of actual or potential competition in a line of trade or commerce, all or any part of which is within this state"); ***HN19***[] *M.S.A. § 325D.54* (Minnesota) (act applies to "(a) any contract, combination, or conspiracy when any part thereof was created, formed, or entered

Courts, including this one, have held that "the fact that the named Plaintiffs may not have individual standing to allege violations of . . . laws in states other than those in which they purchased Defendants' [product] is immaterial [because] [t]he issue . . . is one of predominance—whether questions of law or fact common to all class members predominate over any questions affecting only individual members." *Ramirez v. STI Prepaid LLC, 644 F. Supp. 2d 496, 505 (D.N.J. 2009)* (quotations and citations omitted); see also *In re Grand Theft Auto Video Game Consumer Litig. (No. II), No. 06-MD-1739, 2006 U.S. Dist. LEXIS 78064, 2006 WL 3039993, at *3 (S.D.N.Y. Oct. 25, 2006)* ("The relevant question . . . is not whether the Named Plaintiffs have standing to sue Defendants—they most certainly do—but whether their injuries are sufficiently similar to those of the purported Class to justify the prosecution **[*32]** of a nationwide class action. This question is, at least in the first instance, appropriately answered through the class certification process."); *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002)* ("[T]hese alleged problems with standing will not arise unless class certification is granted. If certification is granted, the proposed class would contain plaintiffs who have personal standing to raise claims under the laws governing purchases in all of the [] states, and the only relevant question about the named plaintiffs' standing to represent them will be whether the named plaintiffs meet the ordinary criteria for class standing. . .").

Other courts find that they must initially "review[] the standing of actual, not proposed plaintiffs" to assert the claims in a class action complaint because "[t]he alternative . . . would allow named plaintiffs in a proposed class action,

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into in this state; and (b) any contract, combination, or conspiracy, wherever created, formed, or entered into; any establishment, **[*28]** maintenance, or use of monopoly power; and any attempt to establish, maintain, or use monopoly power; whenever any of the foregoing affects the trade or commerce of this state."); ***HN20***[] *Neb. Rev. St. § 59-801* (Nebraska) ("Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal."); ***HN21***[] *N.R.S. § 598A.060* (Nevada) (same); ***HN22***[] *N.M.S.A. § 1978, 57-1-1* (New Mexico) (same); ***HN23***[] *W.Va. Code § 47-18-3* (West Virginia) (same); ***HN24***[] *NY GBL § 340* (New York) (Every contract, agreement, arrangement or combination whereby. . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained. . . is hereby declared to be against public policy, illegal and void."); ***HN25***[] *N.C.G.S.A. § 75-1* (North Carolina) ("Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal."; ***HN26***[] *NDCC, 51-08.1-01*, *02* (North Dakota) ("A contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, **[*29]** trade or commerce in a relevant market is unlawful. . . . Relevant market means the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state."); ***HN27***[] *O.R.S. 646.705* (Oregon) ("As used in *ORS 136.617* and *646.705 to 646.805*, 'trade or commerce' means trade or commerce within the state; or between the state and any state, territory, or foreign nation."); (Tennessee) ***HN28***[] *T.C.A. § 47-25-101* ("All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void."). IP Plaintiffs' allegations that "[P]rices for MgO and MgO Products were raised, fixed, maintained, and stabilized **[*30]** at artificially high levels throughout the states," and "Defendants' illegal conduct had a substantial effect on commerce in the above states" (Indirect CAC ¶¶ 72, 73) are conclusory and fail to specifically tie their injuries to the alleged MgO conspiracy occurring or its effects in those states.

IP Plaintiffs lack statutory standing to sue under ***HN29***[] Utah's antitrust laws because they have a citizenship/residency requirement. See U.C.A. §§ 1953 76-10-919 ("A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant."), and under ***HN30***[] Illinois's antitrust laws because they do not allow a private right of action. See *740 ILCS 10/7* ("This State, counties, municipalities, townships and any political subdivision organized under the authority of this State, and the United States, are considered a person having standing to bring an action under this subsection.").

However, IP Plaintiffs apparently have standing to sue under ***HN31***[] Mississippi, New Hampshire, **[*31]** Vermont, and Wisconsin antitrust laws, as they provide a private right of action and have no discernible requirement of in-state conduct or effect, or residency. See *Miss. Code Ann. §§ 75-21-1*, *9* (Mississippi); ***HN32***[] *N.H. Rev. Stat § 356:1* (New Hampshire); ***HN33***[] *9 V.S.A. §§ 2453*, *2465* (Vermont); ***HN34***[] *W.S.A. §§ 133.03*, *133.18* (Wisconsin).

with no injuries in relation to the laws of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state in the Union." In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 154-56 (E.D.Pa. 2009); see also In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 924 (N.D.Ill. 2009) **[*33]** (named plaintiffs are required to establish standing for each claim under which they purport to represent class members because "[t]o have standing as a class representative, the plaintiff must be part of the class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." (quotations and citations omitted)), rev'd on other grounds by, Minn-Chem Inco. V. Agrium Inco., 657F.3d650, No. 10-1712, 2011 U.S. App. LEXIS 19433, 2011 WL 4424789 (7th Cir. Sept. 23, 2011); In re Packaged Ice Antitrust Litig., 08-md-01952, 779 F. Supp. 2d 642, 2011 U.S. Dist. LEXIS 26048, 2011 WL 891160, at *11 (E.D.Mich. Mar. 11, 2011) ("[N]amed plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury.").

Two Supreme Court decisions, Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), are at the heart of this issue. In Amchem, the Supreme Court reviewed a challenge to certification of a global settlement class involving persons who were exposed to asbestos. See 521 U.S. at 591-92. In doing so, it analyzed the role of settlement in determining class certification under Rule 23, as well as arguments set **[*34]** forth by objectors that certain members of the settlement class lacked standing to sue because they had not sustained a cognizable injury or because their injury was not redressable. Id. at 612. The Court declined to reach the standing arguments because it found the class certification issues under Rule 23 to be dispositive. Id. Consequently, the Court held that because resolution of the class certification issues "here is logically antecedent to the existence of Article III issues, it is appropriate to reach them first." Id. (citation omitted).

The Court further explained that it was "follow[ing] the path taken by the [Third Circuit] Court of Appeals" in "declin[ing] to reach these issues because they 'would not exist but for the [class-action] certification.'" Id. (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996)). To be sure, in Georgine, the Court of Appeals, when faced with class certification and Article III issues simultaneously, decided the class certification issues first because they were dispositive. 83 F.3d at 623. In doing so, the Court found "it prudent not to decide issues unnecessary to the disposition of the case, especially when many of these **[*35]** issues implicate constitutional questions." Id. (citing Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944) (expressing the rule that courts will avoid constitutional questions when possible)). Thus, these rulings echo the "fundamental and longstanding principle of judicial restraint [] requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

The Ortiz court also dealt with certification issues regarding a global settlement class for asbestos related injuries and arguments regarding the Article III standing of certain class members who petitioners alleged did not suffer an injury-in-fact. 527 U.S. at 821, 831. As in Amchem, the Court decided to address the class certification issues before the Article III questions. Id. at 831. In doing so, it explained:

> Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). But the class certification issues are, as they were in Amchem, **[*36]** "logically antecedent" to Article III concerns, 521 U.S., at 612, 117 S.Ct. 2231, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see Steel Co., supra, at 92, 118 S.Ct. 1003. Thus the issue about Rule 23 certification should be treated first, "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints. . . ." Amchem, supra, at 612-613, 117 S.Ct. 2231.

Id.

Thus, Amchem and Ortiz stand for the proposition that, **HN35**[] in cases where a court is presented with class certification and Article III standing issues simultaneously, and the class certification issues are dispositive in that they pertain to statutory standing—i.e. whether a statute authorizes a given party to sue in the first place, the certification issues are "logically antecedent" to the standing issues and the court may therefore elect to address the certification issues first in the interest of judicial restraint. Under these circumstances, if a court finds that "certification of [a] proposed class [is] improper, the issue of certain class members' standing would [be] moot." *In re Welbutrin XL, 260 F.R.D. at 153*.

Here, however, the Court **[*37]** is presented solely with the issue of whether the named IP Plaintiffs have standing to assert the causes of action in the Indirect CAC, a threshold issue that the Court must address. See *Lewis 518 U.S. at 357*. Contrary to *Ramirez* and *In re Grand Theft Auto*, the "[Supreme] Court's standing cases confirm that ***HN36***[] a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)*; see also *Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."); *Blum v. Yaretsky, 457 U.S. 991, 999, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)* ("It is not enough that the conduct of which the plaintiff complains will injure *someone.* The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."). Otherwise, a plaintiff would be able to **[*38]** bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states, thereby dragging defendants into expensive nationwide class discovery, potentially without a good-faith basis. In other words, the plaintiff would have to do "no more than name the preserve on which he intends to hunt." *Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, (5th Cir. 1969)*, overruled on other grounds by *Griffin v. Dugger, 823 F.2d 1476 (11th Cir. 1987)*. Accordingly, because the named IP Plaintiff lack standing to assert antitrust violations under the laws of Arizona, the District of Columbia, Hawaii, Illinois, Maine, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and West Virginia, see Note 10, IP Plaintiffs' claims under those laws are dismissed.

C. The Alleged MgO Conspiracy

i. One Conspiracy or Two

As an initial matter, Defendants maintain that Plaintiffs allegations are confusing to the point where it is impossible to determine whether the alleged conspiracy relates to DBM, CCM, or MgO in general. As a result, Defendants contend that **[*39]** Plaintiffs fail to allege a plausible antitrust conspiracy. This contention is unfounded. While Plaintiffs at times refer to anticompetitive conduct regarding MgO generally, it is clear from the surrounding allegations whether such conduct concerns DBM or CCM. [11] Indeed, as evidenced by their next contention, Defendants have no problem categorizing Plaintiffs' individual allegations as relevant to DBM or CCM.

On that note, Defendants contend that, to the extent that the Court finds that Plaintiffs allege distinct conspiracies regarding DBM and CCM, respectively, the Court should analyze the allegations relating to each conspiracy separately and require that those allegations independently meet the pleading requirements of Twombly and Iqbal. Plaintiffs counter that they allege a single MgO conspiracy comprised of intertwined and interdependent anticompetitive agreements.

As Plaintiffs point out, it is well-settled that ***HN37***[] "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking **[*40]** at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; see also *In re Fine Paper Antitrust Litig., 685 F.2d 810, 822 (3d Cir. 1982)* ("a seriatim examination of [] claims against each [] conspiracy defendant[] as if they were separate lawsuits . . . overlook[s] the conspiracy itself."). Defendants contend

[11] Moreover, the CACs specifically note at the outset that the term MgO can refer to DBM or CCM. See (Direct CAC ¶ 1; Indirect CAC ¶ 1 n.1).

that the Supreme Court's ruling in Continental Ore is inapposite because that case concerned a monopolistic exclusion conspiracy, as opposed to a price-fixing conspiracy. This contention is remarkably unpersuasive. The very case that Continental Ore cites for the proposition that a court must look to an alleged conspiracy as a whole, *United States v. Patten, 226 U.S. 525, 33 S. Ct. 141, 57 L. Ed. 333 (1913)*, concerned a conspiracy to artificially inflate the price of cotton. Furthermore, there is no indication that Continental Ore limited its ruling to conspiracies based on monopolistic exclusion. See *370 U.S. at 699* ("we do not believe that . . . liability under the antitrust laws can be measured by any rigid or mechanical formula . . ."). Finally, Defendants fail to present, nor does the Court see, a single reason why it would be any less logical or equitable to assess **[*41]** an alleged price-fixing or market allocation conspiracy as a whole than a monopolistic exclusion conspiracy.

Defendants' contention that the Court should analyze Plaintiffs' allegations separately with respect to DBM and CCM because Plaintiffs allege "two different courses of conduct as to the two different products at two different times" (Sumitomo Reply Br., 3) is also unavailing. While it is true that Defendants initially "agreed to fix prices and allocate markets for DBM," ("the DBM Agreement") and subsequently agreed to allocate the domestic CCM market to Premier ("the CCM Agreement"), (id.), those agreements are not mutually exclusive. To the contrary, the CCM Agreement is dependent on the DBM Agreement, and vice versa. See *In re Vitamins Antitrust Litig., 320 F. Supp. 2d 1, 16 (D.D.C. 2004)* (recognizing the potential "interdependency between various branches of a common conspiracy."). Specifically, Defendants entered into the CCM Agreement in order to restore and maintain the DBM Agreement after Premier broke that agreement due to Sumitomo and YAS's attempt to enter the domestic CCM market. Consequently, the absence of one eliminates the consideration for the other. Moreover, **[*42]** "[h]orizontal antitrust conspiracies commonly include sellers in more than one relevant market." *In re Vitamins Antitrust Litig., No. MISC 99-197, 2000 U.S. Dist. LEXIS 7397, 2000 WL 1475705, at *10 (D.D.C. May 9, 2000)*. Accordingly, the Court will treat Plaintiffs CACs as alleging a single conspiracy not to compete in the sale of two forms of MgO.

ii. The Necessity of Allegations Regarding the MgO Market

Defendants argue that Plaintiffs fail to allege an unlawful price-fixing and market allocation conspiracy because they do not set forth relevant market conditions and Sumitomo's, YAS's, and Premier's relative market power indicating that they plausibly could have fixed the price of DBM and allocated the domestic DBM and CCM markets. Plaintiffs argue that they are alleging per se violations of Section 1 of the Sherman Act and therefore "Defendants' arguments concerning market power and relevant markets are legally irrelevant." (DP Pl's. Br., 12.)

"Section 1 of the Sherman Act provides: ***HN38***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 314 (3d Cir. 2010)* **[*43]** (quoting *15 U.S.C. § 1*). ***HN39***[] "[T]his statutory language imposes two essential requirements on an antitrust plaintiff." Id. "First, the plaintiff must show that the defendant was a party to a contract, combination . . . or conspiracy." *Id. at 315* (quotation and citation omitted). This requires the plaintiff to demonstrate "some form of concerted action" indicating a "unity of purpose or a common design and understanding or a meeting of the minds or a conscious commitment to a common scheme." Id. (quotations and citations omitted).

Second, "the plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." Id. (quotation and citation omitted). ***HN40***[] "[T]he usual standard applied to determine whether a challenged practice unreasonably restrains trade is the so-called rule of reason." Id. (quotation and citation omitted). "[U]nder a rule-of-reason analysis, the plaintiff bears the initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic market." Id. (quotation and citation omitted). "[S]uccessful attempts to meet this burden typically include a demonstration of defendants' **[*44]** market power, as a judgment about market power is [a] means by which the effects of the [challenged] conduct on the market place can be assessed." *Id. at 315-16* (quotation and citations omitted).

"If the plaintiff carries this burden, the court will need to decide whether the anticompetitive effects of the practice are justified by any countervailing pro-competitive benefits." Id. However, "Judicial experience has shown that some classes of restraints" almost never have "redeeming competitive benefits," and therefore a court need not apply the rule of reason analysis. Id. Instead, they are "subject to a 'per se' standard." Id. "Paradigmatic examples are horizontal agreements among competitors to fix prices or to divide markets." Id. (quotation and citation omitted). If a plaintiff's allegations "fall into one of the recognized classes," an unreasonable restraint on trade is "conclusively presumed" and therefore "plaintiffs are relieved of the obligation to define a market and prove market power." Id. (citations omitted).

As discussed below, Plaintiffs sufficiently allege that Defendants entered into (1) a horizontal agreement to fix prices in and allocate shares of the domestic DBM market **[*45]** and (2) a horizontal agreement to allocate the domestic CCM market to Premier. Accordingly, Plaintiffs assert per se antitrust violations that do not require allegations regarding the nature of the domestic DBM and CCM markets or Defendants' power within those markets. [12]

iii. The DBM Agreement

Defendants argue that Plaintiffs' allegations of an agreement to fix prices in and allocate shares of the domestic DBM market are facially insufficient because (1) they fail to provide the substance of the agreement, (2) they fail to rule out potentially alternative, lawful explanations for such an agreement, and (3) their "factual narrative is inherently implausible." (Sumitomo (DP Pl's.) Br., 15.) Plaintiffs argue that their allegations of a price-fixing and market allocation agreement are sufficient because (1) they "explicitly state who was conferring with whom about MgO pricing, markets and customers" (DP Pl's. Br., **[*46]** 15.), and (2) Defendants' arguments regarding the inherent plausibility of the alleged conspiracy implicate factual questions that are not properly resolved on a motion to dismiss.

Defendants' contention that Plaintiffs' allegations are inadequate because they "fail to disclose the actual substance of the alleged conversations or agreements" (Sumitomo (DP Pl's.) Br., 14) is unavailing. ***HN41***[] Twombly does not require detailed allegations regarding the specific nature of a price-fixing or market allocation agreement; rather, "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *550 U.S. at 556*. Put another way, a complaint "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." Id. Requiring Plaintiffs to set forth the full details of an antitrust conspiracy at this stage of the litigation would present an onerous burden because "in antitrust cases, [] the proof is largely in the hands of the alleged conspirators." *In re Neurontin Antitrust Litig., No. 02-1390, 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029, at *7 (D.N.J. Aug. 28, 2009)* (quoting *Hosp. Building Co. Trustees of Rex Hosp., 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976))*.

Here, **[*47]** Plaintiffs allege that (1) a significant portion of DBM consumed in the United States comes from China; (2) during the Class Period, Premier and Sumitomo bought nearly all Chinese DBM available for purchase and resold it to their customers in the United States; (3) Mr. Ahl of Premier "regularly called" Mr. Sumikawa of YAS "to discuss fixing Premier's and Sumitomo's [DBM] prices and allocating their respective MgO accounts in the U.S" (Direct CAC ¶ 34; Indirect CAC ¶ 42); (4) these market allocation and price-fixing schemes were implemented by Mr. Ahl and his successors at Premier and Mr. Wakisama of Sumitomo; (5) at the 2004 Tulsa meeting, Mr. Akiyama recounted to Mr. Sumikawa "multiple discussions" between him and Mr. Ahl to set DBM prices and allocate DBM markets "and ensure that Sumitomo was maintaining its agreement with Premier to fix [DBM] prices and allocate [DBM] markets," (Direct CAC ¶ 40; Indirect CAC ¶ 49); and (5) when Mr. Vannorsdel allegedly "expressed concern about compromising his relationship with Premier by helping facilitate Sumitomo and YAS's involvement" in the CCM market, Mr. Akiyama responded, "'Don't be concerned because we [Sumitomo] talk with Premier on a **[*48]** daily basis to set prices and to discuss what accounts they can have.'" (Direct CAC ¶ 41; Indirect CAC ¶ 50.)

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[12] This also disposes of Sumitomo's contention that the Court should consider "certain relevant facts" noted in *Animal Science Prods., Inc. v. China Nat'l Metals & Minerals, 596 F. Supp. 2d 842 (D.N.J. 2008)* regarding the domestic DBM and CCM markets. (Sumitomo (DP Pl.'s) Br., 4.)

These allegations plausibly suggest that Defendants entered into an agreement to fix prices in and allocate shares of the domestic DBM market, the specifics of which can be reasonably expected to be revealed in discovery. Plaintiffs state (1) the subject of the alleged agreement, (2) the parties to the agreement and the specific individuals that discussed and implemented the agreement, and (3) the context in which the agreement arose. This is sufficient to withstand a motion to dismiss.

Defendants' contention that Plaintiffs fail to assert a plausible antitrust conspiracy because their allegations could, in fact, refer to a lawful vertical agreement between Sumitomo and Premier to fix prices for DBM whereby Sumitomo purchases DBM from Premier as a reseller, is irrelevant. ***HN42***[] At the pleading stage, Plaintiffs need only set forth allegations that create an inference of an unlawful agreement, *Twombly, 550 U.S. at 556*, which, as previously discussed, they have done; they need not set forth allegations tending to rule out potential alternative explanations. [13]

Finally, Defendants' contention that the alleged DBM Agreement is "inherently implausible" in that, on the one hand, Sumitomo was allegedly worried about retaliatory action by Premier for attempting to enter the CCM market and, on the other hand, "could give credible assurances to the Vannorsdels that it could shield them from Premier['s] retaliation because of [Sumitomo's] 'daily' contact with Premier," (Sumitomo (DP Pl.'s) Br., 15) is similarly irrelevant because it asks the Court to improperly assess the merits of Plaintiffs' allegations. [14] See *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 17, 381 U.S. App. D.C. 76 (D.C. Cir. 2008)* ("Twombly was **[*50]** concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim. ***HN43***[] A court deciding a motion to dismiss must not make any judgment about the probability of the plaintiff's success . . . the court must assume that all the allegations in the complaint as true (even if doubtful in fact)" (quotations and citations omitted)). Thus, Plaintiffs have sufficiently alleged an unlawful agreement among Defendants to fix prices in and allocate shares of the domestic DBM market.

iv. The CCM Agreement

Defendants contend that Plaintiffs fail to allege the existence of an unlawful agreement to allocate the domestic CCM market to Premier because **[*51]** (1) they merely allege parallel conduct that does not indicate concerted action, (2) there are obvious alternative explanations for Sumitomo's and YAS's decision not to enter the CCM market, and (3) they fail to establish that Defendants were competitors in the CCM market. Plaintiffs counter that they are not relying on parallel conduct but rather direct admissions of an agreement among Defendants to allocate the domestic CCM market to Premier, and therefore Defendants' proffered alternative explanations are irrelevant.

As previously discussed, ***HN44***[] Section 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy." *Twombly, 550 U.S. at 553* (quotation and citation omitted). This is because seemingly anticompetitive conduct may be just as "consistent with conspiracy . . . [as] with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id. at 554* (citation omitted). Accordingly, "[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express." *Id.*

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[13] This is to be distinguished **[*49]** from the requirement to plead plus factors to rule out independent action "when a plaintiffs' claims of conspiracy rest on parallel conduct," *In re Ins. Brokerage, 618 F.3d at 323*, which is discussed below regarding the alleged CCM Agreement. Plaintiffs need not assert plus factors to establish the plausibility of the DBM Agreement because they set forth direct allegations of that agreement. See *In re Ins. Brokerage, 618 F.3d at 323* ("Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.").

[14] Moreover, there is nothing "inherently implausible" about Sumitomo's attempt to assuage the Vannorsdels' concern about Premier's potential retaliation by stating that it speaks with Premier on a daily basis to set DBM prices and allocate shares of the DBM market. It is certainly plausible that Sumitomo was aware of the risk of retaliation by Premier but believed it could "enter the [CCM] market discreetly" (Direct CAC ¶ 39; Indirect CAC ¶ 48) because Premier's attention was focused on maintaining their agreement in the DBM market.

at 553 **[*52]** (quotation and citation omitted). "Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 557*.

This is usually accomplished by pleading one or more "plus factors" that "indicate the existence of an actionable agreement." *In re Ins. Brokerage, 618 F.3d at 321*. While "[t]here is no finite set of such criteria," the Court of Appeals has identified "at least three such plus factors: (1) evidence that the defendant had a motive to enter into a [] conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Id. at 321-22* (quotations and citation omitted).

Here, Plaintiffs' allegations suggest an agreement among Defendants to allocate the CCM market to Premier. Plaintiffs allege that (1) representatives from Sumitomo and YAS met with others at a Tulsa hotel, in the summer of 2004, to discuss entering the domestic CCM market in order to fill Sumitomo's barge capacity; (2) Premier discovered their plan to enter the domestic CCM market **[*53]** and retaliated by lowering DBM prices; and (3) as a result, Sumitomo and YAS agreed with Premier to remain out of the CCM market.

To be sure, contrary to Plaintiffs' contentions, these allegations do not amount to a direct admission of an unlawful agreement to allocate the CCM market to Premier; taken in isolation, they merely amount to parallel conduct plus a conclusory allegation of an agreement. Placing these allegations in the context of the CACs as a whole, however, Plaintiffs successfully demonstrate the first plus factor—that Sumitomo and YAS had a motive to enter into an unlawful agreement with Premier to stay out of the domestic CCM market—and provide a plausible context for that agreement. As previously discussed, Sumitomo and YAS maintained an agreement with Premier to fix prices in and allocate shares of the domestic DBM market. As a result, as the CACs indicate, Sumitomo and YAS wanted to enter the CCM market undetected so that they could continue to maintain their agreement with Premier in the DBM market. When Premier discovered their plans and, in response, cut prices in the DBM market, Sumitomo and YAS agreed with Premier to stay out of the CCM market with the motive **[*54]** of restoring and maintaining their agreement in the DBM market.

In this context, Defendants' alternative explanations that a profit-maximizing entity could independently decide not to enter a market in which (1) it remained unfamiliar with the product and its customers and (2) the dominant player recently cut prices are by no means "obvious" or "more plausible" (Sumitomo (DP Pl's.) Br., 18) than an illegal agreement to stay out of the CCM market and therefore do not provide a basis for dismissal. ***HN45***[] At the pleading stage, "a claim of conspiracy predicated on parallel conduct should be dismissed if common economic experience, or the facts alleged in the complaint itself, show that independent self-interest is an obvious alternative explanation for defendants' common behavior." *In re Ins. Brokerage, 618 F.3d at 326*. Plaintiffs' allegations need not rule out all potential alternative explanations. See *Starr v. Sony BMG Music Entertainment, 592 F.3d 314, 325 (2d Cir. 2010)* ("Although the Twombly court acknowledged that for purposes of summary judgment a plaintiff must present evidence that tends to exclude the possibility of independent action, it specifically held that, to survive a motion **[*55]** to dismiss, plaintiffs need only enough factual matter (taken as true) to suggest that an agreement was made" (quotations and citations omitted)).

Finally, Sumitomo's argument that Plaintiffs fail to allege a plausible agreement to allocate the CCM market to Premier because there is no indication that Defendants were actual or potential competitors in the CCM market is unavailing. Sumitomo specifically contends that Plaintiffs must establish that it had the intent and capability of entering the CCM market as a competitor in order to allege a plausible agreement among Defendants to allocate the CCM market to Premier. However, the authority cited by Sumitomo provides little support for this contention. See *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (parties need not have competed in the same territorial market to unlawfully allocate that market); *Andrx Pharms, Inc. v. Bioval Corp., Int'l, 256 F.3d 799, 806-07, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)* (potential competitor must show background and experience in new market, financial capability to enter market, and affirmative steps toward entry in order to establish injury-in-fact for standing to sue under Section 4 of the Clayton Act); *Engine Specialities, Inc. v. Bombardier Ltd., 605 F.2d 1, 9 (1st Cir. 1979)* **[*56]** (to sustain jury finding of unlawful horizontal market allocation agreement among potential competitors, there must have been sufficient support in the record to establish that potential competitors had the "necessary desire, intent, and capability to enter the market").

To be sure, the Court of Appeals has generally recognized that the existence of an unlawful horizontal agreement to allocate a given market must occur among competitors or potential competitors in that market:

> An agreement among persons who are not actual or potential competitors in a relevant market is for Sherman Act purposes *brutum fulmen* . . . To some extent, of course, a horizontal agreement tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very existence supports an inference that it would have an effect in a relevant market. Where, . . . however, the disputed issue is the existence or scope of the alleged horizontal agreement that is to be inferred from circumstantial evidence, the first inquiry must be whether or not each firm alleged to have been a party to it was an actual **[*57]** or potential competitor in that market.

United States v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir. 1986) (reversing dismissal of indictment on double jeopardy grounds). However, Sumitomo fails to present, ***HN46***[] nor is the Court aware of, any authority requiring a purchaser plaintiff to specifically establish, at the pleading stage, that the parties to a horizontal agreement to allocate a given market were competitors or potential competitors in that market. To require Plaintiffs, pre-discovery, to establish Sumitomo's background and experience in the CCM market, its financial capability to enter that market, and the specific steps taken by Sumitomo to enter it, would be overly onerous, as much of this information is likely to be exclusively in the hands of Sumitomo. [15] Thus, Plaintiffs have sufficiently alleged an unlawful agreement among Defendants to allocate the domestic CCM market to Premier.

v. YAS' Involvement in the Alleged Conspiracy

YAS separately argues that Plaintiffs fail to establish **[*58]** its participation in the alleged conspiracy because they fail to show that it came to a meeting of the minds with Sumitomo and Premier to (1) fix prices in and allocate shares of the domestic DBM market and (2) allocate the domestic CCM market to Premier. [16] Plaintiffs counter that (1) they have set forth direct allegations indicating YAS's knowledge and participation in the alleged conspiracy, and (2) YAS need not have played the same role in the conspiracy, maintain the same motives as Sumitomo or Premier for participating in it, or sell MgO to be held liable.

As previously discussed, to hold YAS or any other Defendant liable, Plaintiffs must set forth allegations suggesting that YAS maintained "unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment **[*60]** to a common scheme" with Sumitomo and Premier to (1) fix prices in and allocate shares of the domestic DBM market, and (2) allocate the CCM market to Premier. *In re Ins. Brokerage, 618 F.3d at 315* (quotations and citation omitted). This does not require a showing that YAS knew of or participated in every transaction in furtherance of or related to the alleged conspiracy. See *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co., 462 F.2d 1256, 1259 (8th Cir. 1972)* ("Although knowledge is implicit in the requirement of unity of

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[15] In any event, Plaintiffs allege Sumitomo's motive for entering the CCM market (filling excess barge capacity), and certain steps taken to enter that market (meeting with the Vannorsdels in Tulsa).

[16] Citing to *Toledo Mack Sales & Serv. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008)*, YAS further argues that Plaintiffs' failure to establish that YAS occupies the same level as Sumitomo and Premier on the MgO supply chain "precludes *per se* treatment of YAS' alleged antitrust violations." (YAS Br., 4 n. 5.) This argument misses the mark. While Toledo Mack noted that, "[i]n contrast to horizontal price-fixing agreements between entities at the same level of a product's distribution chain, the legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed **[*59]** by the rule of reason," and that "[t]he rule of reason analysis applies even when . . . the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers," *530 F.3d at 225* (citation omitted), Plaintiffs do not allege YAS' arrangement with Sumitomo to source Chinese magnesite and MgO constitutes an unlawful vertical agreement to support a horizontal conspiracy between Sumitomo and Premier. Rather, Plaintiffs allege that YAS participated directly with Sumitomo and Premier in the alleged horizontal conspiracy to fix prices in and allocate shares of the DBM market and allocate the CCM market to Premier. Moreover, "[t]he law is settled that ***HN47***[] where an upstream supplier participates in a conspiracy involving horizontal competitors, it is proper to analyze the entire restraint as one of horizontal price-fixing." *In re Mercedez-Benz, 157 F. Supp. 2d at 362*.

purpose, no case of which we are aware requires that each party to a conspiracy knows of each transaction encompassed by the conspiracy in order to be held accountable therefore."); *In re Vitamins Antitrust Litig., 320 F. Supp. 2d 1, 15 (D.D.C. 2004)* (**HN48**[] "Although Plaintiffs must show that each Defendant had knowledge of an agreement as to the overall conspiracy, they need not show (1) evidence of a formal agreement, or (2) knowledge, on behalf of the Defendant, of every detail of the alleged conspiracy."); *In re Mercedez-Benz, 157 F. Supp. 2d at 375* ("That a particular defendant may or may not have joined in a specific overt act in furtherance of the conspiracy **[*61]** . . . does not affect its status as a conspirator."). On the other hand, "knowledge alone [of the conspiracy] is not sufficient" to hold it liable. *In re Vitamins, 320 F. Supp. 2d at 16*. Plaintiffs must therefore set forth allegations suggesting that YAS (1) had knowledge of the conspiracy to fix prices in and allocate shares of the domestic DBM market, and allocate the CCM market to Premier, and (2) intended to join that conspiracy. Id. "[A] a party progresses form mere knowledge of an endeavor to intent to join it when there is 'informed and interested cooperation, stimulation, instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy.'" Id. (quoting *Direct Sales Co. v. United States, 319 U.S. 703, 713, 63 S. Ct. 1265, 87 L. Ed. 1674 (1943))*.

1. The DBM Agreement

Plaintiffs allege that Mr. Sumikawa of YAS (1) facilitates Sumitomo's purchases of Chinese DBM for resale in the domestic DBM market, (2) received regular phone calls from Mr. Ahl of Premier "to discuss fixing Premier's and Sumitomo's [DBM] prices and allocating their respective [DBM] accounts in the U.S," (Direct CAC ¶ 34; Indirect CAC ¶ 42), and (3) attended the 2004 Tulsa **[*62]** meeting where (i) Mr. Akiyama of Sumitomo recounted to him "multiple discussions" between him and Mr. Ahl to set DBM prices and allocate DBM markets "and ensure that Sumitomo was maintaining its agreement with Premier to fix [DBM] prices and allocate [DBM] markets," (Direct CAC ¶ 40; Indirect CAC ¶) and (ii) it was revealed that Sumitomo communicates with Premier on a daily basis fix prices and allocate accounts. These allegations create a plausible inference that YAS had knowledge of an agreement to fix prices in and allocate shares of the domestic DBM market and the intent to join it. Accepting Plaintiff's allegations as true and making all reasonable inferences in their favor, YAS' facilitation of Sumitomo's DBM purchasing indicates a plausible stake in the DBM Agreement, while its receipt of phone calls to discuss the Agreement and attendance at a meeting at which it was revealed indicates that YAS had knowledge of the DBM Agreement and that it engaged in informed and interested cooperation.

Citing to *In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)* and *Hinds County, Mississippi v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 518 (S.D.N.Y. 2009)*, YAS argues that these **[*63]** allegations should be "discounted" because they amount to mere "averments of agreements made at some unidentified place and time." (YAS Br., 4.) In re Elevator Antitrust Litig. concerned a list of "basically every type of conspiratorial activity that one could imagine . . . in entirely general terms without any specification of any particular activities by any particular defendant." *502 F.3d at 50*. Similarly, Hinds County dealt with conclusory allegations of "'*per se* illegal horizontal communications' in support of [an] alleged conspiracy." *620 F. Supp. 2d at 518*. Here, in contrast, Plaintiffs allege (1) the way in which YAS participates with Sumitomo— a member of the conspiracy—in the domestic DBM market, (2) phone calls from Premier— another party to the conspiracy—to YAS to discuss fixing prices in and allocating shares of the domestic DBM market, and (3) YAS's attendance at a meeting where Sumitomo—its partner in the domestic DBM market—recounted to YAS discussions in which it set prices in and allocated shares of the domestic DBM market with Premier. These allegations, do not amount to a mere "list of theoretical possibilities," *In re Elevator Antitrust Litig., 502 F.3d at 50*, **[*64]** or "require the Court to assume the existence of the conspiracy." *Hinds County, 620 F. Supp. 2d at 518*. Rather, they make the alleged conspiracy more plausible.

YAS further argues that "it is wholly implausible that [it] (a minor player that was not itself a manufacturer, importer or seller [17]) would have discussed fixing Premier's and Sumitomo's [DBM] prices," particularly since Plaintiffs fail to

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[17] Citing to *Howard Hess Dental Laboratories Inc. v. Dentsply Intern, Inc., 424 F.3d 363 (3d Cir. 2005)*, YAS also argues that Plaintiffs' failure to allege that it sold DBM or CCM requires its dismissal from this case as a matter of law. While that case notes **HN49**[] the well-settled proposition that only direct purchasers may recover damages in federal antitrust suits, it by no means

"allege that YAS had any ability to influence (let alone) dictate Sumitomo's [DBM] prices, nor which customers Sumitomo dealt with." (YAS Br., 5.) As previously discussed, this line of argument is not only improper at the pleading stage—where the Court must accept Plaintiffs' allegations as true—it is also unpersuasive. There is nothing "wholly implausible" **[*65]** about YAS participating in discussions to fix prices in and allocate shares of the domestic DBM market. Sumitomo was only able to participate in the domestic DBM market in the first place due to YAS's relationship with Chinese mines from which Sumitomo could purchase DBM and magnesite. Consequently, it is certainly plausible that YAS could participate in discussions with co-conspirators to fix prices and allocate shares of the DBM market.

2. The CCM Agreement

Plaintiffs' allegations suggesting an agreement among Sumitomo and Premier to allocate the CCM market to Premier apply with equal **[*66]** force to YAS. As previously discussed, Plaintiffs allege that (1) Sumitomo and YAS met with others at a Tulsa hotel, in the summer of 2004, to discuss entering the domestic CCM market in order to fill Sumitomo's barge capacity; (2) Premier discovered their plan to enter the domestic CCM market and retaliated by lowering DBM prices to keep Sumitomo and YAS out of the CCM market; and (3) as a result, Sumitomo and YAS agreed with Premier to remain out of the CCM market.

YAS argues that these allegations are conclusory because they "provide[] no details whatsoever about YAS's participation in this alleged agreement, including what role it is alleged to have played." (YAS Br., 7.) At the pleading stage, however, Plaintiffs need not allege the specific nature of YAS's or any other Defendant's participation in the agreement to allocate the CCM market to Premier. See *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 904 (N.D.Cal. 2008)* ("Although Plaintiffs will need to provide evidence of each Defendants' participation [at summary judgment] . . . they now only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy."). **[*67]** As previously discussed, Plaintiffs must set forth allegations suggesting that YAS had knowledge of the agreement and the intent to join it. Plaintiffs' allegations that YAS, as Sumitomo's partner in the domestic MgO market, (1) attended a meeting to arrange for Sumitomo to enter the domestic CCM market and (2) subsequently agreed with Sumitomo and Premier to allocate that market to Premier in order to maintain their agreement to fix prices and allocate shares of the domestic DBM market, do just that.

Finally, like Sumitomo, YAS argues that it cannot be held liable for the alleged agreement to allocate the domestic CCM market to Premier because Plaintiffs fail to establish that YAS was an actual or potential competitor in that market. For the reasons discussed in Point IIC*iv*, at the pleading stage, Plaintiffs, as purchasers, need not establish that YAS was an actual or potential competitor in the CCM market in order to allege its participation in a horizontal conspiracy. Furthermore, YAS's (1) role in facilitating Sumitomo's purchase of Chinese DBM and (2) attendance at the 2004 Tulsa meeting where it, Sumitomo, and the Vannorsdels discussed entering into the CCM market, suggests that **[*68]** YAS intended to participate with Sumitomo in the CCM market in the same way as they had been participating in the DBM market. Thus, Plaintiffs have set forth allegations plausibly suggesting that YAS participated in an agreement to allocate the CCM market to Premier.

D. Statute of Limitations and Fraudulent Concealment

HN50[] Actions brought under the Clayton Act are subject to a four-year statute of limitations. *15 U.S.C. § 15b*. In an antitrust conspiracy that continues over a period of years, each overt act in furtherance thereof that injures the plaintiff—for example, the selling of a price-fixed product—starts the statute of limitations period running for that particular act. *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*; see also *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77* ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business" (citations omitted)). However, "the commission of a separate new overt act generally does not permit the

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indicates that only a seller of the product in question may be found liable in a Section 1 conspiracy. As previously discussed, YAS need not have participated in a particular act in furtherance of the conspiracy to be held liable.

plaintiff to recover for the injury caused by old overt acts outside the limitations period." Klehr, 521 U.S. at 190 (citations omitted).

Defendants argue **[*69]** that Plaintiffs' federal antitrust claims are barred by the applicable four-year statute of limitations. Specifically, Defendants contend that Plaintiffs (1) fail to allege overt acts in furtherance of the alleged conspiracy that occurred after 2004 and (2) fail to plead fraudulent concealment with particularity to otherwise toll the statute of limitations. Plaintiffs do not dispute that they fail to allege overt acts after 2004, but maintain that they plead fraudulent concealment with the requisite particularity to toll the statute of limitations.

HN51[] The equitable doctrine of fraudulent concealment applies to every federal statute of limitations. Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743 (1946). To toll a statute of limitations through fraudulent concealment, a plaintiff must show "(1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action." In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1178-79 (3d Cir. 1993) (citation omitted). In addition, **HN52**[] allegations of fraudulent concealment must be pled with particularity in accordance with Federal Rule of Civil Procedure 9(b). **[*70]** In re Mercedes-Benz, 157 F. Supp. 2d at 368.

However, "Rule 9[(b)] does not require plaintiffs to plead facts that, by the nature of the alleged fraud, are within the defendants' control." Id. (citing In re Craftmatic Secs. Litig., 890 F.2d 628, 645 (3d Cir. 1989)). Indeed, "[c]ourts must be sensitive to the fact that [a rigid] application of Rule 9(b) prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud." In re Craftmatic, 890 F.2d at 645 (quotation and citation omitted). "Thus, courts have relaxed the rule when factual information is peculiarly within the defendant's knowledge or control." Id. Accordingly, under the more flexible application of Rule 9(b), Plaintiffs need not allege the specific information that is exclusively within Defendants' knowledge or control. See id. at 646. However, Plaintiffs must allege facts suggesting fraudulent concealment and "why additional information lies exclusively within the defendants' control." Id.

As discussed fully below, Plaintiffs fail to satisfy each element of fraudulent concealment, thus requiring dismissal of their federal antitrust claims as time-barred. However, the Court will grant **[*71]** Plaintiffs leave to amend their allegations of fraudulent concealment to equitably toll the statute of limitations. [18]

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[18] IP Plaintiffs' state ***antitrust law*** claims similarly require dismissal for failure to establish fraudulent concealment, as their **HN53**[] applicable statutes of limitations range from three to six years. See Ariz. Rev. Stat. Ann. § 44-1410(A) (Arizona) (2011) (four years); **HN54**[] Cal. Bus. & Prof. Code § 16750.1 (2011) (California) (four years); **HN55**[] D.C. Code § 28-4511(b) (2011) (four years); **HN56**[] Haw. Rev. Stat. § 480-24(a) (2010) (Hawaii) (four years); **HN57**[] Ill. Comp. Stat. ch. 740, § 10/7(2) (2010) (four years); **HN58**[] Iowa Code § 553.16 (2011) (Iowa) (four years); Four B Corp. v. Daicel Chem. Indus., Ltd., 253 F. Supp. 2d 1147, 1156 (D. Kan. 2003) (Kansas) (three years) (citing **HN59**[] Kan. Stat. Ann. § 60-512(2) (2010)); McKinnon v. Honeywell Int'l, Inc., 2009 ME 69, 977 A.2d 420, 424 (Me. 2009) (Maine) (six years) (citing **HN60**[] Me. Rev. Stat. Ann. tit. 14 § 752 (2008)); **HN61**[] Mich. Comp. Laws § 445.781 (2010) (Michigain) (four years); Am. Computer Trust Leasing v. Jack Farrell Implement Co., 763 F. Supp. 1473, 1491 n.21 (D.Minn. 1991) (Minnesota) (four years) (citing **HN62**[] Minn. Stat. § 325D.64 (subdiv. 1) (2010)); **HN63**[] Miss. Code Ann. § 15-1-49(1) **[*72]** (2010) (three years); **HN64**[] Neb. Rev. Stat. § 25-206 (2010) (Nebraska) (four years); **HN65**[] Nev. Rev. Stat. § 598A.220(2)(a) (2010) (four years); **HN66**[] N.H. Rev. Stat. § 356:12(II) (1973) (New Hampshire) (four years); **HN67**[] N.M. Stat. § 57-1-12(B) (1978) (New Mexico) (four years); **HN68**[] N.Y. Gen. Bus. Law § 340(5) (2004) (New York) (four years); **HN69**[] N.C. Gen. Stat. § 75-16.2 (2010) (North Carolina) (four years); **HN70**[] N.D. Century Code § 51-08.1-10(2) (1987) (four years); **HN71**[] Or. Rev. Stat. § 646.800(2) (1975) (Oregone) (four years); **HN72**[] S.D. Codified Laws § 37-1-14.4 (1975) (South Dakota) (four years); State ex rel. Leech v. Levi Strauss & Co., No. 79-722-III, 1980 WL 4696, at *3 (Tenn. Ch. Sept. 25, 1980) (Tennessee) (three years) (citing **HN73**[] Tenn. Stat. § 28-3-105(3) (2011)); **HN74**[] Utah Code § 76-10-925(2) (1979) (Utah) (four years); **HN75**[] Vt. Stat. Ann. tit. 12, § 511 (2010) (Vermont) (six years); **HN76**[] W. Va. Code § 47-18-11 (1978) (West Virginia) (four years); **HN77**[] Wis. Stat. § 133.18(2) (2011) (Wisconsin) (six years). However, to the extent that IP Plaintiffs sufficiently amend their allegations to establish fraudulent concealment of their federal antitrust claims, they will also have established fraudulent concealment of their state law antitrust claims. **[*73]** See Note 9.

i. Affirmative Acts of Concealment

Defendants argue that (1) Plaintiffs fail to sufficiently allege affirmative acts of concealment and (2) their allegations that the MgO conspiracy is self-concealing cannot satisfy the first element of fraudulent concealment. [19] Plaintiffs contend that they have alleged (1) a self-concealing conspiracy that satisfies the first element of fraudulent concealment, or, (2) in the alternative, affirmative acts of concealment committed by Defendants.

The Court of Appeals has yet to define what constitutes an affirmative act **[*74]** of concealment in antitrust cases. However, courts have generally taken two distinct views. *In re Mercedez-Benz, 157 F. Supp. 2d at 368*. The first requires a plaintiff to show one or more affirmative acts to conceal an antitrust conspiracy that are wholly extrinsic to the conspiracy itself. See, e.g., *Colorado v. Western Paving Constr. Co., 630 F. Supp. 206, 210 (D.Colo. 1986)*, aff'd en banc by an equally divided court, *841 F.2d 1025 (10th Cir. 1988)*, cert. denied, *488 U.S. 870, 109 S. Ct. 179, 102 L. Ed. 2d 148 (1988)*. The second also requires a plaintiff to show one or more affirmative acts of concealment, but those acts may be part and parcel to, or in furtherance of, the conspiracy. *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 122 (4th Cir. 1995)* (citing *Texas v. Allen Constr. Co., 851 F.2d 1526, 1532 (5th Cir. 1988))*. The Court finds the first view to be overly restrictive in this case. In a conspiracy involving price-fixing, "it **[*75]** is virtually impossible to distinguish between acts in furtherance of the conspiracy and acts designed to maintain the conspiracy's secrecy because the conspiracy's success is often contingent upon its ability to avoid detection by regulators and purchasers." *In re Aspartame Antitrust Litig., No. 06-1732, 2007 U.S. Dist. LEXIS 16995, 2007 WL 5215231, at *5 (E.D.Pa. Jan. 18, 2007)*; See also *In re Mercedez-Benz, 157 F. Supp. 2d at 372* ("secrecy is [the] natural lair" of a price-fixing conspiracy).

Several courts, including those in this Circuit, have found that a plaintiff may avoid the affirmative act requirement altogether in cases where an antitrust conspiracy is "inherently self-concealing." See, e.g., *In re Aspartame, 2007 U.S. Dist. LEXIS 16995, 2007 WL 5215231, at *5*; *In re Nine West Shoes Antitrust Litig., 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000)*; *In re Mercedez-Benz, 157 F. Supp. 2d at 371*; *Pennsylvania Milk Indus. Mgmt. Corp., 812 F. Supp. 500 (E.D.Pa. 1992)*; *Bethlehem Steel Corp. v. Fischbach & Moore, Inc., 641 F. Supp. 271, 273-74 (E.D.Pa. 1986)*. However, the definition of a self-concealing antitrust conspiracy, particularly one that involves price-fixing, remains nebulous. The In re Mercedez-Benz court held that a self-concealing **[*76]** antitrust conspiracy is one where "concealment is so intertwined with the conspiracy as a whole that the equitable foundations of the fraudulent concealment doctrine require the limitations period to be tolled." *157 F. Supp. 2d at 371*. Other courts maintain that all properly alleged price-fixing conspiracies are inherently self-concealing. See, e.g., *In re Issuer Plaintiff Initial Public Offering Antitrust Litig., No. 00-7804, 2004 U.S. Dist. LEXIS 3892, 2004 WL 487222, at *4 (S.D.N.Y. Mar. 12, 2004)*; *Nine West, 80 F. Supp. 2d at 192*.

The Court agrees that, ***HN79***[] under certain circumstances, an antitrust conspiracy may depend on its own concealment to the point that any act in furtherance thereof can also be said to conceal it. As the Supreme Court explained long ago, the purpose of the fraudulent-concealment doctrine is to prevent a defendant from "concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it." *Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349, 22 L. Ed. 636 (1874)*. However, the Court cannot find that conspiracies involving price-fixing are *per se* self-concealing, as such a finding would render **[*77]** them wholly exempt from the applicable statute of limitations.

Although not binding, *In re Publication Paper Antitrust Litig., No. 04-1631, 2005 U.S. Dist. LEXIS 19896, 2005 WL 2175139 (D.Conn. Sept. 6, 2005)* provides a helpful framework under which to determine whether a conspiracy

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[19] Defendants further argue that Sumitomo's alleged admission to the Vannorsdels of the DBM Agreement cuts against their fraudulent concealment allegations. This is unpersuasive because the admission in no way put Plaintiffs on notice of their claims during the limitations period. See *Emerson Elec. Co. v. Le Carbone Lorraine, SA, 500 F. Supp. 2d 437, 448 (D.N.J. 2007)* (***HN78***[] "Where fraudulent concealment of a federal antitrust claim has been shown, the four-year federal statute of limitations begins anew from the time the plaintiff knew or should have known of the existence of the federal claim." (quotations and citations omitted)).

involving price-fixing is self-concealing for the purposes of establishing fraudulent concealment. That case found that a price-fixing conspiracy may be self-concealing, depending on the nature of the industry in which the item is price-fixed:

> In a competitive, well-regulated industry it will often be the case that a price-fixing conspiracy, if not concealed, would immediately fail because of governmental or private legal action. In such circumstances, any announcement of a price increase will carry with it an implicit statement that the price increase is legitimate, i.e., the result of competitive forces, not collusion. Nevertheless, not every price-fixing conspiracy is self-concealing. For example, there may be industries in which the participants are aware of collusion but it is not stopped because of indifference, fear, or because the perpetrators are exempt from, or beyond the reach of, antitrust laws. In such circumstances, the **[*78]** defendants' announcement of a price increase will not carry with it any implied certification of legitimacy, and so, absent additional circumstances, will not be self-concealing.

*In re Publication Paper, 2005 U.S. Dist. LEXIS 19896, 2005 WL 2175139, at *4*. Accordingly, ***HN80***[] "whether a particular price-fixing conspiracy or, more precisely, whether a particular announcement of a price increase necessarily conceals its true nature depends on the nature of the industry and the circumstances surrounding the announcement." Id. In other words, a plaintiff must show circumstances indicating that a price increase "carries with it a pretense of legitimacy" or "that it would necessarily be assumed that [it was] the result of legitimate market forces." Id. To do so, a plaintiff may, for example, set forth allegations showing "that price increases are not abnormal, that such increases are typically ascribed to market forces, that an openly collusive price increase would not be tolerated, and that there was nothing suspicious about the circumstances under which each of the pre-limitations period price announcements were made." Id.

Here, Plaintiffs fail to allege particular circumstances surrounding the MgO market indicating that the **[*79]** alleged conspiracy was self-concealing. Plaintiffs come close to pleading an affirmative act of concealment in alleging that "price increases for MgO were justified by references to tight supply, thinning margins, and increased energy and freight costs" (Direct CAC ¶ 51; Indirect CAC ¶ 58), however they fail to explain the particular circumstances surrounding Defendants' price increases and pretextual justifications for those increases— information which is in Plaintiffs' control—in accordance with *Rule 9(b)*. [20] Thus, Plaintiffs have failed to meet the first element of fraudulent concealment to toll the statute of limitations. However, the Court will grant Plaintiffs leave to amend to adequately plead either (1) circumstances surrounding the MgO market during the Class Period indicating that the alleged conspiracy is self-concealing, or (2) particular circumstances surrounding Defendants' price increases and the allegedly pretextual justifications for those price increases. See *In re Burlington Coat Factory Litig., 114 F.3d at 1434*.

ii. Reliance

Defendants argue that Plaintiffs fail to meet the second element of fraudulent concealment because they have not alleged that that they relied on Defendants' alleged affirmative acts of concealment. Plaintiffs argue that there is no reliance requirement to establish fraudulent concealment.

While the aforementioned elements of fraudulent concealment do not specifically note a reliance requirement, the language of the second element strongly suggests one. As previously noted, the second element of fraudulent concealment requires a showing that the defendant's concealment misled or relaxed the plaintiff's potential inquiry into what otherwise would have been evidence of its cause of action. *In re Lower Lake Erie, 998 F.2d at 1179*; see also *Forbes v. Eagleson, 228 F.3d 471, 487 (3d Cir. 2000)* ("[T]he plaintiff must show that he actually was mis[led] . . . into thinking that he d[id] not have a cause of action" (quotation and citation omitted)). ***HN81***[] Implicit in the

[20] Nor can Plaintiffs' conclusory allegation that "defendants met secretly and among themselves for the express purpose of fixing prices and allocating markets **[*80]** of domestically sold MgO" (Direct CAC ¶ 50; Indirect CAC ¶ 57) satisfy the affirmative act requirement.

notion that a plaintiff's inquiry was misled or relaxed by an act of concealment is that the plaintiff relied on that **[*81]** act of concealment. That is, the plaintiff's inquiry would not have been misled or relaxed if it did not rely on the defendant's act of concealment. Here, Plaintiffs make no allegations that they were misled by Defendants' concealment of the alleged conspiracy and therefore have failed to meet the second element of fraudulent concealment. However, the Court will grant Plaintiffs leave to amend to adequately plead that they relied on the self-concealing nature of Defendants' conspiracy and/or pretextual justifications for Defendants' price increases. See *In re Burlington Coat Factory Litig., 114 F.3d at 1434*.

iii. Due Diligence

Defendants argue that Plaintiffs fail to satisfy the due diligence element of fraudulent concealment because they do not allege any due diligence performed during the Class Period, particularly that which led to the discovery of the alleged conspiracy. Plaintiffs counter that, under the fraudulent concealment doctrine, they need only plead that they would not have discovered their claim, even in the exercise of reasonable due diligence. Plaintiffs further argue that determinations of due diligence are fact-intensive and therefore not properly addressed on a motion **[*82]** to dismiss.

The parties cite somewhat differently worded standards to support their respective positions on what the due diligence prong requires. Defendants cite In re Lower Lake Erie, in which the Court of Appeals held that a plaintiff must show that he "exercised due diligence in investigating his cause of action." *998 F.2d at 1178-79*. Plaintiffs, on the other hand cite Matthews v. Kidder, Peabody & Co., Inc., where the Court of Appeals held that a plaintiff must show that his ignorance is not attributable to a lack of "reasonable due diligence in attempting to uncover the relevant facts." *260 F.3d 239, 256 (3d Cir. 2001)*.

While the wording of the due diligence prong has differed slightly among Third Circuit case law, its substance has remained consistent. ***HN82***[] The due diligence prong is rooted in the notion of inquiry notice: that an injury accrues when a reasonable plaintiff under the circumstances would have discovered it. See *Matthews, 260 F.3d at 251*. As previously discussed, a federal antitrust injury accrues when an overt act is committed that injures the plaintiff, thereby triggering the four-year statute of limitations; however, one or more affirmative acts of concealment "may **[*83]** toll the statute of limitations [] if [they] mislead[] a plaintiff into thinking that he does not have a cause of action." *Davis v. Grusemeyer, 996 F.2d 617, 624 (3d Cir. 1993)*, overruled on other grounds by *Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998)*. Thus, to establish the due diligence prong of fraudulent concealment, a plaintiff must affirmatively show that he was not on inquiry notice of the alleged antitrust conspiracy. See id. ("A key aspect of a plaintiff's case alleging fraudulent concealment is [] proof that the plaintiff was not previously on notice of the claim he now brings." (citations omitted)).

HN83[] In this Circuit, "inquiry notice [is] analyzed in two steps." [21] *Matthews, 260 F.3d at 252*. "First, the burden is on the defendant[s] to show the existence of 'storm warnings.'" Id. In this case, a storm warning would be information or data that would alert a reasonable MgO purchaser of ordinary intelligence to potentially culpable conduct. "Second, if the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discovery their injuries." Id. **[*84]** This requires Plaintiffs to show that (1) they investigated the storm warnings and (2) in their investigation, they exercised the due diligence expected of a reasonable DBM or CCM purchaser of ordinary intelligence. See id.

As Plaintiffs point out, this inquiry is necessarily bound up with the facts of the case because it "implicates factual questions as to when [a] plaintiff discovered or should have discovered the elements of the cause of action," *id. at 250* (quotations and citation omitted); see also *Mercedez-Benz, 157 F. Supp. 2d at 373* ("At a minimum, this issue will involve assessing the factual circumstances surrounding the accused purchasing transactions and whether

[21] While the following inquiry notice analysis is laid out in the context of a RICO case, it has also been applied in antitrust cases involving price-fixing. See *In re Aspartame Antitrust Litig., 416 Fed. App'x. 208, 211-12 (3d Cir. 2011)*; *In re Electrical Carbon Prods. Antitrust Litig., 333 F. Supp. 2d 303, 317 (D.N.J. 2004)*.

those circumstances would have put a reasonably diligent plaintiff on notice of a price-fixing conspiracy"), and, as a result, at the pleading stage, this court has been hesitant to dismiss an **[*85]** otherwise fraudulently concealed antitrust claim for failure to sufficiently allege due diligence. See *In re Electrical Carbon Prods., 333 F. Supp. 2d at 317-18*; *Mercedez-Benz, 157 F. Supp. 2d at 374*.

Citing to In re Publication Paper and Hinds County, Defendants maintain that, at the pleading stage, the due diligence prong nonetheless requires that "Plaintiffs [] allege with particularity when the Named Plaintiffs or Class members became aware of the antitrust violations and what inquiries [they] made into the activities alleged in the complaint." (Sumitomo Reply Br., 18) (internal quotations omitted). In In re Publication Paper, the plaintiffs alleged that they were aware of certain suspicious activities two years before the end of the limitations period. See *2005 U.S. Dist. LEXIS 19896, 2005 WL 2175139, at *5*. Accordingly, the court found that the plaintiffs were therefore required allege they steps they took to investigate those activities. See id. Here, however, Plaintiffs do not allege any suspicious activities or storm warnings within the limitations period.

Defendants' citation to Hinds County is more persuasive. In that case, the plaintiffs attempted to satisfy the due diligence prong by ***HN84***[] alleging that they **[*86]** "did not discover, nor could have discovered through reasonable diligence, that [d]efendants and their co-conspirators were violating the antitrust laws until shortly before this litigation was commenced, because [d]efendants and their co-conspirators were using deceptive and secret methods to avoid detection and affirmatively conceal their violations." *Hinds County, 620 F. Supp. 2d at 521-22*. The court found that allegation too vague to satisfy *Rule 9(b)* and further explained that to deem such an allegation sufficient would "allow[] the allegations required to satisfy the first prong of fraudulent concealment to also satisfy the third prong." *Id. at 521-22*.

The Court finds this logic persuasive. Here, Plaintiffs allege that, due to the secretive nature of the alleged MgO conspiracy, "neither plaintiffs nor the class members had knowledge of any of the foregoing violations, and neither plaintiffs nor the class members, until recently, could have discovered through reasonable diligence that [D]efendants and their co-conspirators had engaged in the foregoing violations." (Direct CAC ¶ 49; Indirect CAC ¶ 56.) This allegation cannot satisfy the requirements of *Rule 9(b)*, particularly when **[*87]** it fails to encompass when and how Plaintiffs ultimately discovered the alleged MgO conspiracy—information that is certainly with Plaintiffs' control. See *In re Craftmatic, 890 F.2d at 645*. Without some level of specificity regarding Plaintiffs' discovery of the alleged conspiracy, it is impossible to discern whether Plaintiffs could or should have discovered it within the limitations period. Thus, Plaintiffs have failed to meet the due diligence prong of fraudulent concealment. However, Plaintiffs will be granted leave to amend to adequately plead, in accordance with *Rule 9(b)*, (1) when and how they discovered the alleged MgO conspiracy, and (2) that the self-concealing nature of the conspiracy and/or pretextual justifications for Defendants' price increases made it so that they were not alerted to any storm warnings that would otherwise trigger an obligation to perform due diligence. See *In re Burlington Coat Factory Litig., 114 F.3d at 1434*.

E. IP Plaintiffs' Claims for Violations of Various States' Consumer Protection Laws

IP Plaintiffs assert claims under California, Florida, Hawaii, Massachusetts, Montana, Nebraska, New Hampshire, New York, South Carolina, and Vermont consumer **[*88]** protection and unfair competition laws. As with IP Plaintiffs' antitrust claims under state law, Defendants argue that IP Plaintiffs lack standing to assert their consumer protection claims, except that under California law, because they "do not allege purchases in any of the 10 states other than California." (Sumitomo (IP Pl.'s) Br., 5). Defendants further argue that these claims should be dismissed because IP Plaintiffs do not plead them with particularity in accordance with *Federal Rule of Civil Procedure 9(b)*.

i. Standing

IP Plaintiffs' standing to sue under a state's consumer protection law is analogous to their standing under a state's ***antitrust law***. As discussed in Point B, IP Plaintiffs' failure to tie their injuries or Defendants' unlawful conduct to a number of states was fatal to their standing to sue because the antitrust laws of those states require a showing that part of Defendants' conduct occurred or had an effect in-state. On the other hand, IP Plaintiffs have standing to sue under the antitrust laws that have no such requirement.

Similarly, many of the ***HN85***[] consumer protection and unfair competition laws asserted by IP Plaintiffs require that Defendants' unlawful conduct **[*89]** affect trade and commerce in the state under whose law they are suing, see *MCA 30-14-103*, *102* (Montana) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. . . . [T]rade or commerce [must] directly or indirectly affect[] the people of this state."); ***HN86***[] *MGLA §§ 93A 1*, 2 (Massachusetts) (same); ***HN87***[] *S.C. Code 1976 §§ 39-5-10*, *20* (South Carolina) (same); ***HN88***[] *Neb. Rev. St. §§ 59-1602*, *1601* (Nebraska) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful. . . . Trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."); ***HN89***[] *N.H. Rev. Stat. § 358-A:2* (New Hampshire) ("It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state."); ***HN90***[] *N.Y. Gen. Bus. Law § 349* (New York) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."); *Sherman v. Ben & Jerry's Franchising, Inc., 08-CV-207, 2009 U.S. Dist. LEXIS 72663, 2009 WL 2462539, at *10 (D.Vt. Aug. 10, 2009)* **[*90]** (***HN91***[] Out of state plaintiffs alleging out of state conduct do not have standing to sue under Vermont Consumer Fraud Protection Act), while others do not, see ***HN92***[] *F.S.A. 501.204*, *501.211* (Florida); ***HN93***[] *HRS 480-2*, *480-13* (Hawaii). [22]

IP Plaintiffs' allegations that "Defendants agreed to, and did in fact, act in restraint of trade or commerce in a market that includes the above states, by affecting, fixing, controlling, and/or maintaining, at artificial and noncompetitive levels, the prices at which MgO and MgO Products were sold, distributed, or obtained in those states;" "MgO price competition was restrained, suppressed, and eliminated throughout the states;" and "MgO prices were raised, fixed, maintained, and stabilized at artificially high levels throughout the states" (Indirect CAC ¶¶ 79, 81) are conclusory and do not tie their injuries to the alleged conspiracy's effect on trade and commerce in those specific states. Therefore, IP Plaintiffs' consumer protection claims under Montana, Massachusetts, Nebraska, New Hampshire, and New York law are dismissed for lack of standing.

*ii. [*92] Pleading Requirements*

HN94[] The consumer protection laws of Florida and Hawaii—under which IP Plaintiffs currently maintain standing to sue—require that they plead the circumstances of any alleged fraudulent conduct with particularity in accordance with *Rule 9(b)*. See *Jovine v. Abbott Laboratories, Inc., 11-CV-80111, 795 F. Supp. 2d 1331, 2011 U.S. Dist. LEXIS 39702, 2011 WL 1376029 (S.D.Fla. Apr. 12, 2011)* (applying *Rule 9(b)* to allegations of unfair or deceptive acts or practices under the Florida Deceptive and Unfair Trade Practices Act); *Cannon v. U.S. Bank, NA, Civ. No. 11-00079, 2011 U.S. Dist. LEXIS 46455, 2011 WL 1637415, (D. Hawai'i Apr. 29, 2011)* (applying *Rule 9(b)* to allegations of fraudulent business practices under the Hawaii State Unfair and Deceptive Business Practices Act); *Athena Feminine Techs., Inc. v. Wilkes, No. C 10-4868, 2011 U.S. Dist. LEXIS 103209, 2011 WL 4079927 (N.D.Cal. Sept. 13, 2011)* ("[A] claim brought under the fraudulent prong of the [Unfair Competition Law] must be pled with particularity under *Rule 9(b)*").

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[22] Thus, contrary to Defendants' contention, the fact that IP Plaintiffs fail to allege that they reside or purchased an MgO product in a given state does not automatically deprive them of standing to sue under the state's consumer protection or unfair competition law. To be sure, the case Defendants cite in support of this contention held that the named plaintiffs in that case lacked standing to assert consumer protection and unfair competition claims under the laws of states in which they neither resided nor suffered an injury. See *In re Potash 667 F. Supp. 2d at 924*. However, the Court cannot accept this holding as a bright line rule. Standing issues are intimately bound up with the elements of the particular claim asserted, as a plaintiff must establish that his injury is "fairly traceable to the challenged action of the defendant." *Lujan, 504 U.S. at 560*; see also *Blum, 457 U.S. at 999* ("The **[*91]** complaining party must also show that he is within the class of persons who will be concretely affected."); *Allen, 468 U.S. at 752* ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.").

IP Plaintiffs' allegations that "Defendants deliberately failed to disclose material facts to Plaintiff and the classes concerning Defendants' unlawful activities and artificially inflated prices for MgO and MgO Products," and "misrepresented to all consumers **[*93]** during the Class Period that Defendants' MgO prices were competitive and fair" (Indirect CAC ¶ 80); see also (Indirect CAC ¶ 83) (alleging "affirmative misrepresentations and omissions concerning the price of MgO") are not set forth with any measure of particularity. See *In re Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 270 (3d Cir. 2006)* (***HN95***[] Under *Rule 9(b)*, a plaintiff must allege fraud with particularity by pleading the following: "(1) a specific false representation [or omission] of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his [or her] damage." (quotations and citation omitted)). Accordingly, IP Plaintiffs' consumer protection and unfair competition claims under Florida and Hawaii law are dismissed to the extent they are premised on Defendants' fraudulent conduct. However, IP Plaintiffs are granted leave to amend their allegations to comply with the requirements of *Rule 9(b)*. Additionally, at this time, those claims may move forward to the extent they are premised on allegations of Defendants' **[*94]** engaging in unfair competition, as there is no indication that *Rule 9(b)* applies to such allegations.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED to the following extent only. The Court rules as follows:

(1) IP Plaintiffs' federal and state antitrust claims are dismissed without prejudice for lack of standing. IP Plaintiffs have thirty (30) days to amend their allegations to set forth (1) the specific products purchased containing DBM or CCM and (2) the nexus between an increase in the price of those products and the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets.

(2) IP Plaintiffs' antitrust claims under Arizona, the District of Columbia, Hawaii, Illinois, Maine, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and West Virginia law are dismissed with prejudice for lack of standing.

(3) Plaintiffs' federal and state antitrust claims are dismissed without prejudice as time-barred under the applicable statutes of limitations. Plaintiffs have thirty (30) days to amend their allegations of fraudulent concealment to equitably toll those **[*95]** statutes of limitations.

(4) IP Plaintiffs' consumer protection and unfair competition claims under Montana, Massachusetts, Nebraska, New Hampshire, and New York are dismissed with prejudice for lack of standing.

(5) IP Plaintiffs' consumer protection and unfair competition claims under Florida and Hawaii law are dismissed without prejudice to the extent they are premised on allegations of Defendants' fraudulent conduct. IP Plaintiffs have thirty (30) days to amend those allegations to comply with *Federal Rule of Civil Procedure 9(b)*.

The Court will enter an order implementing this opinion.

/s/ **Dickinson R. Debevoise**

DICKINSON R. DEBEVOISE, U.S.S.D.J.

Dated: October 20, 2011

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Expedite, Inc. v. Plus, Bags, Cars & Serv, LLC

United States District Court for the District of Oregon, Portland Division

October 21, 2011, Decided; October 21, 2011, Filed

Civ. No. 11-329-AC

Reporter
2011 U.S. Dist. LEXIS 147740 *; 2011 WL 6399460

EXPEDITE, INC., Plaintiff, v. PLUS, BAGS, CARS & SERV, LLC, a Florida corporation, Defendant.

Subsequent History: Adopted by, Claim dismissed by, Without prejudice, Claim dismissed by *Expedite, Inc. v. Plus, Bags, Cars & Serv, LLC, 2011 U.S. Dist. LEXIS 146561 (D. Or., Dec. 19, 2011)*

Core Terms

baggage, vendors, alleges, antitrust, delivery, Sherman Act, airlines, Clayton Act, bid, delivery service, fraud claim, monopolization, subsidiaries, consumers, contracts, intentional interference, restraint of trade, motion to dismiss, commerce, prices, economic relations, claim for relief, Recommendations, pleads, supplemental jurisdiction, cause of action, state law claim, anti trust law, leave to amend, rule of reason

LexisNexis® Headnotes

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

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

Fed. R. Civ. P. 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. In considering a 12(b)(6) motion to dismiss, the court construes all allegations in the light most favorable to the non-moving party. The court must accept all well-pleaded facts as hue and draw all reasonable inferences in favor of the plaintiff. The Supreme Court addressed the proper pleading standard under *Rule 12(b)(6)* in Bell Atlantic Corp. v. Twombly, a case involving anti-trust claims. Twombly established the need to include facts sufficient in the pleadings to give proper notice of the claim and its basis: While a complaint attached by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiffs obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Since Twombly, the U.S. Supreme Court has clarified that the pleading standard announced therein is generally applicable to cases governed by the Rules, not only to those cases involving antitrust allegations. The Iqbal court explained that Twombly was guided by two specific principles. First, although the court must accept as true all facts asserted in a pleading, it need not accept as true any legal conclusion set forth in a pleading. Second, the complaint must set forth facts supporting a plausible claim for relief and not merely a possible claim for relief. The court instructed that determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

The U.S. Court of Appeals for the Ninth Circuit explained the Twombly-Iqbal standard in Moss v. U.S Secret Service. The Moss court reaffirmed the Iqbal holding that a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inference from that content must be plausibly suggestive of a claim entitling the plaintiff to relief.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] **Sherman Act, Claims**

Section 1 of the Sherman Act provides a cause of action for contracts, combinations, or conspiracies in restraint of trade. *15 U.S.C.S. § 1*. *Section 2* of the Sherman Act provides a cause of action for monopolies and attempted monopolies in restraint of trade. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

Section 1 of the Sherman Act provides that every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. Though *§ 1* could be read to prohibit all contracts, courts do not take a literal approach to its language. Rather, *§ 1* is read to outlaw only unreasonable restraints.

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

HN6[] **Per Se Rule & Rule of Reason, Sherman Act**

To state a claim under *§ 1* of the Sherman Act, a plaintiff must plead evidentiary facts showing (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint of trade affected interstate commerce. The per se rule of illegality is used when an agreement facially appears to be one that would always or almost always restrict competition and decrease output. Examples of agreements judged under the per se rule are agreements between competitors to fix prices or divide markets. Application of the per se rule is limited, however, and most courts analyze agreements under the rule of reason.

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

HN7[] **Per Se Rule & Rule of Reason, Sherman Act**

Under the rule of reason analysis, a plaintiff must allege "antitrust injury", that is, that the agreement at issue actually caused injury to competition within a market, beyond its impact on the plaintiff. When analyzing whether an agreement violates the Sherman Act under the rule of reason, the focus is the direct result of anti competitive conduct on consumers. Congress designed the Sherman Act to protect consumers or purchasers of goods in a market. Accordingly, antitrust injury manifests as higher prices, lower output, or decreased quality in the products within a defined market.

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

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The focus of antitrust lawsuits is to protect consumers, not to protect producers or ensure that one firm gets a certain amount of business.

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

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

If the plaintiff simply wants the transfer of benefits that a defendant is reaping in the market, without discernable benefits to consumers, it is likely that no antitrust injury exists.

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

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust laws are focused on protecting consumers, not vendors.

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

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

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

Though claims under *§ 1* and *§ 2* of the Sherman Act differ, both require allegations of anticompetitive activity to state a claim. *Section 2* of the Sherman Act provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. *15 U.S.C.S. § 2*. To state a claim for monopolization under *§ 2*, a plaintiff must plead facts showing that the defendant (1) possesses monopoly power in the relevant market; (2) willfully acquired or maintained that power; and (3) causal antitrust injury. Because antitrust laws seek to promote competition, including lawful competition by monopolists, proof of anticompetitive conduct is vital for a *§ 2* claim.

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

HN12[] **Sherman Act, Scope**

A decline in one party's market share is not sufficient for a Sherman Act claim. reduction in competition does not invoke the Sherman Act until it harms consumer welfare. On the contrary, injuries to rivals are byproducts of vigorous competition of the kind and quality that antitrust laws seek to nurture.

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

HN13[] **Sherman Act, Scope**

Alleging the natural consequences of competition is insufficient to state a claim under *§ 2* of the Sherman Act.

Antitrust & Trade Law > Clayton Act > Scope

HN14[] **Antitrust & Trade Law, Clayton Act**

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act, prohibits commercial bribery in transactions involving the sale or purchase of goods that injures competition.

Antitrust & Trade Law > Clayton Act > Scope

HN15[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 13(c)*.

Antitrust & Trade Law > Clayton Act > Scope

HN16[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act applies exclusively to the sale of "goods, wares, or merchandise" and does not apply to contracts for services. Courts use a "dominant nature" standard to determine whether a transaction is for goods or services. Sometimes the dominant nature is clear, while in other instances courts look to factors such as the breakdown of costs and the supplying of ingredients. The dominant nature of transportation or delivery contracts is clearly service.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN17[] Regulated Practices, Price Discrimination

Section 2(f) of the Clayton Act provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. 15 U.S.C.S. § 13(f).

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN18[] Subject Matter Jurisdiction, Supplemental Jurisdiction

A district court has discretion on whether to exercise supplemental jurisdiction in a case arising from a common nucleus of operative fact where it has dismissed the original federal claims. 28 U.S.C.S. § 1367(c)(3). When deciding whether to exercise supplemental jurisdiction, a court should consider factors such as economy, convenience, fairness, and comity.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN19[] Antitrust & Trade Law

The right to exercise supplemental jurisdiction extends to antitrust cases.

Antitrust & Trade Law > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN20[] Antitrust & Trade Law

Under Oregon law, conduct that is permitted under ***antitrust law*** may not be punished as tortious interference.

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

HN21[] Actual Fraud, Elements

To state a claim for fraud under Oregon law, a plaintiff must prove the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.

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

HN22[] **Heightened Pleading Requirements, Fraud Claims**

In addition to proving the elements of fraud under Oregon law, *Fed. R. Civ. P. 9(b)* imposes the additional requirement that the circumstances of fraud be pled with particularity.

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

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN23[] **Heightened Pleading Requirements, Fraud Claims**

Claims of fraud must be plausible; that is, fraud claims must contain facts that raise a reasonable expectation that discovery will reveal evidence of the misconduct alleged.

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

HN24[] **Heightened Pleading Requirements, Fraud Claims**

The heightened pleading requirement of *Fed. R. Civ. P. 9(b)* requires that the parties state the time, place, and content of the fraudulent statement, in addition to what part of the statement is false or misleading, and why.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN25[] **Pleadings, Amendment of Pleadings**

Amendments to pleadings are governed by *Fed. R. Civ. P. 15(a)*, which provides that a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. *Fed. R. Civ. P. 15(a)*. The court recognizes that leave to amend should be granted with "extreme liberality." The U.S. Court of Appeals for the Ninth Circuit has held that a number of factors may bear on whether to grant leave to amend, such as prejudice to the non-moving party, bad faith by the moving party, and whether the amendment would be futile.

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Judges: JOHN V. ACOSTA, United States Magistrate Judge.

Opinion by: JOHN V. ACOSTA

Opinion

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiff Expedite, Inc. ("Expedite") alleges claims for violation of the Sherman Antitrust Act and the Clayton Act, as well as claims for intentional interference with economic relations and fraud.[1] Defendant Plus, Bags, Cars & Serv, LLC ("Plus") move for dismissal of all claims, arguing that Expedite has failed to state facts sufficient to constitute a claim for relief. Accordingly, Plus moves the court to dismiss Expedite's claims with prejudice. For the reasons set forth below, the court recommends that Plus's *Rule 12(b)(6)* **[*2]** motion be GRANTED.

Background

The alleged facts are taken as true from the pleading in question. Since 2000, Expedite, an Oregon-based corporation, has operated a baggage claim and delivery service at Portland International Airport ("PDX"). Expedite takes lost baggage recovered by customer airlines and delivers the baggage to its respective owners in Oregon and Washington.

As of 2000, Expedite and other baggage delivery vendors obtained contracts with airlines by winning a sealed bid process. Baggage delivery vendors would submit sealed bids to an intermediary, the intermediary would deliver the bids to airlines, and the airlines would select their preferred vendors. In January 2009, Diversified Services International ("DSI"), a bid-sourcing agent, became the intermediary for several major airlines. Tracy Hoffman served as DSI's officer agent. Expedite used DSI to obtain contracts with customer airlines, including Alaska Airlines ("Alaska") and Delta Airlines ("Delta").

In June 2009, Plus, a Florida-based corporation, purchased DSI. Following the purchase, Home **[*3]** Serv, a subsidiary corporation of Plus, began serving as the intermediary between baggage-delivery vendors and airlines. At the same time, Bags, Inc., a different subsidiary corporation of Plus, began placing bids as a baggage delivery vendor. Expedite alleges that Bags, Inc., learned of the content of other baggage delivery vendors's bids from Home Serv and used that knowledge to outbid other baggage delivery vendors, including Expedite.

Expedite alleges that around June 2009, Plus and Alaska secretly agreed that Alaska would award its baggage delivery exclusively to Bags, Inc. In November 2010, Home Serv sent Expedite a letter stating that Alaska and Plus were now jointly selecting baggage-delivery vendors for Alaska. The letter was issued by Tracy Hoffman, the former DSI employee now employed by Plus. The letter stated that Plus and Alaska would be basing their selections off of "evaluation of cost, service levels, vendor history/track record as well as the vendor's local or regional presence," and that Plus and Alaska were replacing Expedite with an alternate baggage-delivery vendor. (First Amended Complaint ¶ 24.) At the end of November 2010, Alaska sent Expedite a letter confirming **[*4]** that Alaska had replaced Expedite's contract for a contract with Bags, Inc. Plus and Delta subsequently formed a similar exclusive baggage delivery contract.

Expedite alleges that other baggage delivery vendors have left and are leaving PDX as a result of Plus' actions, and that Expedite's own share of the baggage-delivery market has declined from eighty to approximately twenty percent.

Legal Standard

HN1[] *Rule 12(b)(6)* allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. In considering a 12(b)(6) motion to dismiss, the court construes all allegations in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*. The

[1] Expedite included a claim for injunctive relief in its First Amended Complaint, but withdrew this claim in its response briefing.

court must accept all well-pleaded facts as hue and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P 'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)*.

The Supreme Court addressed the proper pleading standard under *Rule 12(b)(6)* in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, a case involving anti-trust claims. *Twombly* established the need to include facts sufficient in the pleadings to give proper notice **[*5]** of the claim and its basis:

> While a complaint attached by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiffs obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. at 555 (brackets omitted).

HN2[] Since *Twombly*, the Supreme Court has clarified that the pleading standard announced therein is generally applicable to cases governed by the Rules, not only to those cases involving antitrust allegations. *Ashcroft v. Iqbal, 556 U.S.662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. The *Iqbal* court explained that *Twombly* was guided by two specific principles. First, although the court must accept as true all facts asserted in a pleading, it need not accept as true any legal conclusion set forth in a pleading. *Id*. Second, the complaint must set forth facts supporting a plausible claim for relief and not merely a possible claim for relief. *Id*. The court instructed that "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common **[*6]** sense." *Iqbal, 129 S. Ct. at 1949-50* (*citing* *Iqbal v. Hasty, 490 F.3d 143, 157-158 (2nd Cir. 2007))*. The court concluded: "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id. at 1950*.

HN3[] The Ninth Circuit further explained the *Twombly-Iqbal* standard in "*Moss v. U.S Secret Service, 572 F.3d 962 (9th Cir. 2009)*. The *Moss* court reaffirmed the *Iqbal* holding that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Moss, 572 F.3d at 969* (*quoting* *Iqbal, 129 S. Ct. at 1949*). The court in *Moss* concluded by stating: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inference from that content must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss, 572 F.3d at 969*.

Discussion

I. Sherman Act

Expedite captions its first claim for relief "Statutory Violation **[*7]** of Sherman Antitrust Act, *15 U.S.C. § 1 et. seq.*" and alleges a claim for "restraint of trade or monopolization." (FAC ¶¶ 30-41.) ***HN4***[] *Section 1* of the Sherman Act provides a cause of action for contracts, combinations, or conspiracies in restraint of trade. *15 U.S.C. § 1*. *Section 2* of the Sherman Act provides a cause of action for monopolies and attempted monopolies in restraint of trade. *15 U.S.C. § 2*. In moving to dismiss Expedite's Sherman Act claim, Plus exclusively addresses claims arising under *Section 1*. However, viewing Expedite's first claim in the light most favorable to Expedite, the court assumes it alleges a cause of action under both *Section 1* for restraint of trade and *Section 2* for monopolization.

I. Restraint of trade

Plus contends that Expedite's First Amended Complaint does not state a claim under the Sherman Act because it does not contain factual allegations that Plus's actions had an adverse effect on competition in the baggage delivery market at PDX.

HN5[] Section 1 of the Sherman Act provides: "Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to **[*8]** be illegal." 15 U.S.C. § 1. Though Section 1 could be read to prohibit all contracts, courts do not take a literal approach to its language. Texaco Inc. v. Dagher, 547 U.S. 1,5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006). Rather, Section 1 is read to "outlaw only unreasonable restraints." State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

HN6[] To state a claim under Section 1 of the Sherman Act, a plaintiff must plead evidentiary facts showing "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint of trade affected interstate commerce." Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 (9th Cir. 1991). The per se rule of illegality is used when an agreement facially appears to be one that would always or almost always restrict competition and decrease output. Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, 1025 (9th Cir. 1988). Examples of agreements judged under the per se rule are agreements between competitors to fix prices or divide markets. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). Application of the per se rule is limited, however, and **[*9]** most courts analyze agreements under the rule of reason. Hahn at 1022.

HN7[] Under the rule of reason analysis, a plaintiff must allege "antitrust injury", that is, that the agreement at issue actually caused injury to competition within a market, beyond its impact on the plaintiff. Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 847 (9th Cir.1996) (citing Austin v. McNamara, 979 F.2d 728, 738 (9th Cir. 1992)). When analyzing whether an agreement violates the Sherman Act under the rule of reason, the focus is the direct result of anti competitive conduct on consumers. Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984). Congress designed the Sherman Act to protect consumers or purchasers of goods in a market. Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). Accordingly, antitrust injury manifests as higher prices, lower output, or decreased quality in the products within a defined market. Stearns v. Select Comfort Retail Corp., 08-2746 JF, 2009 U.S. Dist. LEXIS 48367, 2009 WL 1635931, at *13 (N.D. Cal. June 5, 2009).

Antitrust complaints that do not focus on injury to consumers are usually unsuccessful. In *Phillips Getschow Co. v. Green Bay Brown County Professional Football Stadium District*, **[*10]** a contracting company that unsuccessfully bid on a renovations contract for a stadium sued the entities in charge of the bidding process, alleging bid-rigging in violation of Section 1 of the Sherman Act. 270 F. Supp. 2d 1044, 1045 (E.D. Wis. 2003). The plaintiff alleged that the general contractor disclosed submitted bids to the favored bidder, improperly allowing the favored bidder to submit a new, lower bid and be awarded the contract. *Id*. The district court granted defendants' motion to dismiss, holding that the complaint did not allege facts that could cause antitrust injury. Id. at 1048. While the plaintiff was personally harmed because it did not receive the bid, the "consumer" of the bids--the general contractor--paid the same or a lower price than the plaintiff wanted. *Id*. Because HN8[] the focus of antitrust lawsuits is to protect consumers, not to protect producers or ensure that one firm gets a certain amount of business, the plaintiff did not have a claim under the Sherman Act. Id. at 1049. The court found the plaintiff's focus on injury to itself misplaced. It wrote: HN9[] "If the plaintiff simply wants the transfer of benefits that a defendant is reaping in the market, without discernable **[*11]** benefits to consumers, it is likely that no antitrust injury exists." *Id*

Expedite alleges two restraints in its First Amended Complaint: the agreement between Plus subsidiary Home Serv to provide closed bid information to fellow subsidiary Bags, Inc., allowing Bags, Inc., to underbid on baggage delivery contracts; and the exclusive dealing contract between Alaska and Bags, Inc. (FAC ¶ 13, 33.) Because neither restraint is of the type that always or almost always restricts competition, the restraints are judged under a rule of reason analysis.

Viewing the First Amended Complaint in the light most favorable to Expedite, Expedite does not allege sufficient facts from which the court can discern antitrust injury from either the collusion between Home Serv and Bags, Inc., or the exclusive contract between Plus and Alaska. Expedite does not plead that airlines pay higher prices for baggage delivery services, that airlines suffer from a shortage of baggage delivery services in general, that airlines' choice of baggage delivery vendors is limited to Bags, Inc., or that the quality of baggage delivery services has declined as a result of either restraint. Rather, the focus of Expedite's Complaint **[*12]** is on its own injuries, only passing reference to injury to other baggage delivery vendors.

HN10[] Antitrust laws are focused on protecting consumers, not vendors. In this instance, the ultimate consumers — the airlines at PDX — presumably *benefitted* from both restraints by paying less for baggage delivery services, and, in the cases of Alaska and Delta, by obtaining a preferred partner for baggage delivery services. These results are pro-competitive, not anticompetitive, and not actionable under anti-trust laws.

B. Monopolization

Expedite's claim for monopolization falters on similar grounds. ***HN11***[] Though *Section 1* and *Section 2* claims differ, both require allegations of anticompetitive activity to state a claim. *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811-12 (9th Cir. 1988)*. *Section 2* of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *15 U.S.C. § 2*. To state a claim for monopolization under *Section 2*, a plaintiff must plead facts showing that the defendant (1) possesses **[*13]** monopoly power in the relevant market; (2) willfully acquired or maintained that power; and (3) causal antitrust injury. *Rutman Wine Co. v. E. & J Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)*. Because antitrust laws seek to promote competition, including lawful competition by monopolists, proof of anticompetitive conduct is vital for a *Section 2* claim. *Arminak & Associates, Inc. v. Saint-Gobain Calmar, Inc., 789 F. Supp. 2d 1201, 2011 WL 2268066, at *3 (C.D. Cal. 2011)*.

While Expedite pleads that the contract between Plus and Alaska resulted in Expedite having a seventy percent share of the baggage delivery market at PDX, and that Expedite willfully acquired its share of power, Expedite again does not allege evidentiary facts supporting causal antitrust injury. Expedite essentially alleges that it had a monopoly on baggage delivery services at PDX and that its monopoly was replaced by Plus. ***HN12***[] A decline in one party's market share is not sufficient for a Sherman Act claim. "[R]eduction in competition does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421,1433 (9th Cir. 1995)* (citing *Products Liab. Ins. Agnecy, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663 (7th Cir. 1982))*. **[*14]** On the contrary, "'injuries to rivals are byproducts of vigorous competition' of the kind and quality that antitrust laws seek to nurture." *Arminak & Associates, 789 F. Supp. 2d 1201, 200 WL 2268066, at *2* (quoting *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986))*. Expedite does not allege that the airlines now suffer from a lack of baggage delivery services or that Plus's actions caused the price of baggage delivery services to increase. ***HN13***[] Alleging the natural consequences of competition is insufficient to state a claim under *Section 2* of the Sherman Act. Expedite's monopolization claim should be dismissed.

C. Intra-enterprise agreements

Of note, Plus argues in its Memorandum of Law in Support of Plus's Motion to Dismiss Amended Complaint that the agreement between Home Serv and Bags, Inc. to share bid information is an intra-enterprise agreement protected by *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752,759-60, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Though it does not impact this court's decision that Expedite's Sherman Act claims should be dismissed, the *Copperweld* doctrine does not apply to the case at hand. The reach of *Copperweld* is circuit-specific. Within the **[*15]** Ninth Circuit, *Copperweld* protection only applies to wholly-owned subsidiaries or subsidiaries where the same owner owns only a *de minimis* amount less than one hundred percent. *Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605, 609 (D. Or. 1990)*, *order clarified*, *1990 U.S. Dist. LEXIS 16159, 990 WL 200085 (D. Or. 1990)*; *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477 (D. Or. 1987)*. Construing the First Amended Complaint in the light most favorable to Expedite, Home Serv and Bags, Inc. are not *wholly-owned* subsidiaries, rendering the *Copperweld* protection inapplicable.

II. Clayton Act

The second claim that Expedite alleges is a statutory violation of the Clayton Act. (FAC ¶¶ 42-48.) Expedite alleges claims under *Section 2(c)* of the Clayton Act for payment or acceptance of commission or brokerage and under *Section 2(f)* for knowingly inducing or receiving discriminatory pricing.

A. Payment or acceptance of commission or brokerage.

Plus moves to dismiss Expedite's claim for relief under *Section 2(c)* of the Clayton Act because the Clayton Act applies solely to the sale of goods, and not to services. ***HN14***[] *Section 2(c)* of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act, **[*16]** prohibits commercial bribery in transactions involving the sale or purchase of goods that injures competition. *Harris v. Duty Free Shoppers Ltd P'ship, 940 F.2d 1272, 1274 (9th Cir. 1991)*. *Section 2(c)* provides:

> ***HN15***[] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein ... "

15 U.S.C. § 13 (c).

HN16[] The Clayton Act applies exclusively to the sale of "goods, wares, or merchandise" and does not apply to contracts for services. *May Dep't Store v. Graphic Process Co.., 637 F.2d 1211, 1213 (9th Cir. 1980)*. Courts use a "dominant nature" standard to determine whether a transaction is for goods or services. *Id at 1215*. Sometimes the dominant nature is clear, while in other instances courts look to factors such as the breakdown of costs and the supplying of ingredients. *Id*. The dominant nature of transportation **[*17]** or delivery contracts is clearly service. *See Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 140-141 (5th Cir. 1987)*(holding that for Clayton Act purposes storage and delivery of fuel is a service, not a good).

The analysis on this claim is brief. Expedite cannot state a claim under *Section 2(c)* of the Clayton Act because Expedite provided a service, not a tangible product. It is undisputed that Expedite's sole business is as a baggage transportation service, not as a baggage vendor. Expedite does not own or sell the baggage it delivers, and key to the statute's applicability is a "sale or purchase" of a tangible item. *Section 2(c)* of the Clayton Act does not apply to the case at hand.

B. Knowingly inducing or receiving discriminatory pricing

Plus moves to dismiss Expedite's *Section 2(f)* Clayton Act claim because Plus provided a service, not a good, and the Complaint does not allege that Plus participated in discriminatory pricing. ***HN17***[] *Section 2(f)* of the Clayton Act provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." *15 U.S.C. § 13 (f)*.

Expedite **[*18]** cannot state a claim under *Section 2(f)*. Again, Plus provided a baggage delivery service, not baggage itself, rendering the Clayton Act inapplicable. Even if baggage delivery were considered a good, however, *Section 2(f)* still would not apply to the case at hand. Congress designed *Section 2(f)* to prevent large chain buyers from exerting their buying power to obtain preferential prices in the purchase of goods. *Kapiolani Motors, Ltd v. Gen. Motors Corp., 337 F.Supp 102, 103 (D. Haw. 1972)*. Accordingly, *Section 2(f)* addresses the liability of *buyers* of goods. *Id*. In the case at hand, neither Plus nor Plus's subsidiaries are buyers of goods: Bags, Inc., sells baggage delivery services, and Home Serv sells bid-processing services. Because Plus and its subsidiaries are vendors, not purchasers, Section 2(f) cannot provide a cause of action for Expedite.

III. State Law Claims

A. Supplemental Jurisdiction

Expedite's third claim for intentional interference with economic relations and its fourth claim for fraud are state common law claims. ***HN18***[] A district court has discretion on whether to exercise supplemental jurisdiction in a case arising from a common nucleus of operative fact where it has dismissed **[*19]** the original federal claims. *28 U.S.C. §1367(c)(3)*. When deciding whether to exercise supplemental jurisdiction, a court should consider factors such as "economy, convenience, fairness, and comity." *Acri v. Varian Associates, Inc., 114 F.3d 999,1001 supplemented*, *121 F.3d 714 (9th Cir. 1997)*.

HN19[] The right to exercise supplemental jurisdiction extends to antitrust cases. In *nSight, Inc. v. PeopleSoft, Inc.*, the Ninth Circuit reviewed the district court's grant of summary judgment to the defendant on both state and federal antitrust claims. *296 F. App'x 555, 557 (9th Cir. 2008)*. On appeal, the plaintiff argued that the district court erred in exercising supplemental jurisdiction over the state law claims after it had dismissed the federal claims. *Id at 559*. The Ninth Circuit affirmed the district court's decision, holding that the district court advanced judicial economy and convenience to the parties by retaining jurisdiction over the state claims. *Id. at 559*.

For the same values of judicial economy and convenience, this court chooses to exercise jurisdiction over Expedite's state law claims. B. *Intentional Interference with Economic Relations*

Expedite's third claim is a state law claim **[*20]** for intentional interference with economic relations and prospective business advantage. (FAC ¶¶ 49-55.) Expedite alleges that Plus intentionally interfered with Expedite's business relationship with Delta and other airlines when Home Serv communicated other vendors' bids to Bags, Inc. and allowed Bags, Inc. to use that knowledge to outbid other vendors.

Expedite's intentional interference claim is cased on conduct it alleges violates ***antitrust law***.***HN20***[] Under Oregon law, however, "conduct that is permitted under ***antitrust law*** may not be punished as tortious interference." *Kovac v. Crooked River Ranch Club & Maint. Ass'n, 186 Ore. App. 545, 552, 63 P.3d 1197 (2003)* (holding that dismissal of antitrust claim necessitates dismissal of interference with business relationship claim), *see also Cascade HealthSolutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008)* (holding that dismissal of antitrust claims necessitates dismissal of intentional interference with prospective economic advantage claim). The court's finding on Expedite's third claim follows from its earlier analysis on the first and second claims. Because Expedite did not state a claim for violation of the Sherman Act or Clayton Act, Expedite cannot **[*21]** state a claim for intentional interference with economic relations.

C. Fraud

Expedite's fourth claim is a state law claim for fraud. (FAC ¶¶ 56-63.) ***HN21***[] To state a claim for fraud under Oregon law, a plaintiff must prove the following elements:

> "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury."

Wieber v. FedEx Ground Package Sys., Inc., 231 Ore. App. 469, 480, 220 P.3d 68 (2009) (quoting *Conselmann v. N.WP.&D. Prod. Co., 190 Or. 332, 350, 225 P.2d 757 (1950))*. ***HN22***[] In addition to proving the elements of fraud under Oregon law, *Federal Rule of Civil Procedure ("Rule") 9(b)* imposes the additional requirement that the circumstances of fraud be pled with particularity. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,1103 (9th Cir. 2003)*.

Drawing all reasonable inferences in favor of the plaintiff, Expedite does not state a claim for fraud. ***HN23***[] Claims of fraud must be plausible; that is, fraud claims must contain **[*22]** facts that raise a reasonable expectation that discovery will reveal evidence of the misconduct alleged. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011)*. Expedite bases its fraud claim on the November 2010 letter from Plus to Expedite. In that letter, Plus informed Expedite that its contract with Alaska was terminated and that Plus and Alaska would be using the additional criteria of "evaluation of cost, service levels, vendor history/track record as well as the vendor's local or regional presence" to select vendors. (FAC ¶¶ 58-63.) Expedite alleges that these statements regarding the criteria for awarding baggage delivery contracts were false and that Expedite relied on these statements to its detriment. However, Expedite pleads that it began losing contracts as a result of Plus's conduct in June 2009, nearly a year and a half before the November 2010 letter. To successfully plead a fraud claim, the alleged damage must result from a fraudulent statement, not precede it. It is not plausible that Expedite relied on a November 2010 letter in June 2009.

Of note, Expedite's fraud claim in its FAC also mentions June 2009 "materially false statements **[*23]** to plaintiff regarding the criteria for being awarded bidding contracts." (FAC ¶ 62.) Expedite's opposition brief exclusively addresses the November 210 letter. Even if this court ignored the opposition brief and examined the FAC mention of June 2009 statements, Expedite would not state a claim for fraud. ***HN24***[] The heightened pleading requirement of *FRCP 9(b)* requires that the parties state the time, place, and content of the fraudulent statement, in addition to what part of the statement is false or misleading, and why. *Ebeid ex. rel. U.S. v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010)*. Expedite does not clarify what statement in June 200 it is referencing, how the statement was made, or why the statement was false. Expedite's fraud claim is not pleaded with particularity, and should be dismissed.

Leave to Amend

HN25[] Amendments to pleadings are governed by *Federal Rule of Civil Procedure ("Rule") 15(a)*, which provides: "A party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Fed.R. Civ.P. 15(a)*. The court recognizes that leave to amend should be granted with "extreme liberality." *Eminence Capital, LLC. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir.2003)* **[*24]** . The Ninth Circuit has held that a number of factors may bear on whether to grant leave to amend, such as prejudice to the non-moving party, bad faith by the moving party, and whether the amendment would be futile. *Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir.1999)*. Here, on the record Expedite has presented or otherwise not objected to, Expedite can plead no set of facts to maintain claims for violation of the Sherman Act, violation of the Clayton Act, or intentional interference with economic relations. Accordingly, leave to amend for these claims should not be granted. However, this court recommends granting leave to amend on Expedite's fraud claim alone to allow Expedite to plead its claim with specificity.

Conclusion

For the reasons stated above, Plus's Rule 12(b)(6) motion should be GRANTED.

Scheduling Order

The Findings and Recommendations will be referred to a district judge. Objections, if any, are due November 4, 2011. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within fourteen days after being served with **[*25]** a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and

Recommendations will go under advisement.

DATED this 21st day of October 2011.

/s/ John V. Acosta

JOHN V. ACOSTA

United States Magistrate Judge

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[Williams v. Mission Viejo Emergency Med. Assocs.](#)

Court of Appeal of California, Fourth Appellate District, Division Three

October 21, 2011, Filed

G043849

Reporter
2011 Cal. App. Unpub. LEXIS 7990 *; 2011 WL 5025932

JUDY WILLIAMS et al., Plaintiffs and Appellants, v. MISSION VIEJO EMERGENCY MEDICAL ASSOCIATES, Defendant and Respondent.

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

Prior History: [*1] Appeal from a judgment of the Superior Court of Orange County. Super. Ct. No. 30-2008-00076369. Nancy Wieben Stock, Judge.

Disposition: Affirmed.

Core Terms

unfair, cause of action, demurrer, consumer, leave to amend, customary, restitution, patients, billing, reasonable rate, unjust enrichment, breach of contract, fair dealing, out-of-network, plaintiffs', prong, unfair business practice, declaratory, deductible, notice, cases, rates, amended complaint, trial court, list price, chargemaster, fraudulent, discovery, terms

Counsel: Law Offices of Ron Bochner and Ron Bochner for Plaintiffs and Appellants.

Call & Jensen, Ward J. Lott, Melinda Evans and Kent R. Christensen for Defendant and Respondent.

Judges: RYLAARSDAM, ACTING P. J.; BEDSWORTH, J., O'LEARY, J. concurred.

Opinion by: RYLAARSDAM

Opinion

Plaintiffs Judy Williams and Russell Williams appeal from the judgment entered after the trial court sustained without leave to amend defendant Mission Viejo Emergency Medical Associates's demurrer to their second amended complaint for unjust enrichment and restitution, breach of contract and the implied covenant of good faith and fair dealing, declaratory and injunctive relief, unfair business practices, and fraud. They contend they alleged sufficient facts to support each cause of action and the court abused its discretion in denying leave to amend. Finding no error, we affirm.

FACTS

In 2004, Mr. Williams was treated in the emergency room of Mission Viejo Medical Center, where defendant provided emergency room physicians. Although the medical center accepted his Blue Shield insurance, defendant did not. Because it was **[*2]** an "out-of-network" provider for Blue Shield insureds, defendant charged them a different rate than for in-network patients.

Plaintiffs sued defendant alleging they were unreasonably required to pay defendant "the $281.00 list price solely because they were deemed to be out of network for this treatment and thus, like the uninsured, are members of the sole class of patients compelled to pay [defendant's] unreasonable chargemaster or list price." They alleged this charge was "not the usual, customary or reasonable rate, and was . . . unauthorized by law."

The second amended (operative) complaint asserted five causes of action on behalf of plaintiffs and a putative class: (1) unjust enrichment and restitution; (2) breach of contract and the implied covenant of good faith and fair dealing; (3) declaratory and injunctive relief; (4) unfair business practices; and (5) fraud. Each was based on the claim the rates charged to uninsured and out-of-network patients were unreasonable because they differed from rates charged to patients with private insurance (in-network patients) or those covered by government programs. The putative class included plaintiffs and "similarly-situated insured and **[*3]** uninsured individuals who were responsible for payment for treatment for emergency room and related professional services, who were, or will be, billed by [defendant] at its full list, chargemaster price, which is not the usual, customary or reasonable rate and is otherwise not the lawful rate."

Defendant demurred to the complaint on the ground it failed to state a cause of action. In connection with the demurrer, it requested the court take judicial notice of admissions made by plaintiffs in declarations filed in support of their opposition to defendant's motion for summary judgment. Although the motion had been taken off calendar when the court granted plaintiffs leave to file a first amended complaint, the documents remained part of the court record.

In their declarations, plaintiffs explained their claims arose from one visit to the emergency room by Mr. Williams where he received medical services from defendant. After plaintiffs requested Blue Shield pay defendant's $281 bill, Blue Shield sent them a check for $175.68, representing the full amount minus the $105.32 deductible remaining on their account.

The trial court granted defendant's request for judicial notice and sustained **[*4]** its demurrer without leave to amend. On the breach of contract cause of action, it cited plaintiffs' failure to allege the contract terms or whether the contract was written, oral, or implied. It also noted a contract mandating payment of a specific amount before emergency healthcare is rendered was likely unenforceable and, in any event, plaintiffs conceded they paid only their out-of-network deductible and not defendant's bill. As to the unfair business practices claim, it found insufficient facts to show defendant's acts were unlawful, unfair, or fraudulent, or that defendant's billing practices were unreasonable. Regarding the fraud cause of action, the court again observed plaintiffs did not suffer the alleged harm of being "fully balance-billed [defendant's] full list price or chargemaster rate" because they admitted they only paid their out-of-network deductible. Additionally, plaintiffs had failed to plead scienter or fraud with the necessary specificity. Because these claims failed, the court concluded plaintiffs did not have viable causes of action for unjust enrichment or injunctive and declaratory relief.

Plaintiffs filed a motion for reconsideration, to allow discovery **[*5]** to locate new class representatives, and to compel further responses to discovery. They reasoned the court's order sustaining defendant's demurrer without leave to amend may have been premised on their lack of standing and they were entitled to discovery to seek substitute class representatives. They also submitted a proposed third amended complaint. The court denied the motion and dismissed the action with prejudice.

DISCUSSION

1. Standard of Review

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action, considering judicially noticeable matters and accepting as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan (1985) 39 Cal.3d 311, 318*.) When a demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]" (*Ibid.*) Plaintiffs have the burden to show a reasonable possibility the **[*6]** complaint can be amended to state a cause of action. (*Ibid.*)

2. Order Sustaining Demurrer Without Leave to Amend

a. Breach of Contract

The breach of contract cause of action alleged defendant "entered into contracts with plaintiffs, leaving the price term to be implied, then billed . . . plaintiffs at its full, undisclosed chargemaster or list prices, which plaintiffs are informed and believe are not the usual, customary or reasonable rate, not the lawful rate and far exceed those rates." But plaintiffs never alleged whether these purported contracts were written, oral, or implied, making their complaint susceptible to demurrer under *Code of Civil Procedure section 430.10, subdivision (g)* [failure to allege whether contract is oral, written or implied is grounds for demurrer to a breach of contract claim]; see also *Holcomb v. Wells Fargo Bank, N.A. (2007) 155 Cal.App.4th 490, 501* [court properly sustained demurrer where complaint failed to state either "nature of the contract" or its specific terms the plaintiff claimed had been breached, and at most alleged a form of express contract with implied terms].

In their opening brief, plaintiffs contend they "alleged an implied in fact contract **[*7]** . . . that services were provided . . . ." Yet in the very same sentence they also allege "the Conditions of Admissions form, which left the price term out was written, so the contract could be deemed to be written . . . ." To this end, they attach to their reply brief a copy of the Conditions of Admission form they claim every patient or their representative must sign. But in addition to being unauthenticated, unsigned, and not part of the trial court record, the document shows on its face that it is between the patient and the *hospital,* not *defendant.*

As for their asserted implied in fact contract, plaintiffs failed to allege its material terms. In order for a contract to be enforceable the terms of the contract must be sufficiently certain so as to provide a basis for determining to what obligations the parties have agreed. (*Weddington Productions., Inc. v. Flick (1998) 60 Cal.App.4th 793, 811*.) Whether a proposed contract is sufficiently definite to form an enforceable contract is a question of law for the court. (*Ladas v. California State Auto. Assn. (1993) 19 Cal.App.4th 761, 770, fn. 2*; *Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal.App.4th 613, 623*.) The above quoted allegation **[*8]** does not satisfy the requirement of being sufficiently certain.

Plaintiffs argue they pleaded "their performance, . . . that they were deemed out-of-network, paid $281 and breach, that this was a balance bill and was not the usual, customary or reasonable rate." But none of this sets forth the terms of the contract. Because the second amended complaint does not identify the terms of the agreement sought to be enforced, the demurrer was properly sustained on this ground as well.

Plaintiffs maintain they should have been given leave to amend because they urged at the hearing on the demurrer that defendant provided health care services and "left the price term open and therefore to be implied and reasonable and that breach occurred by imposing an unagreed to sticker price which was more than the usual, customary and reasonable rate." They cite page 12 of the reporter's transcript but that page relates to a hearing on a motion by Mission Hospital Regional Medical Center, not defendant. It is not this court's obligation to search the record for evidence supporting plaintiffs' argument. (See *ASP Properties Group, L.P. v. Fard, Inc. (2005) 133 Cal.App.4th 1257, 1270*.)

Even if plaintiffs had **[*9]** referred us to the correct portion of the transcript, *Carney v. Hayter (1944) 62 Cal.App.2d 792*, on which they rely, does not support their claim the absence of a price term creates an enforceable contract whereby defendant agreed to charge only what plaintiffs deemed reasonable. Unlike this case, *Carney* involved an express contract. Moreover, it held that "'[w]here work is done under an express contract which does not specify the compensation to be paid, the law implies a promise to pay what the service is reasonably worth.' [Citations.]" (*Carney v. Hayter, supra, 62 Cal.App.2d at p. 798*.) Plaintiffs cite no authority for the proposition that *their* implied promise to pay the reasonable worth of services means *defendant* entered into a contract, the breach of which gives rise to a cause of action, to charge no more than an amount plaintiffs considered fair. Their claim under *Civil Code section 1611* ["When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth"] **[*10]** fails for this reason as well.

Plaintiffs have not shown a reasonable possibility the complaint can be amended to state a cause of action for breach of contract. In their proposed third amended complaint, they again fail to specify the terms of the purported contract or state whether it was written, oral or implied by conduct, leading to the conclusion the defect cannot be cured by amendment. The demurrer to the breach of contract claim, including the covenant of good faith and fair dealing, was properly sustained without leave to amend and we need not address the other bases for the court's ruling.

b. Unfair Business Practices

To establish a claim for unfair business practices under *Business and Professions Code section 17200* (*section 17200*), plaintiffs had to plead and prove that the defendant engaged in a business practice that was "either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely to deceive members of the public). [Citations.]" (*Albillo v. Intermodal Container Services, Inc. (2003) 114 Cal.App.4th 190, 206*.) The cause of action for unfair business practices alleges "defendant['s] conduct constitutes unfair **[*11]** practices . . . in that defendant[] unfairly, unlawfully, fraudulently and/or in a deceptive manner led [p]laintiffs . . . to believe that their emergency healthcare services would be billed in a reasonable manner and at a reasonable rate, when, instead, they allowed [them] . . . to be charged full undisclosed and unwarranted rates . . . that [p]laintiffs are informed and believe[d] are not the usual, customary and reasonable and lawful rate."

(1) Unlawful Prong

According to plaintiffs, defendant's alleged acts are unlawful because they violated *Health and Safety Code section 1317*, which prohibits the denial of emergency room services due to "ethnicity, citizenship, age, preexisting medical condition, insurance status, economic status, [or] ability to pay for medical services" (*id.,* subd. (b)), and "the holdings and inferences to be drawn" from *Bell v. Blue Cross* [*of California] (2005) 131 Cal.App.4th 211*[and] *Prospect Medical Group*[*, Ins.*] *v. Northridge Emergency Medical Group (2009) 45 Cal.4th 497* and unlawful breaches of contract . . . ." But plaintiffs concede defendant provided services, not denied them, and thus no violation of *Health and Safety Code section 1317* occurred. And **[*12]** as the trial court found, *Bell* "is inapposite because it involved the reasonable amount of reimbursement by a health insurer to a[n] emergency physician under the Knox-Keene Health Care Service Plan Act of 1975," which is inapplicable "because neither [p]laintiff[s] nor [d]efendant [are] health care insurer[s] . . . ."

As for *Prospect Medical Group,* the Supreme Court addressed only the narrow issue of whether "emergency room doctors [can] directly bill the *patient* for the difference between the bill submitted and the payment received?i.e., engage in the practice called 'balance billing,'" answering that question in the negative. (*Prospect Medical Group, Inc. v. Northridge Emergency Group, supra, 45 Cal.4th at p. 502*.) But "Proposition 64 requires that a plaintiff's economic injury come 'as a result of' the unfair competition . . . ." (*Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 326*; *Bus. & Prof. Code, § 17204*.) Plaintiffs' judicially admissible and binding declarations show the $105.32

that they are out-of-pocket resulted from the deductible remaining on their Blue Shield account, not from defendant's alleged practice of balance billing. Thus *Prospect Medical Group* also does **[*13]** not support a *section 17200* claim based on plaintiffs' allegation defendant's conduct was unlawful.

(2) Unfair Prong

Plaintiffs also alleged defendant's acts were unfair because instead of charging the "usual, customary and reasonable rate, [defendant] charged and charges a rate much higher than such a rate, based on the fact that its usual and customary rates are an amalgam of set and negotiated fees with government and private programs that are significantly less than its chargemaster or list rates." Noticeably missing are any facts to support the claim that these negotiated fees should be deemed the "usual" rate for out-of-network patients.

At the hearing on the demurrer, plaintiffs argued "[w]hat's unfair under the unfair prong is basically very close to the court's equitable powers [a]nd those powers are to find a breach of fundamental rules of honesty and fair dealing . . . ." Similarly in their opening brief, plaintiffs assert defendant's practice "appears to violate fair dealing . . . because to allow providers to impose on consumers its unilaterally chosen price without disclosure or negotiation . . . violates fundamental premises of our legal system . . . ." But the Supreme **[*14]** Court has rejected the notion that "[c]ourts may . . . simply impose their own notions of the day as to what is fair or unfair." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 182* (*Cel-Tech*).)

"'The proper definition for the term "unfair" in a consumer action is uncertain. . . . *Cel-Tech* . . . held that in the context of an unfair competition claim by a competitor, the term "unfair" in . . . *section 17200* "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." [Citation.]'" (*Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1364*.) Nevertheless it "'left open the question of whether its definition of "unfair" should also apply to consumer actions. [Citation.]'" (*Id. at p. 1365*.) "'[T]his has resulted in a split in the Courts of Appeal. [Citation.] One line of cases applies *Cel-Tech*'s definition of "unfair" to consumer cases [citation], the other recognizes the new *Cel-Tech* definition, but applies the old definitions to consumer **[*15]** cases [citation.]' [Citation.]" (*Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 991*, fn. omitted.) Plaintiffs fail to allege a claim under either test.

"The test applied in one line of cases is similar to the *Cel-Tech* test . . ., and requires 'that the public policy which is a predicate to a consumer unfair competition action under the "unfair" prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions.' [Citations.]" (*Drum v. San Fernando Valley Bar Assn. (2010) 182 Cal.App.4th 247, 256* (*Drum*).) The only such provision plaintiffs cite is *Civil Code section 1611*, which we already concluded does not support their theory of liability.

"The test applied in a second line of cases is whether the alleged business practice 'is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.' [Citations.]" (*Drum, supra, 182 Cal.App.4th at p. 257*.) Plaintiffs assert defendant's "conduct is against public policy, since it is clear that balance billing is unlawful as set forth by *Prospect* [*Medical Group v. Northridge* ***[*16]*** *Emergency Group*]." The contention lacks merit, as we have rejected plaintiffs' attempt to state a *section 17200* claim based on that case.

Plaintiffs also argue defendant's conduct "appears to violate fair dealing . . . because to allow providers to impose on consumers its unilaterally chosen price without disclosure or negotiation—particularly where those rates far exceed what it normally charges—violates fundamental premises of our legal system, such as notions that obligations cannot be imposed absent agreement, consent and/or reasonableness." Their failure to cite any supporting legal authority forfeits this claim. (*Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784-785*.)

"[A] third line of cases draws on the definition of 'unfair' in section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45, subd. (n)*), and requires that '(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.' [Citations.]" (*Drum, supra, 182 Cal.App.4th at p. 257*.) According to plaintiffs, "it appears the balance favors a finding **[*17]** of unfairness: the rates are alleged to be substantially higher than the usual rate, are unavoidable by the consumer and serve no apparent purpose." This is nothing more than a conclusory restatement of the FTC elements without any supporting facts. Plaintiffs have not stated a *section 17200* cause of action based on the unfair prong.

(3) Fraud Prong

Plaintiffs contend the trial court did not address their allegation defendant's conduct was deceptive and fraudulent because it did not disclose the fact it did not accept certain types of insurance. But they alleged no facts demonstrating defendant owed them a legal duty to make that disclosure. "'Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.' [Citation.]" (*Buller v. Sutter Health, supra, 160 Cal.App.4th at p. 987*; see also *Levine v. Blue Shield of California (2010) 189 Cal.App.4th 1117, 1136*.)

(4) Leave to Amend

Plaintiffs do not suggest any manner in which the complaint can be amended to state a claim under *section 17200*. The court did not err in sustaining the demurrer to this cause of action without leave to amend.

c. Fraud

"In California, fraud must be pled specifically; **[*18]** general and conclusory allegations do not suffice. [Citations.]" (*Lazar v. Superior Court (1996) 12 Cal.4th 631, 645*.) "'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Id. at p. 638*.)

The fraud cause of action alleged defendant falsely "represented in and by its bills for service to plaintiffs and members of the class that a sum much more than the usual, customary and reasonable rate was due and owing," plaintiffs reasonably relied on those representations, paid the bills and were damaged. These conclusory allegations fail to meet the specificity requirement.

In particular, the element of scienter is absent. Plaintiffs have not shown how billing more than the usual, customary and reasonable rate constitutes a knowingly false representation. It is simply the rate defendant charges out-of-network patients; there is no truth or falsity to the statement. We thus reject plaintiffs' claim the statement was false because "only the usual, **[*19]** customary and reasonable amount was due and owing, not a list price."

Moreover, plaintiffs' allegation of reliance is belied by their admissions in their declarations in support of their opposition to defendant's summary judgment of which the court took judicial notice. "[T]he mere assertion of 'reliance' is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance. [Citation.]" (*Cadlo v. Owens-Illinois, Inc. (2004) 125 Cal.App.4th 513, 519*.)

Plaintiffs contend they sufficiently alleged reliance because they paid defendant's bill and were overcharged. But in their declarations they concede they refused to make any payments for the services and that Blue Shield, not plaintiffs, ultimately paid the bill while plaintiffs paid only their deductible amount of $105.32. These judicially noticeable admissions render the conflicting allegations of the complaint meritless (*Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604-605)*, and distinguish this case from *Vasquez v. Superior Court (1971) 4 Cal.3d 800, 814* [inference of reliance arises where no contrary evidence], *Massachusetts Mutual Life Ins. Co v. Superior Court (2002) 97 Cal.App.4th 1282, 1292-1293*, **[*20]** and *National Solar Equipment Owners' Assn.*

v. Grumman Corp (1991) 235 Cal.App.3d 1273, 1283, on which plaintiffs rely for their claim reliance may be inferred.

Plaintiffs assert the court abused its discretion in dismissing the fraud claim because "it certainly could be" properly alleged. But they do not explain how. Because they failed to show how the complaint can be amended to state a cause of action, we affirm the court's order sustaining the demurrer to the fraud claim without leave to amend.

d. Unjust Enrichment, Restitution, and Injunctive and Declaratory Relief

"'[T]here is no cause of action in California for unjust enrichment.' [Citations.] Unjust enrichment is synonymous with restitution. . . . [¶] . . . [¶] 'Under the law of restitution, "[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense. [Citation.]" [Citation.] However, "[t]he fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between **[*21]** the two individuals, it is *unjust* for the person to retain it. [Citation.]"' [Citation.]" (Durell v. Sharp Healthcare, supra, 183 Cal.App.4th at p. 1370.)

Plaintiffs argue it is unjust for defendant to retain funds obtained "by balance billing, a practice which has been determined to be unlawful, and to which it, therefore, has no entitlement . . . ." But given our rejection of their claims for breach of contract and the covenant of good faith and fair dealing, unfair competition, and fraud, plaintiffs have not shown any basis under which they would be entitled to restitution. Moreover, no actual controversy exists and declaratory relief is unnecessary. (Gilbert v. State of California (1990) 218 Cal.App.3d 234, 248; Code Civ. Proc., § 1061.) The court properly sustained without leave to amend the demurrers to the first cause of action for "unjust enrichment/restitution/action in equity" (capitalization and emphasis omitted) and the third cause of action for declaratory relief.

3. Discovery to Seek Proper Class Representatives

Plaintiffs argue that upon determining they had no standing, the court should have allowed them discovery to seek alternative class representatives. But the court **[*22]** never ruled plaintiffs were not "suitable representatives." In addition to finding plaintiffs had not suffered their alleged harm, the court determined they had failed to state valid claims despite several opportunities to do so. We agree and affirm the judgment.

DISPOSITION

The judgment of dismissal is affirmed. Respondent shall recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

O'LEARY, J.

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In re Visa Check/MasterMoney Antitrust Litig.

United States District Court for the Eastern District of New York

October 24, 2011, Decided; October 24, 2011, Filed

MASTER FILE NO. 96-CV-5238 (JG)

Reporter
2011 U.S. Dist. LEXIS 122680 *; 2011-2 Trade Cas. (CCH) P77,654; 2011 WL 5029841

IN RE VISA CHECK/MASTERMONEY ANTITRUST LITIGATION

Notice: FOR ELECTRONIC PUBLICATION ONLY

Subsequent History: Related proceeding at *Nass-Romero v. Visa U.S.A. Inc., 2012 N.M. App. LEXIS 31 (N.M. Ct. App., Apr. 18, 2012)*

Prior History: *In re Visa Check/Mastermoney Antitrust Litig., 2009 U.S. Dist. LEXIS 124884 (E.D.N.Y., Oct. 16, 2009)*

Core Terms

consumers, antitrust, cy pres, funds, credit card, settlement, class member, distributed, card, advocacy, checks, recommendation, donation, merchant, costs, settlement fund, anti trust law, debit card, organizations, recipient, practices, products, hidden, offers, consumer protection, member of the class, remaining funds, advisory board, marketplace, protections

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For Robin Wilcox, Special Master: Robin M. Wilcox, LEAD ATTORNEY, Attorney at Law, New York, NY.

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For Roman Buholzer, also known as, The Continental Garden Restaurant, Intervenor Plaintiff: Lawrence W. Schonbrun, LEAD ATTORNEY, Law Offices of Lawrence W. Schonbrun, Berkeley, CA.

For Visa U.S.A., Inc., Defendant: Robert C. Mason, LEAD ATTORNEY, Arnold & Porter LLP, New York, NY; Joseph F. Tringali, Simpson Thacher & Bartlett LLP, New York, NY.

For Mastercard International, Inc., Defendant: Joseph F. Tringali, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, New York, NY; Keila D. Ravelo, LEAD ATTORNEY, Hunton & Williams LLP, New York, NY; Kenneth Anthony Galloe, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Washington, DC; Kevin J. Arquit, LEAD ATTORNEY, Simpson Thacher & Bartlett, **[*3]** New York, NY.

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For Rent-A-Center Texas, L.P., Claimant: Robert C. Angelillo, Meyer, Suozzi, English & Klein, P.C., Garden City, NY.

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For United States of America, Interested Party: Matthew Bester, LEAD ATTORNEY, Department of Justice, Washington, DC; Allen Paul Grunes, United States Department of Justice, Antitrust Division, Washington, DC; Maurice E. Stucke, US Departmenbt of Justice, Washington, DC.

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For Preston Center Personal Training, Inc., Objector: William Kenneth Dippel, LEAD ATTORNEY, Dippel & Davis, PLLC, Dallas, TX.

For G&G Enterprises, NSG Enterprises, Inc., S &GJ Enterprises, Inc., Jac Vaca, Inc., John Wenturine, Y.P.I., Inc., Mobil Town USA, Inc., Young Pioneers, Inc., Objectors: Robert W. Bishop, LEAD ATTORNEY, Bishop & Associates, PSC, Louisville, KY.

For Digital Playroom, Inc., Sound Deals, Inc., Digital Solutions, Inc., Objectors: Robert Stephen Griffis, LEAD ATTORNEY, R. Stephen Griffis, P.C., Birmingham, AL.

For Village Fabrics and Furnishing, Inc., Objector: Charles M. Thompson, LEAD ATTORNEY, Charles M. Thompson & Associates, P.C., Birmingham, AL.

For Southern Network Services, Inc., Duke Products, Inc., Objectors: Kearney Dee Hutsler, LEAD ATTORNEY, Kearney Dee Hutsler, P.C., Birmingham, AL.

For Wagner's Bakery, **[*5]** Inc., also known as, Thomas (owner) McMackin, Objector: Douglas A. Cole, LEAD ATTORNEY, Stem & Cole, Milford, NJ.

For Leonardo's Pizza by the Slice, Inc., 710 Corp., Objectors: Edward Willard Cochran, LEAD ATTORNEY, Cochran and Cochran, Shaker Heights, OH; John F. Duane, LEAD ATTORNEY, New York, NY; N. Albert Bacharach, Jr., Paul S. Rothstein, LEAD ATTORNEYS, Gainesville, FL.

For UCC Kwik Doc., Inc., Plaintiff Class Representative, Objector: Dennis Stewart, LEAD ATTORNEY, Milberg, Weiss, Bershad, Bershad & Schulman LLP, One America Plaza, San Diego, CA; Fred T. Isquith, Sr., LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz, LLP, New York, NY; Michael Jaffe, LEAD ATTORNEY, Wolf & Haldenstein, New York, NY.

For Reyn's Pasta Bella, Jeffrey Ledon DeWeese, M.D., Barry Leonard, doing business as, Critter Fitters, Hat-In-The-Ring, Inc., doing business as, Eddie Rickenbacker's, Objectors: James A. Kopcke, LEAD ATTORNEY, Golden Kopcke, LLP, San Francisco, CA; Matthew S Flamm, LEAD ATTORNEY, Brooklyn, NY; Richard J. Archer, LEAD ATTORNEY, Archer & Hanson, Occidental, CA.

For NuCity Publications, Inc., Objector: Harvey Adam Prussin, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross, New **[*6]** York, NY; John Gerard Balestriere, LEAD ATTORNEY, Pomerantz Haudek Block Grossman Gross, LLP, New York, NY; Joseph Goldberg, LEAD ATTORNEY, Freedman Boyd Daniels Hollander Goldberg & Cline, P.A., Albuquerque, NM; Stanley M. Grossman, Pomerantz Haudek Block Grossman, & Gross, LLP; New York, NY, LEAD ATTORNEY.

For Beaches N Cream, Objector: Nicholas M. Fausto, LEAD ATTORNEY, Law Office of Nicholas M. Fausto, pHILADELPHIA, pa.

For Kickers' Corner of the Americas, Inc., Objector: J. Scott Kessinger, LEAD ATTORNEY, J. Scott Kessinger, Attorney At Law, St. Louis, MO; John Jacob Pentz, III, PRO HAC VICE, Class Action Fairness Group, Maynard, MA.

For MSV Records & Production, Inc., Objector: Morris Villia, LEAD ATTORNEY, MSV Records & Productions, Inc., New Orleans, LA.

For Nu City Publications, Objector: Harvey Adam Prussin, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross, New York, NY; John Gerard Balestriere, LEAD ATTORNEY, Pomerantz Haudek Block Grossman Gross, LLP, New York, NY; Stanley M. Grossman, Pomerantz Haudek Block Grossman & Gross, LLP; New York, NY, LEAD ATTORNEY.

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For Round House, Inc., Ron Jen, Inc., The Boathouse, Ron Fred, Inc., Objectors: John Jacob Pentz, III, PRO HAC VICE, LEAD ATTORNEY, Class Action Fairness Group, Maynard, MA.

Judges: John Gleeson, United States District Judge.

Opinion by: John Gleeson,

Opinion

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

BACKGROUND

In a complaint filed on October 5, 1996, the named plaintiffs "alleged that the defendants' practice of requiring merchants who accepted defendants' credit cards to also accept their debit products . . . was an illegal tying arrangement, in violation of *section 1* [of the Sherman Act]." *In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 507 (E.D.N.Y. 2003)*. They "further alleged that, through these tying arrangements and other anticompetitive conduct, the defendants attempted to monopolize the debit card market, in violation of *section 2* [of the Sherman Act]." *Id*. On February 22, 2000, this Court granted the motion to certify a class of "approximately four million merchants who have accepted Visa or MasterCard credit cards and who therefore have been required to accept **[*8]** VisaCheck or MasterMoney [debit cards]." *In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 73-74 (E.D.N.Y. 2000)*; *see also* *id. at 90* (certifying a class of "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept VisaCheck and/or MasterMoney debit cards under the challenged tying arrangements during the fullest period permitted by the applicable statute of limitations"). The Second Circuit affirmed the class certification order on October 18, 2001. *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001)*.

After motion practice, and just before opening statements were to begin at trial, the plaintiffs entered into preliminary settlement agreements with each of the defendants. *Visa Check/MasterMoney, 297 F. Supp. 2d at 508*. These Settlement Agreements provided, among other things, for "the creation of a $3.05 billion settlement fund." *Id*. On December 19, 2003, this Court issued an Opinion and Order approving the Settlement Agreements. *Id. at 526*, *aff'd*, *396 F.3d 96 (2d Cir. 2005)*. The Amended Plan of Allocation provided that, "[w]hen distributions are otherwise complete, any monies remaining **[*9]** in the Net Settlement Fund . . . will be applied in a manner recommended by Lead Counsel and approved by the Court." (Amended Plan of Allocation § 12.7.)

On April 1, 2011, Constantine Cannon LLP ("Lead Counsel") asked the Court to approve a plan requiring class members to cash their settlement checks by June 15, 2011 so that Lead Counsel could conclude the case. (ECF No. 1601.) Lead Counsel estimated that, after the deduction of expenses and in light of the anticipated check cashing, there would be approximately $1.7 million remaining in the fund — "only a miniscule percentage (0.7%) of the roughly $2.6 billion distributed to date." (*Id*. at 4.) Consistent with the Amended Plan of Allocation, Lead Counsel proposed that "a *cy pres* donation of funds remaining in the settlement account" thereafter be made because "another distribution to the class would not be efficient or economically feasible." (*Id*. at 1.) Lead Counsel accordingly requested that this Court order "that any residual funds left in the settlement account as of that date be donated to a charity or cause related to the merchant community to be approved by the Court." (*Id*. at 4.) In support of its recommendation, Lead Counsel **[*10]** attached an affidavit of Neil Zola, President and Chief Operating Officer of The Garden City Group, Inc. ("GCG"), the Claims Administrator retained by Lead Counsel. (Neil Zola Aff., ECF No. 1601-2.) Mr. Zola is also of the view that a further distribution to class members would not be economically feasible:

> Given the small percentage of remaining funds, GCG does not believe that any further Class distributions would be economically feasible because the cost to effectuate a distribution of the estimated available balance could exceed 50% of that balance. By way of example, if the more than 500,000 Class members who previously cashed their 2010 Distribution checks were eligible to receive another residual payment from the $1.7 million estimated remaining balance we would, at best, be able to distribute $900,000 since the rest would be used for the cost of printing 500,000 checks, postage for those checks, and handling all follow up, including thousands of check reissues. Moreover, if we distributed $900,000 to those eligible Class members, over 450,000 Class members would receive a check of less than $1.00. Further, another 42,000 Class members would receive a check in an amount between **[*11]** $1.00 and $5.00. In fact only 1.4% of Class members (about 7,100 merchants) would receive a check greater than $5.00. Therefore, GCG agrees with Lead Counsel that donating the balance of the remaining funds to charity is appropriate.

(*Id*. ¶15.)

By Order dated April 4, 2011, this Court set June 15, 2011, "as the final date by which all class members must cash their checks" and stated that "[a]ny residual funds left in the settlement account as of that date shall be donated to a charity to be approved by the Court."

By letter dated June 15, 2011, Lead Counsel estimated that, given the number of checks that had been cashed, and in light of the anticipated deduction of costs and expenses, there would ultimately be "between $1.5 million and $1.6 million remaining in the settlement account available for a *cy pres* donation." (ECF No. 1604.) "As such," according to Lead Counsel, "at the end of the day, well over 99% of the funds that were available for distribution, net of expenses, were returned to the class" — resulting in a *cy pres* donation amount of "roughly 0.057% to 0.061% of the total amount distributed to class members." (*Id*. at 1-2.) Lead Counsel asserted that this amount is "considerably **[*12]** lower than such distributions in similar cases." (*Id*. at 2 & n.1 (citing cases).)

In the same letter, Lead Counsel proposed that the settlement funds remaining after the final deadline for cashing settlement checks (net of remaining fees and disbursements) be given to the American Antitrust Institute ("AAI"), an organization that Lead Counsel's June 15, 2011 letter described as follows:

> The mission of the AAI, a non-profit organization dedicated to education, research, and advocacy concerning ***antitrust law***, is closely aligned with the substance and rationale of the case, as well as the interests of the class. The AAI has been the leading voice in urging more aggressive enforcement of antitrust laws — through private cases, such as *In re Visa Check/MasterMoney Antitrust Litigation* or via government enforcement — to increase competition in the interests of consumers and businesses such as the merchant class. *See* American Antitrust Institute, About Us, available at *http://www.antitrustinstitute.org/content/about-us*, last visited June 12, 2011. In fact, through its advocacy the AAI attempts to create a substantive and procedural environment to enable more cases like *In re Visa Check/MasterMoney* ***[*13]*** *Antitrust Litigation*, which will benefit businesses such as the merchant class and consumers alike. We can think of no better way to conclude this case than to make this contribution to this worthy cause. *Cf. In re Publ'n Paper Antitrust Litig., 2009 U.S. Dist. LEXIS 66654, 2009 WL 2351724, at *2 (D. Conn. July 30, 2009)* (ordering that a *cy pres* award in an antitrust class action be distributed to the AAI, finding that "[b]ecause the plaintiffs' claims here are based on antitrust injury, the next best use for the settlement funds is to disburse those funds to charitable institutions designed to guard against antitrust injury and protection consumers.").

(*Id*. at 3.)

By letter dated June 22, 2011, Consumers Union, a nonprofit advocacy organization and publisher of *Consumer Reports*, applied for an award of the *cy pres* funds. (ECF No. 1607.) The letter explained that the organization, which "does not accept advertising revenue or commercial donations," does work "in the area of consumer financial protection," an area that, according to Consumers Union, is "closely related both to the underlying subject matter of this antitrust action (payment card practices) and to an essential goal of antitrust enforcement: combating **[*14]** the impact that anti-competitive conduct has on consumers." (*Id*. at 1.) The organization maintains that "[a] *cy pres* award could provide significant support as we expand our reach and impact to consumer constituencies that are particularly vulnerable to anti-competitive or predatory financial practices." (*Id*.) With respect to its financial services policy and advocacy work, Consumers Union stated as follows:

> While Consumers Union's policy and advocacy work focuses on several pocketbook and safety issues, we have a particularly deep level of expertise and long commitment to helping consumers on financial services matters. And we have a track record of success in this key area. For example, our financial services team works to help consumers make smart financial choices and avoid hidden fees on credit cards, debit cards, payroll cards, government-issued benefit cards, prepaid cards, mobile payments, checks and bank accounts. We seek to improve protections associated with existing payment methods, as well as emerging ones, through public education, consumer engagement, media outreach, policy reports, legislative and regulatory advocacy, social media outreach, and marketplace efforts.
>
> Consumers **[*15]** Union was a leader in helping to shape and pass the landmark 2009 credit card reform law, as well as last year's financial reform law establishing the Consumer Financial Protection Bureau. We are currently engaged in a Payments Project that focuses on newer ways to make payments that do not yet receive the same protections as credit cards. Our most recent research and policy white paper, entitled "*Mobile Pay or Mobile Mess: Closing the Gap Between Mobile Payment Systems and Consumer Protections*" . . . examines the complicated array of basic protections, and the troubling lack of protections on some of the newest

> products that consumers face while making purchases via their cell phones, and suggests ways to improve the marketplace.
>
> The goal of this project is to understand existing and emerging payment methods facing consumers from various economic backgrounds, including lower-income consumers. We are evaluating the risks to consumers in new payment methods as they evolve, and working to improve products with substandard consumer protections before those methods spread widely. We reach out to media outlets and individual consumers to help us achieve marketplace change. A recent example **[*16]** is the *Kardashian Kard*, a debit card with particularly high fees, marketed to teenagers and young adults. Soon after the *Kardashian Kard* was launched, Consumers Union analyzed and reported on the card's exorbitant fees; that work in part encouraged prompt removal of this high-priced product. . . .
>
> We also continually bring to the attention of lawmakers, payment providers, the media and the public documented problems that consumers face when using existing payment methods. We do this through our Share Your Story database where we have collected thousands of personal financial experiences from individual consumers across the nation. (See *www.defendyourdollars.org/share_your_story.html*) These stories help us to develop a comprehensive understanding of the marketplace, inform consumers about emerging trends, fight for greater protections through marketplace engagement, and educate appropriate policymakers at the local, state and federal levels. In addition, we have nearly one million consumer activists who receive our online information and who use our network to make their opinions on financial services issues known to lawmakers and regulators.
>
> Finally, recognizing that Americans have the **[*17]** responsibility to change the way they handle credit, we have worked to educate the public on the best ways to avoid the pitfalls of debt through our online "Dangers of Debt" contest, social media, and educational campaign directed at young people and their parents.

(*Id*. at 2-3.) Consumers Union concluded as follows:

> We believe that Consumers Union would make an excellent *cy pres* award recipient, offering an important means by which the Court can expand the benefits and impact of this historic antitrust settlement to consumers. It is, after all, consumers who bear the ultimate brunt of anti-competitive practices, either directly through means such as exorbitant or hidden fees, or indirectly via costs passed down in the form of higher prices for consumer goods.

(*Id*. at 3.)

In a letter dated July 5, 2011, Lead Counsel (which was in receipt of the letter from Consumers Union) stated that it was "sympathetic to the idea of distributing a portion of the funds to organizations dedicated to consumers — in fact, we view the American Antitrust Institute as just such an organization given the consumer welfare backdrop of ***antitrust law***." (ECF No. 1608.) It accordingly asked for three additional weeks **[*18]** to consider Consumers Union, as well as other consumer groups, as possible recipients of the *cy pres* donation. (*Id*.) This Court granted the request on July 7, 2011.

On July 27, 2011, Jewelers Vigilance Committee ("JVC") — "a not for profit trade association dedicated to preserving the ethics and integrity of the U.S. precious metal, gem and jewelry trade to protect consumer confidence" — wrote to request consideration as a recipient of the *cy pres* funds. (ECF No. 1610, at 1.) In support of its application, JVC stated as follows:

> Since 1917, the JVC has actively pursued education and outreach programs to foster and promote legal compliance with regulations and laws that govern our industry. We also actively work to protect consumers to ensure that their trust in our products (gold, silver, diamonds, color gemstones, etc.) is not violated. We have taken on the resolution of consumer complaints regarding trade practices, including advertising, product description, representations of quality, etc. Our work in the area of consumer protection is vital. Many consumer protection agencies (both not for profit and government agencies) refer such matters to us due to

> their lack of resources and **[*19]** expertise to take on these often complicated investigations and enforcement action. Without the JVC's activity in this area, there would be little, if any, action taken to represent and protect consumers of jewelry in the U[.]S.
>
> The members of the JVC consist of all sectors of the jewelry trade — manufacturers, wholesalers, distributor [sic] and retailers, many of whom are also members of the class which is the subject of the above referenced litigation since they accept both MasterCard and Visa, as well as other credit cards and all forms of debit cards, for payment for these products at every level of the trade. . . . [W]e have the support of a wide array of jewelry companies for the consumer protection work that we do. . . .
>
> . . . .
>
> Since all of our members accept credit cards for payment, and because many of them fall victim to fraudulent practices associated with credit card use, JVC has undertaken an education program to help members of our trade to avoid losses due to credit card payments being reversed to their detriment. Our high value products are often targeted for purchase by money launderers, identity thieves or other criminals. The FTC recently issued regulations requiring **[*20]** businesses using credit cards to implement programs and policies to detect and prevent use of credit cards by identity thieves. In this regard, the JVC offers identification verification services which allow companies accepting credit cards to ensure that the card being proffered is not stolen and is in fact connected to the person offering it. We have also undertaken to educate our members about this law, as well as state and local requirements to protect the security of the data they gather from credit cards to ensure that data breaches do not occur and to mitigate any instances where identifying data has been made public.
>
> Our budget for these kinds of (both consumer and trade protection) programs is quite small, and we are the only trade association doing the work. We are funded by member dues, and[,] as previously mentioned, our membership base is reducing in size due to the state of the economy. We can do more consumer outreach and trade counseling for members of the class if we have sufficient financial support to do so.

(*Id*. at 1-2).

By letter dated July 29, 2011, Lead Counsel supplemented its recommendation to the Court regarding the *cy pres* award. (ECF No. 1609.) Acknowledging **[*21]** that it has represented JVC in the past, Lead Counsel nevertheless "respectfully recommend[ed] that the Court deny [JVC's] request to participate in the distribution," because "the JVC members that were members of the class have already benefitted from the settlement and the distribution" and because Lead Counsel is "disinclined to endorse such a narrowly tailored interest['s] receiving a portion of the funds, particularly when its connection to the underlying case and the issues it concerned is so attenuated." (*Id*. at 3.) Lead Counsel instead reiterated its recommendation that the entire *cy pres* distribution be granted to AAI, but further stated that "to the extent the Court would like to include consumer organizations in the distribution we respectfully recommend that 2/3 of the award be given to the AAI, with the remaining 1/3 awarded to one or two worthy consumer organizations." (*Id*. at 2.) While "laud[ing] the work that Consumers Union does on behalf of consumers," Lead Counsel expressed the view that U.S. PIRG "would be an equally worthy recipient of the funds that the Court decides to allocate to consumer groups," (*id*. at 2-3), saying:

> PIRG is a network of state public interest **[*22]** groups working on behalf of the American public on issues such as product safety, public health and health care reform, higher education, political corruption and voting rights. *See* [*http://www.uspirg.org/about-us*](http://www.uspirg.org/about-us). PIRG has also been among the most active consumer groups on issues pertaining to the high, and hidden, costs of payment cards to consumers. PIRG, for example, submitted comments to the Federal Reserve with respect to its recent rulemakings on debit interchange that were indicative of the sophisticated approach it brings to bear on these issues. . . Accordingly, to the extent the Court chooses to include consumer organizations in the *cy pres* distribution, we respectfully recommend that 1/3 of the available funds be given to PIRG or split between PIRG and Consumers Union.

(*Id*. at 3 (exhibit citations omitted; italics added).)

Lead Counsel's July 29, 2011 letter also provided the following additional information about AAI:

> As noted earlier, the AAI is a non-profit organization dedicated to education, research and advocacy concerning ***antitrust law***. It was the first public interest group to focus on promoting more aggressive antitrust policies and enforcement to maintain competition **[*23]** and protect consumers and small businesses. On virtually all complex antitrust issues, the AAI offers a unique voice in favor of vigorous private and public enforcement of the antitrust laws. It has advocated on behalf of consumers and small businesses in Congress, before agencies and courts, on the state level and internationally on a wide range of issues, from health care and pharmacology to retailer concerns. In that capacity the AAI conducts industry studies and joint programs with foreign antitrust enforcers, submits testimony and comments on agency policies and enforcement practices and files amicus briefs on important antitrust issues before the Supreme Court and the Appellate Courts. For example, in the past decade it has filed roughly 50 amicus briefs, including in *American Needle, Inc. v. National Football League, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*, in which the Supreme Court adopted the AAI's argument. In *Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*, the Supreme Court invited the AAI to provide a 15-minute oral argument, believed to be a first for a non-governmental third party in an antitrust case. . . .
>
> Notably, the AAI's advocacy efforts have included **[*24]** a long-standing interest in the interchange issues central to *In re Visa Check/MasterMoney Antitrust Litigation*. It issued a report over a year ago calling for a policy change that would have Congress giving the Federal Reserve power to mandate lower interchange fees. After the Durbin Amendment granting such power was passed, the AAI continued the fight in the face of heavy opposition to implementation of the amendment, submitting a letter to Congress urging support of the new policy.
>
> Like its advocacy efforts, the AAI's efforts to educate the public about the importance of antitrust are also wide-spread and effective. These efforts include publishing over 100 articles and reports on pressing antitrust issues, producing an award-winning documentary on U.S. ***antitrust law*** that was shown on public television and developing an accompanying educational curriculum for high school classrooms (*see www.fairfightfilm.org*) and hosting several conferences and symposiums on antitrust issues. The AAI's website, which offers a vast array of resources to the public, including resources aimed specifically at aiding consumers, has been called "the best one-stop antitrust site out there" by *Legal Times*. **[*25]** The AAI has also contributed to antitrust scholarship in other ways. For example, in 2010, it published its third book, The International Handbook on Private Enforcement of Competition Law. It is currently preparing a book on private enforcement in the U.S. Under another *cy pres* grant, the AAI is also currently preparing a curriculum for the training of judges.
>
> The AAI is still a young organization, nearly fifteen years old. Its highly qualified five-person staff works from private homes around the U.S. AAI is about to enter the always-difficult transition to a second generation of leadership as its president and some board members approach retirement in the next two years. The AAI depends on *cy pres* grants and other unpredictable contributions, making long-term planning and long-term employment commitments particularly difficult. A full distribution to the AAI at this time would provide much of the financial base that will allow it to recruit the next generation of leadership and retain its excellent staff thereby guaranteeing the nation the continuing public interest services it provides. In sum, it is our hope that providing the full distribution to this worthy organization will **[*26]** endow it well into the future and we fear that, given the amount of the distribution, balkanizing the award between the AAI and other recipients will undermine that objective. For these reasons, we repeat our initial recommendation to the Court.

(*Id*. at 1-2 (exhibit citations omitted; italics added).)

By a letter also dated July 29, 2011, Consumers Union supplemented its prior application by providing the Court with a copy of an article to appear in the September 2011 edition of *Consumer Reports*, entitled "New ways to pay: At the checkout, should you use credit, debit or cell phone?" (ECF No. 1611.) Consumers Union's letter highlighted the following excerpts from the article:

> Most of the new electronic payment options are tied to credit and debit cards, so whatever costs you incur in using your plastic will transfer to the new methods. But some costs are completely hidden, so consumers are often unaware of the price of their payment-choice decisions. . . .

> For example, banks have long charged a fee of 1 to 4 percent of the purchase amount, depending on whether debit or credit was used. That fee is levied on retailers, so consumers don't see it up front, but they pay it in higher merchandise **[*27]** prices. "The average household pays $427 a year in transaction fees to card companies and banks that they don't know they're paying. . . ."

(*Id*. at 2.) The article advises consumers to "never pay a fee to pay by debit" and asserts that "[s]uch fees . . . aren't common, but some merchants impose them. Refuse, cancel the sale, and report the merchant to your debit-card issuer." (*Id*. at 2 (quoting article).) Consumers Union asserts that the article offers "a good example of our ongoing journalism, education and advocacy efforts on hidden costs." (*Id*.) The letter concludes:

> A *cy pres* award from this settlement would be timely indeed, potentially providing significant funding for our efforts to inform, protect, connect and empower consumers in the area of personal finance and payment card fees. It would, for example, assist us in expanding our reach to minority and younger consumer communities, such as those going off to college, using creative methods such as animated videos, contests and school/campus programs.

(*Id*. at 3.)

In a letter dated August 5, 2011, Lead Counsel informed the Court that Jeffrey Shinder and Doug Rosenthal of Constantine Cannon LLP (Lead Counsel), and George Sampson of **[*28]** Hagens Berman (a firm that also represents the class), are members of the AAI advisory board, and that Lloyd Constantine, also of Constantine Cannon LLP, is a former member of the advisory board. (ECF No. 1612.) Lead Counsel explained that advisory board members "receive no compensation or other potential benefit from their roles as advisory board members" and that they "recuse themselves . . . when conflicts of interest arise due to conflicting client matters or past governmental roles." (*Id*. at 1.) Lead Counsel noted that AAI's website lists its advisory board members. (*Id*. (citing *http://www.antitrustinstitute.org/content/people*).)

On September 14, 2011, after ordering the payment of various fees and expenses from the remaining funds, the Court directed Lead Counsel to remit what remained of the settlement fund to the Clerk of the Court on or before September 16, 2011. (*See also* Sept. 15, 2011 Order, ECF No. 1620 (directing Clerk of the Court to place remitted funds into an interest-bearing account).) On September 16, 2011, Lead Counsel sent the Clerk of the Court two checks in the amounts of $1,750,473.29 and $22,734.79. (ECF Nos. 1621, 1622.) On October 18, 2011, Special Master **[*29]** Robin Wilcox submitted her final bill in the amount of $24,702.15.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has "broad supervisory powers with respect to the administration and allocation of settlement funds." *In re Holocaust Victim Assets Litig., 424 F.3d 132, 146 (2d Cir. 2005)* (internal quotation marks omitted); *see also id. at 147* (noting that, in *In re Airline Ticket Commission Antitrust Litigation, 268 F.3d 619, 626 (8th Cir. 2001)*, the Eighth Circuit concluded that a *cy pres* allocation is within the Court's discretion unless the Court "(1) fails to offer any indication of having carefully weighed all of the considerations relevant to the allocation; and (2) makes no findings in connection with its distribution of funds"). "A *cy pres* payment, as an adjunct to a payment by other means to some members of the class, is warranted where the amount to be distributed to the remaining class members is small relative to the administrative costs of a direct distribution." *In re MetLife Demutualization Litig., 689 F. Supp. 2d 297, 343 (E.D.N.Y. 2010)*.

An additional distribution in this case would involve prohibitively high administrative costs. Checks that would be sent to class **[*30]** members in connection with such a distribution would be *de minimis*. Therefore, it is clear to me, and I hereby find, that a *cy pres* award is a more appropriate manner by which to dispose of the remaining settlement funds than would be an additional distribution. The question, then, is to which charitable organization or organizations this award should be made.

Each of the organizations that has applied for or has been mentioned as a potential recipient of an award from the remaining funds is a worthy cause. However, "the purpose of Cy Pres distribution is to put the unclaimed fund to its *next best* compensation use, e.g., for the aggregate, indirect, prospective benefit of the class." *Masters v.*

Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007) (internal quotation marks and alterations omitted); *see also id*. ("Cy Pres means 'as near as possible' . . . ."). Based on this standard, I agree with Lead Counsel that JVC is not an appropriate recipient. The JVC members who were members of the class have already benefited from the settlement and distribution. I am, moreover, concerned that an award to a cause with such narrowly tailored interests would have the effect of inequitably **[*31]** concentrating its benefit on a subset of the class as opposed to the class as a whole.

Bearing in mind the interests of the entire class and all of its members, I believe that the award should be spread among the three remaining charities described above — AAI, Consumers Union and U.S. PIRG. AAI has made significant contributions to the development and enforcement of the antitrust laws and will no doubt make effective use of the funds it receives. Similarly, both Consumers Union and U.S. PIRG have devoted substantial resources to issues that are closely related to the interests of the members of this class — including, for example, issues pertaining to the high and hidden costs of payment cards.

To account for the fact that each of these organizations does work that benefits the class in different ways, I hereby order the distribution of the amount remaining after the payment of the Special Master's final bill as follows: 50% to AAI; 25% to Consumers Union; and 25% to U.S. PIRG.

CONCLUSION

For the reasons described above, I hereby direct the Clerk of the Court to make payment to the Special Master in the amount of $24,702.15. I further direct that the remaining funds be distributed as **[*32]** follows: 50% of the amount that remains after the payment of the Special Master's bill to the American Antitrust Institute, 25% to Consumers Union and 25% to U.S. PIRG.

So ordered.

John Gleeson, U.S.D.J.

Dated: October 24, 2011

Brooklyn, New York

End of Document

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Meyer v. Cmty. College of Beaver County

Commonwealth Court of Pennsylvania

April 6, 2011, Argued; October 27, 2011, Decided; October 27, 2011, Filed

No. 1141 C.D. 2008

Reporter
30 A.3d 587 *; 2011 Pa. Commw. LEXIS 539 **

David J. Meyer, Dallas Berry, Charles J. Brown, Jeremy Lee Fox, Martin Gorecki, Anthony J. Hollibaugh, Lisa L. Salyers, Rochell Sykes, Joseph W. Vucick, David L. Wigley, Dennis W. Woodley, Chris Mack and Tammy Muslo v. Community College of Beaver County, Appellant

Subsequent History: Companion case at *Barr v. Cmty. College of Beaver County, 2011 Pa. Commw. Unpub. LEXIS 886 (2011)*

Appeal granted by, in part, Appeal denied by, in part *Meyer v. Cmty. College of Beaver Cty., 616 Pa. 539, 51 A.3d 177, 2012 Pa. LEXIS 1732 (2012)*

Reversed by, in part, Remanded by *Meyer v. Cmty. College, 2014 Pa. LEXIS 1524 (Pa., June 16, 2014)*

Prior History: [1]** Appealed from No. 11345 of 2002. Common Pleas Court of the County of Beaver. Kwidis.

Meyer v. Cmty. College of Beaver County, 606 Pa. 539, 2 A.3d 499, 2010 Pa. LEXIS 1802 (2010)

Core Terms

community college, consumer protection, local agency, legal entity, public interest, government entity, private action, immune, unfair, commerce, damages, trial court, tort claim, practices, sounding, treble damages, provisions, powers, cases, violations, deceptive, parties, municipal corporation, public entity, certification, Academy, Training, reasons, authorizes, partial summary judgment

LexisNexis® Headnotes

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN1[] **Immunities, Sovereign Immunity**

Governmental immunity does not extend to all statutory causes of action, regardless of whether they sound in tort or contract.

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

HN2[] **Appellate Review, Standards of Review**

The scope of review of a trial court's order granting or denying summary judgment is plenary, and the standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN3[] **Trade Practices & Unfair Competition, State Regulation**

73 Pa. Stat. Ann. § 201-2(2), a provision of the Unfair Trade Practices and Consumer Protection Law, *73 Pa. Stat. Ann. §§ 201-1 to 201-9.3*, defines a "person" as follows: "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities. Clearly, no form of government unit or public authority is expressly included in the definition.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN4[] **Trade Practices & Unfair Competition, State Regulation**

See *73 Pa. Stat. Ann. § 201-9.2(a)*.

Governments > Legislation > Interpretation

HN5[] **Legislation, Interpretation**

A statute is ambiguous where parties the offer conflicting, but plausible interpretations. As in all cases where a latent ambiguity in a statute exists, a court resorts to the canons of statutory construction to discover the Legislature's intent. When statutory language is not explicit, the intention of the General Assembly may be ascertained by considering the mischief to be remedied, the object to be attained, and the consequences of a particular interpretation. *1 Pa.C.S. § 1921(c) (3)*, *(4)*, *(6)*. Further, in ascertaining legislative intent, the Statutory Construction Act requires a presumption that the General Assembly did not intend a result that is absurd or unreasonable, as well as a presumption that the General Assembly intends to favor the public interest as against any private interest. *1 Pa.C.S. § 1922(1)*, *(5)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN6[] **Trade Practices & Unfair Competition, State Regulation**

The term "person" in *73 Pa. Stat. Ann. § 201-9.2*, a provision of the Unfair Trade Practices and Consumer Protection Law (CPL), *73 Pa. Stat. Ann. §§ 201-1 to 201-9.3*, is used not just to refer to a defendant, but also to refer to a plaintiff. This dual use of the term is consistent throughout the CPL. The General Assembly intended the term to have a uniform meaning.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN7[] **Trade Practices & Unfair Competition, State Regulation**

See *73 Pa. Stat. Ann. § 201-4*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN8[] **Trade Practices & Unfair Competition, State Regulation**

See *73 Pa. Stat. Ann. § 201-4.1*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN9[] **Trade Practices & Unfair Competition, State Regulation**

See *73 Pa. Stat. Ann. § 201-8(b)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Governments > Legislation > Interpretation

HN10[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Trade Practices and Consumer Protection Law (CPL), *73 Pa. Stat. Ann. §§ 201-1 to 201-9.3*, should be liberally construed. The purpose of CPL is to eliminate unfair or deceptive business practices.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN11[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Trade Practices and Consumer Protection Law (CPL), *73 Pa. Stat. Ann. §§ 201-1 to 201-9.3*, contains express limitations on liability. First, a "person" is only liable if it is engaged in trade or commerce, as those terms are defined. *73 Pa. Stat. Ann. § 201-2(3)*. This status filter operates to protect defendant "persons," including local agencies, from broad liability. Second, *73 Pa. Stat. Ann. § 201-3* contains specific exclusions from liability. The exclusions cover those who, in good faith and without knowledge of falsity or deceptive character, are involved in the broadcast or publication of an advertisement which may violate the CPL. Tellingly, the exclusions do not more broadly shield local agencies from liability. Third, *73 Pa. Stat. Ann. § 201-9.2*, addressing actions other than those brought in the public interest, limits liability on the basis of the purpose of the transaction. In particular, before a "person" can be liable as a defendant in such an action, the transaction must involve personal, family or household purposes. Through this additional transaction-purpose filter, the General Assembly endeavors to focus recovery on consumer-based practices and to protect defendant "persons," including local agencies, from expansive liability.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN12[] **Trade Practices & Unfair Competition, State Regulation**

Under the Unfair Trade Practices and Consumer Protection Law, *73 Pa. Stat. Ann. §§ 201-1 to 201-9.3*, suits by the Attorney General or district attorney in the name of the Commonwealth must be based on a determination by an elected official that such a suit is in the public interest. This determination is a prerequisite to injunctive relief under

73 Pa. Stat. Ann. § 201-4 (prospective), restorative relief under *73 Pa. Stat. Ann. § 201-4.1* (retrospective), and civil penalties under *73 Pa. Stat. Ann. § 201-8(b)*. This additional public interest filter functions to protect all defendant persons, including local agencies, from inappropriate suit. Thus, the General Assembly's use of the phrase "any other legal entities" in its definition of "person," under *73 Pa. Stat. Ann. § 201-2(2)*, is expansive enough to embrace local agencies.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

HN13[] **Foreseeable Damages, Benefit of the Bargain**

The central focus of contract law is the protection of bargained-for expectations.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN14[] **Trade Practices & Unfair Competition, State Regulation**

See *73 Pa. Stat. Ann. § 201-2(4)(ii)*, *(iii)*, *(v)*, *(vii)*, *(xiv)*, *(xxi)*.

Counsel: Diego Correa, Pittsburgh, for appellant.

John P. Liekar, Jr., Pittsburgh, for appellee Dallas Berry.

Judges: BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE DAN PELLEGRINI, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE MARY HANNAH LEAVITT, Judge, HONORABLE P. KEVIN BROBSON, Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge. OPINION BY JUDGE SIMPSON. CONCURRING OPINION BY JUDGE McCULLOUGH. DISSENTING OPINION BY JUDGE PELLEGRINI. DISSENTING OPINION BY JUDGE LEAVITT. DISSENTING OPINION BY JUDGE BROBSON.

Opinion by: ROBERT SIMPSON

Opinion

[*588] OPINION BY JUDGE SIMPSON

This first of two related interlocutory appeals by permission returns to us after our Supreme Court vacated our prior decision in *Meyer v. Community College of Beaver County, 965 A.2d 406 (Pa. Cmwlth. 2009)* (*en banc*) and remanded the case to us. In doing so, the Supreme Court determined that the part of the Judicial Code commonly known as the Political Subdivision Tort Claims Act (Tort Claims Act)[1] does not grant immunity to a local agency from *all* statutory causes of action. See *Meyer v. Cmty. Coll. of Beaver County, 606 Pa. 539, 2 A.3d 499 (2010)* **[**2]** (Meyer II). The Court instructed us to consider: 1) whether the Community College is a "person" as defined in the Unfair Trade Practices and Consumer Protection Law (CPL)[2] and therefore subject to suit under that statute; and, 2) whether the Community College is immune under the Tort Claims Act because the CPL claims raised against it sound in tort.

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[1] *42 Pa. C.S. §§8541-42*.

[2] Act of December 16, 1968, P.L. 1224, as amended, *73 P.S. §§201.1—201-9.3*.

Generally, the Community College appeals an interlocutory order of the Court of Common Pleas of Beaver County (trial court) denying its motion for partial summary judgment. A group of former students (Plaintiffs)[3] enrolled in the Community College's police technology program (the Academy) during the 2001-02 academic year, brought a civil action after the program lost its school certification under the Municipal Police Officers Education and Training Act (Training Act), *53 Pa. C.S. §§2161-70*, informally known as "Act 120." In their complaints, Plaintiffs allege breach of contract and breach of warranty, and various unfair or deceptive acts as defined in the CPL.

I. Pleadings

In May 2002, before Plaintiffs completed the Academy's course of study, the Pennsylvania Municipal Police Officers' Education and Training Commission (Training Commission) suspended the Academy's Act 120 certification. The Training Commission based the suspension on numerous violations. The Training Commission officially revoked the Academy's Act 120 certification in August 2002.

Thereafter, Plaintiffs filed a complaint against the Community College that alleged as follows. In its 2000-01[4] course catalog, the College expressly represented the Academy to be a Training Commission certified course of study. These express **[*589]** representations were made to induce, and did induce, Plaintiffs to enroll in **[**4]** the Academy. Plaintiffs paid tuition, attended the required courses and took examinations. Plaintiffs raised causes of action for breach of contract, breach of warranty, violations of the CPL, and violations of other statutes.

The Community College filed preliminary objections, only some of which are relevant now. In addition to issues regarding whether it is subject to liability under the CPL and whether it is immune from statutory-based claims, the Community College challenged the sufficiency of averments of fraud.

As pertinent to the current discussion, the trial court allowed CPL claims sounding in contract to proceed; however, the trial court sustained objections to all claims sounding in fraud, including CPL claims, because the averments did not establish scienter on the part of the Community College.

Plaintiffs filed an amended complaint. They repeated their previous claims for breach of **[**5]** contract and breach of warranty. As to claims under the CPL, they removed averments of fraudulent conduct, but they retained averments that conduct was unfair and deceptive. This pleading will be discussed below. Plaintiffs alleged substantial economic losses as a result of the Community College's violations of the CPL. They also sought treble damages and an award of costs and attorney fees under *Section 9.2 of the CPL*.[5]

A second round of preliminary objections was filed. Relevant now, the Community College challenged Plaintiffs' pleading of misrepresentations, asserting the averments reintroduced CPL claims sounding in fraud, contrary to the trial court's ruling on the first set of preliminary objections. Accepting Plaintiffs' arguments that the language sought

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[3] Plaintiffs are David J. Meyer, Dallas Berry, Charles J. Brown, Jeremy Lee Fox, Martin **[**3]** Gorecki, Anthony J. Hollibaugh, Lisa L. Salyers, Rochell Sykes, Joseph W. Vucick, David L. Wigley, Dennis W. Woodley, Chris Mack and Tammy Muslo. This appeal was argued seriately with *Barr v. Community College of Beaver County, __ A.3d. __, 2011 Pa. Commw. Unpub. LEXIS 886 (Pa. Cmwlth., No. 1142 C.D. 2008, filed October 27, 2011)*. The only significant difference between the two cases is Plaintiffs here completed one half of their course of study; the Barr plaintiffs completed virtually the entire course of study.

[4] Although Plaintiffs attended the Academy during the 2001-02 school year, the College provided them with 2000-01 catalogs. The College did not receive its 2001-02 catalogs until October 2001. See App. to the College's Br. in Supp. of Mot. for Summ. J., Tab 26 (Dep. of Harriet Ann Wallace at 3).

[5] *Section 9.2 of the CPL* was added by the Act of November 24, 1976, P.L. 1166, as amended, *73 P.S. §201-9.2*.

to bolster breach of contract and warranty claims and not to plead a cause of action in fraud, the trial court overruled the objections.[6]

II. Partial Summary Judgment

After the close of pleadings and discovery, the Community College filed a motion for partial summary judgment. Relevant to this appeal, the Community College argued the CPL does not apply to community colleges and, as a local agency, a community college is immune from CPL claims under *42 Pa. C.S. §8541*, part of the Tort Claims Act.

Ultimately, the trial court denied the Community College's motion for partial summary judgment. The trial court rejected the assertion the CPL does not apply to community colleges. It further rejected the immunity defense on the basis that some of Plaintiffs. CPL claims sound in contract, not in tort. In denying the motion for partial summary judgment, the trial court reasoned (with emphasis added):

> The party opposing a motion for summary judgment must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather **[*590]** to determine whether any such issues exist.
>
> Our courts have been reluctant to recognize claims **[**7]** of educational malpractice in the academic environment but they have recognized that a contract exists between a student and a college. The courts have held that in general, the basic legal relationship between a student and a private university or college is contractual in nature. The catalogs, bulletins, circulars, and regulations of the institution made available to the matriculant become part of the contract. Questions of discipline, academic matters, and tuition and scholarship disputes have been addressed by courts and resolved on contract principles. At the same time, however, courts have been reluctant to apply strict contract concepts to the unique relationship that exists between students and universities or colleges.

Trial Ct. Slip Op., 5/12/08, at 5, Reproduced Record (R.R.) at 258.

In response to the denial of its motion, the Community College filed a motion to amend the order to certify for an interlocutory appeal of the following two issues: whether the Community College is a "person" as defined in Section 2(2) of the CPL, *73 P.S. §201-2(2)*; and, whether the Community College is immune to prosecution because the CPL sounds in tort and the Community College is immune to **[**8]** tort actions under the Tort Claims Act. The trial court granted the Community College's motion. This Court allowed the appeal.

III. Meyer II

After argument, an *en banc* panel of this Court reversed the trial court, holding that regardless of whether the Community College was a "person" under the CPL, it was immune from claims for statutory damages under the Tort Claims Act. The Supreme Court, however, permitted a discretionary appeal. Ultimately, it reversed and remanded, with direction.

The majority opinion was authored by Mr. Justice Saylor. The majority concluded that our application of the Tort Claims Act to statutory damages was not sustainable. The majority emphasized the main policy considerations historically underlying tort law, centered on injury to a person or property. See *Meyer II, 606 Pa. at 545, 2 A.3d at 502*. This was contrasted with the central focus of contract law, the protection of bargained-for expectations. Id. The Torts Claims Act was intended to apply to the former, not the latter. Id. Consequently, the Supreme Court held that

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[6] Thereafter, the Community College filed an answer and new matter denying Plaintiffs' allegations. In its new matter, the Community College asserted various claims and defenses including **[**6]** failure to state a cause of action, immunity, and statute of limitations.

HN1[] governmental immunity does not extend to all statutory causes of action, regardless of whether they sound in tort or contract. See id. at 546, 2 A.3d at 503 **[**9]** .

In a lengthy note responding to the concurring opinion, the majority presumed the first order of business on remand would be for this Court to undertake the threshold determination of whether the Legislature intended for the government to be subject to private actions under Section 9.2 of the CPL. Id. at 546, 2 A.3d at 503 n.6. The majority highlighted the Plaintiffs. argument referencing Commonwealth Court opinions holding that the Legislature did not intend to include governmental entities within a listing of persons and entities which might technically encompass them where it did not include the governmental entity expressly. See, e.g., Huffman v. Borough of Millvale, 139 Pa. Commw. 349, 591 A.2d 1137 (Pa. Cmwlth. 1991); see also Matter of Leonard v. Masterson, 70 A.D.3d 697, 896 N.Y.S.2d 358 (N.Y. App. Div. 2010).

In her concurring opinion, Madame Justice Orie Melvin expressed her preference for directing this Court "to examine the pleadings on remand to determine whether **[*591]** the [Plaintiffs.] claims satisfy the [CPL]. If sufficient facts have been pled, the Commonwealth Court should then ascertain whether the claims sound in tort or in contract and dispose of the matter accordingly." 606 Pa. at 549, 2 A.3d at 505. **[**10]** With these directives in mind, we analyze the issues.[7]

IV. Issues

A. "Person" Under CPL

1. Contentions

The Community College first asserts it is not included in the CPL's definition of a "person" and thus not subject to prosecution under Section 9.2 of the CPL. Section 2(2) of the CPL, HN3[] 73 P.S. §201-2(2), defines a "person" as follows (with emphasis added):

> 'Person' means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

Clearly, no form of government unit or public authority is expressly included in the definition. What is less clear is whether the phrase "any other legal entities" extends to public agencies.

Section 9.2(a) of the CPL, which deals with private actions for alleged violations of that statute, uses the defined term "person" as follows:

> HN4[] (a) Any person who purchases or leases goods **[**11]** or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

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[7] HN2[] Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion. Kincel v. Dep't of Transp., 867 A.2d 758 (Pa. Cmwlth. 2005).

73 P.S. §201-9.2(a) (emphasis added). Notably, this provision uses the term "person" to describe both a plaintiff and a defendant in a private action under the CPL.

The Community College contends that public subdivisions and municipal corporations are recognized as unique statutory entities and are afforded defenses based on that status. One such defense is the well-established prohibition against a presumption that a public entity is subject to suit without having been specifically identified **[**12]** within the statute.

The Community College relies on various Pennsylvania appellate court decisions for the proposition that unless specifically named, public entities are excluded from the reach of statutes even where "catch-all" language is present. E.g., *In re Keifer, 430 Pa. 491, 243 A.2d 336 (1968)* (an established principle of statutory construction: an act does not deprive the Commonwealth of any prerogative, right, or property unless the Commonwealth is specifically named or the intention to include it is necessarily implied); *Hoffman v. City of Pittsburgh, 365 Pa. 386, 75 A.2d 649, 42 Mun. L Rep. 75 (1950)* (applicability of statutes to public entities never presumed); Huffman (borough beyond reach of Wage and Payment **[*592]** Collection Law[8] notwithstanding broad definition of "employer"). It also relies on decisions from other states, including Leonard. The Community College asserts that based on this authority, we should apply the rule of statutory construction that the express mention of a specific matter in a general statute implies the exclusion of others not named. Thus, the absence of specific reference to public entities precludes the incorporation of the Community College into the definition of **[**13]** "person."

Further, the Community College cites various Pennsylvania statutes as evidence that the General Assembly knew how to specifically include public entities within "catch-all" provisions.[9] Had it been the intention of the General Assembly to do so with the CPL, it could have followed known patterns. Finally, the Community College seeks to distinguish a case upon which Plaintiffs rely, *TIG Specialty Insurance Co. v. Koken, 855 A.2d 900 (Pa. Cmwlth. 2004)*, because the special status of a public entity was not at issue.

In contrast, Plaintiffs assert that a "plain language" reading of the CPL definition of "person" leads to the conclusion that it includes the Community College, which is a legal entity. Citing TIG, they argue that statutory construction rules in general, and the rule of *expressio unius est exclusio alterius* in particular, should not be applied where the words of a statute are clear and unambiguous.

Plaintiffs also contend that there is no rule of construction that would require the General Assembly to name community colleges in a statute in order to evince its intent to apply the statute to those entities. Many of the cases referenced by the Community College are inapplicable because they deal with the sovereign, the Commonwealth, and not with a local agency. Also, those cases make clear that the rule of construction was applied to protect the Commonwealth's rights and prerogatives from diminution, as by the application of a statute of limitations. Because **[**15]** application of the CPL to the Community College will not involve the Commonwealth as a party or the diminution of any right of the Commonwealth, the cases are inapposite. Plaintiffs also remind this Court of the reasoning which compelled the Supreme Court to abolish sovereign immunity.

Further, Plaintiffs contend there is no legislative intent to exclude community colleges from application of the CPL. Assuming that resort to rules of construction is appropriate, various rules support their position. Thus, although a court must assume that the General Assembly intends the entire statute to be effective, *1 Pa. C.S. §1922(2)*, the

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[8] Act of July 14, 1961, P.L. 114, as amended, *43 P.S. §§260.1-260.45*.

[9] *Section 102(b)* of The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, as amended, *35 P.S. §780-102(b)* (definition of "person" expressly includes "government or governmental subdivision or agency" in addition to "any other legal entity"); *Section 911(h)(3)* of the Crimes Code, *18 Pa. C.S. §911(h)(3)* (definition of "enterprise" specifically includes "legitimate as well as illegitimate entities and governmental entities" in addition to "other legal entity" for purposes of corrupt organization sanctions); Section 103 of the Solid Waste Management Act, Act of July **[**14]** 7, 1980, P.L. 380, as amended, *35 P.S. §6018.103* (definition of "person" specifically includes "municipal authority, Federal Government or agency, State institution and agency" as well as "any other legal entity whatsoever ....").

Community College approach would render the definitional phrase "any other legal entities" ineffective. Also, cases require that the CPL be liberally construed to effectuate the legislative goal of consumer protection. *Commonwealth* ***[*593]*** *v. Percudani, 844 A.2d 35 (Pa. Cmwlth.)*, amended on reconsideration by, *851 A.2d 987 (Pa. Cmwlth. 2004)*. They assert it is unclear why, despite this rule, a community college which harmed consumers of educational services should obtain a judicially crafted exemption from the CPL.

Finally, Plaintiffs seek to distinguish Huffman, which **[**16]** involved the definition of "employer" under the Wage and Payment Collection Law, and the other statutory definitions upon which the Community College relies.

2. Discussion

a. Statutory Construction

The parties here advance competing interpretations regarding the meaning of "person" as defined in the CPL. Because the parties offer conflicting interpretations of the relevant statutory provision, the term is ambiguous. See, e.g., *Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd., 601 Pa. 449, 974 A.2d 1144 (2009)*. (***HN5***[] statute is ambiguous where parties offered conflicting, but plausible interpretations). "As in all cases where a latent ambiguity in [a] statute exists, we resort to the canons of statutory construction to discover the Legislature's intent." *Id. at 463, 974 A.2d at 1153*.

When statutory language is not explicit, the intention of the General Assembly may be ascertained by considering the mischief to be remedied, the object to be attained, and the consequences of a particular interpretation. *1 Pa. C.S. §1921(c) (3)*, *(4)*, *(6)*. Further, in ascertaining legislative intent, the Statutory Construction Act requires a presumption that "the General Assembly did not intend a result that **[**17]** is absurd or unreasonable" as well as a presumption that "the General Assembly intends to favor the public interest as against any private interest." *1 Pa. C.S. §1922(1)*, *(5)*.

b. Dual Use of "Person"

The General Assembly's intent is revealed by a careful examination of the entire CPL. As noted above, ***HN6***[] the term "person" in *Section 9.2* is used not just to refer to a defendant, such as the Community College here, but also to refer to a plaintiff. This dual use of the term is consistent throughout the CPL. See, e.g., *Section 4.1 of the CPL*,[10] (where court issues permanent injunction under Section 4, court may direct that defendant to restore money or property "to any person in interest"); *Section 9.1 of CPL*,[11] (receiver may take into possession property of "person or persons for whom the receiver is appointed;" any "person" suffering damages may participate with general creditors).

Examining the context in which "person" is used throughout the CPL, we conclude that the General Assembly intended the term **[**18]** to have a uniform meaning. Thus, there is nothing in the way the General Assembly used the term to indicate it meant something different depending on whether it referred to a plaintiff or a defendant. Also, there is nothing in the way the General Assembly used the term to indicate it meant something different in each section of the CPL.

c. "Person" as Plaintiff/ Actions in the Public Interest

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[10] *Section 4.1 of the CPL* was added by the Act of November 23, 1976, P.L. 1166, *73 P.S. §201-4.1*.

[11] *Section 9.1 of the CPL* was added by the Act of November 23, 1976, P.L. 1166, *73 P.S. §201-9.1*.

We first consider use of the term "person" to connote a plaintiff in an action based on violations of the CPL. Evaluating the consequences of a particular interpretation, **[*594]** we observe that a construction under which a local agency[12] is not a plaintiff "person" results in the inability of local agencies to recover restoration under *Section 4.1*, to participate with general creditors under *Section 9.1*, and to bring suit and recover damages, treble damages, costs and attorneys fees under *Section 9.2*. Thus, local agencies harmed by violations of the CPL would have significantly fewer remedies than other legal entity plaintiffs. Concomitantly, those violating the CPL have more limited liability if a local agency is a victim. How such a construction is in the public interest is unclear.

Moreover, the absurdity of such a construction is most evident with regard to *Sections 4*,[13] and *4.1*,[14] and *8(b)*[15] of the CPL, all of which deal with suits in the public interest. *Section 4* authorizes the Attorney General or district attorney to bring an action in the name of the Commonwealth to restrain practices in violation of the CPL where proceedings would be in the public interest. *Section 4.1* applies where such an injunction is entered, and it allows a court to also restore money or property "to any person in interest." *Section 8(b)* also applies to actions brought under *Section 4* in the public interest, and it provides for recovery by the Commonwealth of civil penalties in certain circumstances. These provisions expressly authorize the Commonwealth to be a party plaintiff and to recover civil penalties in certain circumstances.

A construction under which a local agency is not a plaintiff "person" results in the inability of a local agency to recover past lost sums under *Section 4.1*. This is true even if suit brought in the public interest is successful and prospective injunctive relief is granted. In short, even where suit in the public interest is successful, a local agency would have no retrospective remedy, only a prospective remedy. Such a result is indefensible, clearly not in the public interest, and inconsistent with our **[*595]** charge to liberally construe the CPL to achieve its objectives. *Meyer II, 606 Pa. at 548, 2 A.3d at 504* (Orie Melvin, J., concurring opinion); see also Percudani **[**22]** (***HN10***[] CPL should be liberally construed; purpose of CPL is to eliminate unfair or deceptive business practices).

d. "Person" as Defendant/ Liberal Construction

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[12] It is undisputed **[**19]** that the Community College is a local agency for purposes of governmental immunity. *Meyer II, 606 Pa. at 542 n. 2, 2 A.3d at 500 n. 2*.

[13] Section 4 of the CPL, *73 P.S. §201-4*, provides in pertinent part:

> ***HN7***[] Whenever the Attorney General ... has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this **[**20]** act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

[14] Section 4.1 of the CPL, *73 P.S. §201-4.1*, provides in pertinent part:

> ***HN8***[] Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by any means of any violation of this act, under terms and conditions to be established by the court.

[15] Section 8(b) of the CPL, *73 P.S. §201-8(b)*, provides in pertinent part:

> ***HN9***[] (b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is willfully using or has willfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty **[**21]** of not exceeding one thousand dollars ($1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under sections 4 and 4.1 of this act. Where the victim ... is sixty years of age or older, the civil penalty shall not exceed three thousand dollars ($3,000) per violation, which penalty shall be in addition to other relief which may be granted under sections 2 and 4.1 of this act.

We now consider use of the term "person" to mean a defendant in a suit based on violations of the CPL. One way to protect the public fisc is to construe the CPL so that local agencies are not "persons" and therefore can never be defendants. As discussed above, however, such an overbroad prohibition absurdly limits the right of local agencies to recover as plaintiffs. Moreover, such a construction unnecessarily restricts the rights of ordinary consumers or other legal entities to recover against local agencies should agency practices be unfair or deceptive so as to violate the CPL. Such a construction is not consistent with our charge to liberally construe the CPL to achieve its objectives. Id.

A more targeted approach to protecting the public interest is to limit those circumstances in which a "person," can be liable. Indeed, ***HN11***[] the CPL contains express limitations on liability.

First, a "person" is only liable if it is engaged in trade or commerce, as those terms are defined. See Section 2(3) of the CPL, *73 P.S. §201-2(3)*. This status **[**23]** filter operates to protect defendant "persons," **[*596]** including local agencies, from broad liability.

Second, Section 3 of the CPL, *73 P.S. §201-3*, contains specific exclusions from liability. The exclusions cover those who, in good faith and without knowledge of falsity or deceptive character, are involved in the broadcast or publication of an advertisement which may violate the CPL. Tellingly, the exclusions do not more broadly shield local agencies from liability.

Third, *Section 9.2 of the CPL*, addressing actions other than those brought in the public interest, limits liability on the basis of the purpose of the transaction. In particular, before a "person" can be liable as a defendant in such an action, the transaction must involve "personal, family or household purposes." See *Valley Forge Towers S. Condo. v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 574 A.2d 641 (Pa. Super. 1990)*, aff'd, *605 A.2d 798, 529 Pa. 512 (1992)*. Through this additional transaction-purpose filter, the General Assembly endeavored to focus recovery on consumer-based practices and to protect defendant "persons," including local agencies, from expansive liability.

Fourth, ***HN12***[] a careful review of *Sections 4*, *4.1*, and *8(b)* of the **[**24]** CPL, relating to suits brought in the public interest, supports our analysis. Thus, suits by the Attorney General or district attorney in the name of the Commonwealth must be based on a determination by an elected official that such a suit is in the public interest. See *Weinberg v. Sun Co., Inc., 565 Pa. 612, 777 A.2d 442 (2001)*. This determination is a prerequisite to injunctive relief under *Section 4* (prospective), restorative relief under *Section 4.1* (retrospective), and civil penalties under *Section 8(b)*. We conclude that this additional "public interest" filter functions to protect all defendant "persons," including local agencies, from inappropriate suit.

In sum, considering the statute's dual use of the term "person" to mean both plaintiff and defendant, the provisions for suits in the public interest, the consequences of a construction in which the phrase "any other legal entities" does not include local agencies, and the existence of additional filters to protect all "persons," including local agencies, from overbroad liability, we conclude the General Assembly's use of the phrase "any other legal entities" in its definition of "person" is expansive enough to embrace local **[**25]** agencies.[16]

e. Community College's Arguments

The Community College does not acknowledge the dual use issue, and it does not address use of the term "person" throughout the CPL. Also, the Community College does not address the import of provisions for suits in

[16] We decline to adopt the approach embraced by Judge Brobson in his dissenting opinion. While he posits that many public agency activities may satisfy the "trade or commerce" requirement of the CPL, he does not address the "transaction-purpose" requirement for actions under *Section 9.2*. Also, he does not address the most fundamental limitation on liability: that trade or commerce conduct must be "unfair or deceptive." See Section 3 of the CPL, *73 P.S. §201-3*. We see nothing in the language or structure of the CPL to suggest a legislative intent to insulate local agencies engaged in trade or commerce from responsibility for unfair or deceptive practices which cause a loss to Pennsylvania consumers.

the public interest. Because the Community College does not contemplate the full implications of the construction for which it advocates, its contentions are not persuasive.

Also, given our analysis based on the terms and structure of the **[**26]** CPL, we specifically reject those arguments based on cases which do not involve this statute and those arguments based on unrelated statutes. In particular, we reject as inapplicable the argument based on *Kiefer*, *Hoffman*, and *Huffman*[17] that the applicability of statutes to public entities is never presumed, even where a broad statutory definition is involved. These cases and statutes do not involve the unique provisions of the CPL, especially those which permit suit in the public interest. Based on the provisions of the CPL and our charge to liberally construe the statute, we conclude that local agencies are included among "any other legal entities" by necessary implication.

Further, we distinguish *Leonard*, which was referenced by our Supreme **[**27]** Court majority in Meyers I. Leonard involved a suit in mandamus seeking to compel a superintendent of highways to commence proceedings to declare a private road over land owned by a county. Thus, the petitioner sought a private taking of public land under the Highway Law. The Supreme Court, Appellate Division, determined:

> The Highway Law provisions at issue do not specifically or necessarily include governmental entities such as the County. Indeed, by providing for the payment of damages to a 'person or persons' through whose land the private road is to pass (Highway Law §307), the Legislature evinced an intention not to provide for the taking of land owned by a governmental entity. It has long been the law ... that the term 'person' generally does not include a governmental entity ... unless a statutory definition expressly includes that governmental entity within the meaning of the term.

70 A.D.3d at 698, 896 N.Y.S.2d at 360 (citations omitted).

[*597] Aside from the factual differences between Leonard and the current case, especially the obvious public interest at risk, there are such differences between the statutes as to call into question the application of that decision here. In particular, **[**28]** there is no indication that the phrase "person or persons" in the Highway Law was used to mean both petitioners and respondents. Also, the court did not discuss how provisions for Highway Law actions in the public interest were impacted by the construction of the term "person." Nor did the court allude to any standing rule of liberal construction to achieve the objectives of the Highway Law. In short, due to the language and structure of the CPL, there is reason to conclude that the phrase "any other legal entities" includes local agencies by necessary implication, while the language and structure of the Highway Law do not lead to that conclusion.

For the reasons discussed, we conclude that the Community College is a "person" as defined in the CPL. Therefore, no trial court error is evident on this issue.

B. Immunity under Tort Claims Act

1. Contentions

The Community College next asserts that as a public entity it is immune from tort actions under the Tort Claims Act, except for certain exceptions not relevant here. For several reasons, it asserts the CPL sounds in tort; accordingly, an action for violation of the CPL is a tort action to which immunity under the Tort Claims Act applies.

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[17] Although not controlling, we observe that the United States District Court for the Middle District of Pennsylvania declined to follow Huffman and the *expressio unuis est exclusio alterius* rule; rather, the court predicted the Supreme Court of Pennsylvania would hold that the Wage Payment and Collection Law applies to municipal corporations. See *Carstetter v. Adams County Transit Auth., 2008 U.S. Dist. LEXIS 51874, 2008 WL 2704600 (M.D. Pa. 2008) at *31-32* (unpublished opinion).

As **[**29]** to the standard by which to distinguish actions sounding in tort from actions sounding in contract, the Community College advocates several approaches. First, it suggests that for an action to sound in contract there must be an underlying enforceable contract. Where, as here, there is no underlying enforceable contract, the claim cannot sound in contract and must therefore sound in tort. Moreover, courts recognize that attempts to circumvent the Torts Claim Act by reclassifying an action as sounding in contract are not sufficient to avoid immunity.

Citing *Matarazzo v. Millers Mutual Group, Inc., 927 A.2d 689 (Pa. Cmwlth. 2007)* (application of Tort Claims Act to municipal authority despite attempts to raise contract claim; CPL not involved), the Community College suggests another approach to distinguishing between actions sounding in tort and actions sounding in contract. Under this approach, tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual agreements between the parties. *Id. at 694*. Because the CPL is intended to remedy a breach of social policy related to fraud and unfair and **[**30]** deceptive trade practices, suit for violation of the CPL provisions in question here sounds in tort.

As a third approach, the Community College offers the misfeasance/nonfeasance dichotomy discussed in *Yocca v. Pittsburgh Steelers Sports, Inc., 806 A.2d 936 (Pa. Cmwlth. 2002)*, rev'd on other grounds, *578 Pa. 479, 854 A.2d 425 (2004)* (class action by season ticket holders under CPL; preliminary objections). Under this approach, where, as here, there is misfeasance, the "gist" of the action sounds in tort.

Further, the Community College reminds us that judicial and statutory limitations to damages available against a public entity would be reversed by a decision against it. The Community College specifically refers to treble damages available under *Section 9.2 of the CPL*.

Finally, the Community College seeks to distinguish cases relied upon by Plaintiffs, **[*598]** in particular *Weinberg v. Sun Company Inc., 1999 PA Super 228, 740 A.2d 1152 (Pa. Super. 1999)*, aff'd in part, rev'd in part, *565 Pa. 612, 777 A.2d 442 (2001)* (class certification under CPL), and *Gabriel v. O'Hara, 368 Pa. Super. 383, 534 A.2d 488 (Pa. Super. 1987)* (appropriate limitations of action under CPL provisions).

In response, Plaintiffs contend that the Tort Claims **[**31]** Act does not apply to their claims. Claims under the CPL may sound in contract, warranty, tort, fraud and other common law forms of action. The trial court correctly determined that Plaintiffs' claims sound in contract or warranty. The claims are not based on general social obligations but on private agreements between the parties.

Plaintiffs also assail the Community College's argument that they attempt to plead contract claims as a way of avoiding immunity. In the process of disputing this argument, Plaintiffs seek to distinguish cases upon which the Community College relies, including Matarazzo and cases discussing the relationship between a student and a college.

Addressing the damages available under the CPL, Plaintiffs contend that statutory damages, including possible treble damages and attorneys' fees, do not transform contract claims into tort claims. The statutory damages are legislative remedies, not punitive damages.

Finally, Plaintiffs argue that the question of whether their claims sound in contract cannot be answered by reference to a social policy allegedly embodied in the CPL. In their discussion of this point, Plaintiffs reference the Supreme Court's decision in Weinberg, **[**32]** which addressed a private plaintiff's burden of proof in the context of class certification.

2. Discussion

In her concurring opinion, Madame Justice Orie Melvin encouraged this Court "to examine the pleadings on remand to determine whether the [Plaintiffs'] claims satisfy the CPL. If sufficient facts have been pled, the Commonwealth Court should ascertain whether the claims sound in tort or in contract and dispose of the matter accordingly." *Meyer II, 606 Pa. at 549, 2 A.3d at 505*. As to ascertaining whether the claims sound in tort or in contract, Mr. Justice

Saylor, writing for the majority, reminded us that *HN13*[] the central focus of contract law is the protection of bargained-for expectations. *Id. at 545, 2 A.3d at 502*.

In their amended complaint, Plaintiffs alleged the Community College violated the CPL in the following manner:

> 56. In connection with the sale of its educational services and collection of tuition, fees and costs related thereto, the College committed various unfair and deceptive acts and practices in violation of the CPL, including, but not limited to:
>
> (a) Representing, warranting and guaranteeing in writing that the Academy was in compliance with Act 120 when in fact it **[**33]** was not;
> (b) Representing that the Plaintiffs would be eligible for certification under Act 120 upon completion of the Academy, when they would not be eligible;
> (c) Misrepresenting the nature and qualifications of the Academy;
> (d) Making the material representations described in Paragraphs 3 through 51 of this Complaint; and
> (e) Oppressing and abusing Plaintiffs by charging and collecting unauthorized and illegal fees, costs, expenses and tuition.
>
> 57. Each Plaintiff relied upon the various warranties and misrepresentations **[*599]** of the College in entering their agreements with the College and in continuing to make payments to the College.
>
> 58. The College's unfair and deceptive conduct (a) constituted untrue representations of the approval, characteristics, certifications, sponsorships, affiliations, uses and benefits of the College's educational services; (b) constituted untrue representations that the Academy was of a particular standard or quality; (c) caused confusion and misunderstanding as to the Academy's certification and approval; (d) constituted a failure to comply with the terms of a written guarantee or warranty; and (e) constituted deceptive conduct which created a likelihood of confusion **[**34]** and misunderstanding—all within the meaning of [*Section 3 of the CPL*] and *Sections 2(4)(ii)*, *(iii)*, *(v)*, *(vii)*, *(xiv)* and *(xxi)* of the CPL].

Pls.' First Am. Compl. at 13, R.R. at 114. Thus, Plaintiffs allege conduct proscribed by the CPL as defined in *Sections 2(4)(ii)*, *(iii)*, *(v)*, *(vii)*, *(xiv)* and *(xxi)*, *73 P.S. §201-2(4)(ii)*, *(iii)*, *(v)*, *(vii)*, *(xiv)*, *(xxi)*.[18] After careful review, we conclude that Plaintiffs aver sufficient facts to satisfy the CPL.

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[18] Section 2(4) of the CPL, *73 P.S. §201-2(4)*, provides in relevant part:

> *HN14*[] (4) "**Unfair methods of competition**" and "**unfair or deceptive acts or practices**" mean any one or more of the following:
>
> ....
>
> (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
>
> (iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
>
> ....
>
> (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> ....
>
> (vii) Representing **[**35]** that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
>
> ....

Moreover, we conclude that these averments sound in contract rather than tort. Clearly, the averments relate to the sale of educational services. Under these averments, the protection of bargained-for expectations is implicated.

Further, Plaintiffs brought an action under *Section 9.2 of the CPL*. As discussed elsewhere, such an action may be brought by a person "who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss ...." *73 P.S. §201-9.2*. Thus, an action under *Section 9.2 of the CPL* must be transaction based. For this additional reason, we conclude Plaintiffs' action under the CPL sounds in contract.

Regarding the Community College's argument raising the specter **[**36]** of treble damages, no ruling is necessary at this time, for several reasons. First and foremost, the trial court did not address this issue in denying the motion for partial summary judgment. Second, "[Plaintiffs] are not sure to recover [treble] damages ...." See *Meyer II, 606 Pa. at 549, 2 A.3d at 505* (Orie Melvin, J., concurring opinion). The speculative nature of such recovery is highlighted by the trial court's decision on the first round of preliminary objections and the current pleadings. In particular, the trial court struck off claims for fraud **[*600]** because "the element of fraud necessary to demonstrate scienter is not present in the allegations set forth in the Complaint." Trial Ct. Slip. Op., 5/16/2003, at 8, R.R. at 92. Also, Plaintiffs' amended complaint does not contain averments of foreknowledge or intent on the part of the Community College. For these reasons, there is no need to decide an issue which may never arise.

As a consequence of these conclusions, we hold that immunity under the Tort Claims Act does not apply to Plaintiffs' CPL claims. Therefore, we discern no error in the trial court's ruling on this issue.

V. Conclusion

For all the foregoing reasons, we affirm the **[**37]** decision of the trial court denying the Community College's motion for partial summary judgment. The case is returned to the trial court.

ROBERT SIMPSON, Judge

ORDER

AND NOW, this 27th day of October, 2011, the order of the Court of Common Pleas of Beaver County denying the Motion for Partial Summary Judgment is **AFFIRMED**.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge

Concur by: PATRICIA A. McCULLOUGH

Concur

[*611contd]

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

....

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

CONCURRING OPINION BY JUDGE McCULLOUGH

I concur in the result reached by the Majority. I agree that the Community College of Beaver County (College), as a legal entity, falls within the definition of "person" set forth at *section 2(2)* of the Unfair Trade Practices and Consumer Protection Law (CPL)[1] and is subject to **[*612]** private actions brought under *section 9.2 of the CPL*.[2] I also agree with the Majority's conclusion that the claims set forth in the complaint sound in contract, rather than tort. However, I respectfully diverge from the focus of the Majority's analysis.

The instant action was filed by a group of students (Students) who were enrolled in the College's police **[**38]** academy training program (Academy) and had completed a substantial portion of their training when the Academy lost its Act 120 certification.[3] As a consequence, the credits Students earned are likely of little use towards obtaining Act 120 certification necessary to obtain employment in the field of law enforcement. Students filed a two-count complaint against the College; relevant here, Students allege that the College committed numerous unfair and deceptive acts and practices in violation of the CPL.[4]

The threshold question raised in this appeal is whether the College is subject to private actions brought under *section 9.2 of the CPL. In* deciding this issue, I believe the Majority considers **[**39]** questions neither raised nor necessary to decide for purposes of this appeal. In contrast to the Majority's approach, I would confine our analysis to the issues raised by the parties.

The College asserts that it is not subject to the CPL, based in part on the assertion that it is not a "person," which term is defined by *section 2(2) of the CPL* as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." *73. P.S. §201-2(2)*. Like the Majority, I disagree.

The College contends that, as a general principle, the word "person" does not include a government entity unless the same is expressly included in the statutory definition.[5] In support of this argument, the College relies on decisions in other jurisdictions, particularly, *Leonard v. Masterson, 70 A.D.3d 697, 896 N.Y.S. 2d 358 (N.Y. App. Div. 2010)*. The petitioner in Leonard owned property surrounded by land owned by the county. The petitioner sought to establish a private road over part of the county's land pursuant to a state statute that essentially provides for a private condemnation proceeding. (Highway Law §§300 et seq.) The issue on appeal in Leonard was whether the legislature **[**40]** intended to provide that land owned by a government entity may be the subject of such a proceeding. The court observed that the statutory language at issue referred to a "person or persons" through whose land the private road is to pass. The court relied on previous New York decisions to affirm the denial of the petition, observing "it has long been the law...that the term 'person' generally does not include a government entity unless a statutory definition expressly includes that governmental entity within the meaning of the term." *Id. at 360*.

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[1] Act of December 16, 1968, P.L. 1224, as amended, *73 P.S. §201-2*.

[2] Added by the Act of November 24, 1976, P.L. 1166, *73 P.S. §201-9.2*.

[3] The Municipal Police Officers Education and Training Act, *53 Pa. C.S. §§2161-70*, is informally known as "Act 120."

[4] Students' complaint alleges "some fairly egregious failures on the part of the College," as our Supreme Court described them, including the failure of Academy instructors to be properly certified to teach various courses and the Academy's failure to accurately document student examination scores. *Meyer v. Community College of Beaver County, 606 Pa. 539, 541, 2 A.3d 499, 500 (2010)*.

[5] A community college is a local governmental agency. *Bucks County Community College v. Bucks County Board of Assessment Appeals, 147 Pa. Commw. 505, 608 A.2d 622 (Pa. Cmwlth. 1992)*; *Community College of Allegheny County v. Seibert, 144 Pa. Commw. 616, 601 A.2d 1348 (Pa. Cmwlth. 1992)*.

I agree with the Majority that the holding in *Leonard* is inapplicable here; indeed, I believe that the statute, facts, and policy concerns in Leonard are so distinguishable as to render any reference to that case of no value.

More important, no Pennsylvania court has issued a similarly explicit holding. Relying on *Huffman v. Borough of Millvale, 139 Pa. Commw. 349, 591 A.2d 1137 (Pa. Cmwlth. 1991)*, the College claims that **[**41]** our courts have applied a substantially comparable principle in construing a statutory definition. However, I believe that the College's reliance on *Huffman* is misplaced. Huffman involved an injured borough police officer who filed a complaint alleging that the borough failed to compensate him for holiday, vacation and sick leave benefits. On appeal, this Court first addressed the trial court's determination that the police officer had no cause of action under the Wage Payment and Collection Law (Wage Law)[6] because the Wage Law does not apply to municipalities. At issue was the Wage Law's definition of "employer," which includes "every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing people in this Commonwealth."[7] We noted that **[*613]** "boroughs" are not included within the statutory definition of an "employer" under the Wage Law, and we relied on the legal maxim *expressio unius est exclusio alterius* to affirm the trial court's conclusion, reasoning as follows:

> Municipal corporations such as the Borough are not included within the definition of "employer," and **[**42]** we, as an appellate court, cannot expand the definition of "employer" to include them. There is a clear distinction between municipal and private corporations and, if the legislature wished that municipal corporations be covered by the Law, it could have easily included them. We apply the legal maxim, *expressio unius est exclusio alterius* which directs that the mention of a specific matter in a statute implies the exclusion of others not mentioned. *Samilo v. Pennsylvania Insurance Department, 98 Pa.Commonwealth Ct. 232, 510 A.2d 412 (1986)*.

Huffman, 591 A.2d at 1139 (footnote omitted). Subsequently, in *Philipsburg-Osceloa Education Association v Philipsburg-Osceola Area School District, 159 Pa. Commw. 124, 633 A.2d 220, 223 (Pa. Cmwlth. 1993)*, we relied on our analysis in Huffman to hold that a school district was not an employer under the Wage Law. ("The legislature could have easily included municipal corporations or, for that matter, school districts under its definition of employer, but it did not. We therefore decline to extend the Wage Law to school district employers.")

These cases have been cited for the propositions that: (1) the Wage Law does not apply to municipal employees; and (2) the court will not supply a missing term in a statute. Neither case has been cited for the principle that a statute does not apply to a government entity unless the statute specifically so provides. Notably, neither is part of a "line of cases" holding that the legislature did not intend to include governmental entities within a listing of persons and entities which might technically encompass them where it did not expressly include the governmental entity in such listing.

The College cites *In re Keifer, 430 Pa. 491, 243 A.2d 336 (1968)*, for the established principle of statutory construction that "an act does not deprive the Commonwealth of any prerogative, right or property, as would a statute of limitations, unless the Commonwealth is specifically named therein or unless an intention to include the Commonwealth is necessarily implied. When the act is an expression of "public policy," however, the general rule does not apply." *Id. at 495, 243 A.2d at 339* (citations omitted). Keifer was an eminent domain proceeding that addressed whether a **[**44]** statute of limitations barred the state from accepting a dedication of land. Concluding that the statute was not an expression of public policy, the court in Keifer held that it did not apply against the Commonwealth. The College also relies on the decision in *Hoffman v. Pittsburgh, 365 Pa. 386, 398, 75 A.2d 649, 654, 42 Mun. L Rep. 75 (1950)* ("It is axiomatic that a statute is never presumed to deprive the state of any prerogative, right, or property unless the intention to do so is clearly manifest, either by its express terms or necessary implication"). The court in Hoffman held that an ordinance adopted by the City of Pittsburgh pursuant to a statute did not authorize the City to acquire a fee simple title in property owned by the Commonwealth.

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[6] Act of July 14, 1961, P.L. 114, as amended, *43 P.S. §§260.1-260.45*.

[7] Section 2.1 of the Wage Law, added by the Act of July 14, 1977, **[**43]** P.L. 82, *43 P.S. §260.2a*.

Both of these cases are factually distinguishable from the present matter in an important respect: they involved the status of the Commonwealth, rather than a local government agency. Moreover, the College cites no Pennsylvania case applying such a principle to other governmental entities. The distinction between sovereign and governmental entities is well recognized **[*614]** in Pennsylvania. For example, in affording protection from liability in actions sounding in **[**45]** tort, the legislature has separately provided for sovereign immunity and governmental immunity. See *42 Pa. C.S. §§8521-22* (related to sovereign immunity) and *42 Pa. C.S. §§8541-42* (related to governmental immunity). With respect to more general legal principles, I note that in *Northampton County Area Community College v. Dow Chemical, 389 Pa. Super. 11, 566 A.2d 591 (Pa. Super. 1989)*, the court held that a community college could not assert the doctrine of *nullum tempus occurrit regi* (time does not run against the king) because the community college was not a commonwealth agency.

Accordingly, I agree with the Majority that the College's arguments are without merit. I also would note Students. response to the College's argument that the failure to explicitly include a community college or governmental entity in the CPL's definition of "person" precludes the application of the statute to those entities: the CPL expressly identifies those entities that are not subject to its provisions.

Unlawful acts or practices; exclusions

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by *subclauses (i) through (xxi) of clause (4) of section 2* of **[**46]** this act and regulations promulgated under *section 3.1* of this act are hereby declared unlawful. The provisions of this act shall not apply to any owner, agent or employe of any radio or television station, or to any owner, publisher, printer, agent or employe of an Internet service provider or a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

73 P.S. §201-3. As Students point out, the legislature did not include community colleges or governmental entities of any kind in this provision.[8]

Finally, I agree that a review of the averments establishes that the protection of bargained-for expectations is implicated in this case. Accordingly, I join the Majority in concluding that the College is not immune from Students. claims under the CPL.

However, I believe that the Majority unnecessarily considers issues that are in no **[**47]** way implicated in this appeal. To the extent that this part of the Majority's analysis is other than dicta, I am compelled to disagree.

Indeed, despite the "dual use" of the word "person" within the CPL, I believe it would be equally reasonable to conclude that the CPL's various provisions reflect a legislative intent to provide two distinct methods of ensuring that the purpose of the statute is met. Significantly, the purpose of the CPL is to protect the public from fraud and unfair or deceptive business practices. *Burke v. Yingling, 446 Pa. Super. 16, 666 A.2d 288 (Pa. Super. 1995)*; see also *Commonwealth ex rel Packel v. Ziomek, 145 Pa. Commw. 675, 352 A.2d 235, 238 (Pa. Cmwlth. 1976)* ("The purpose of the General Assembly in passing the [CPL] was to protect citizens from unfair or deceptive practices, and the Legislature granted to the Attorney General the power to bring an action in the name of the Commonwealth for injunctive relief to protect the individual citizens...."). The CPL effectuates **[*615]** this purpose by permitting certain private and public actors to bring suit. Thus, *section 9.2 of the CPL* authorizes private actions to recover actual damages,[9] and *section 4 of the CPL* authorizes the Attorney General or District **[**48]** Attorney to act in the

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[8] This provision, identifying parties to whom the CPL does not apply, distinguishes the CPL from statutes that specifically include state and local entities in their definitions of "person."

[9] In relevant part, section 9.2(a) of the CPL, *73 P.S. §201-9.2(a)* (emphasis added), states as follows:

> (a) Any person who purchases or leases goods or services *primarily for personal, family or household purposes* and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any

public interest by bringing actions to restrain unlawful practices.[10][11] 73 P.S. §§201-4; 201-9.2; see also Portis v. River House Associates, L.P., 498 F. Supp. 2d 746 (M.D. Pa. 2007) (observing that the fact that a public actor may bring suit ensures that the CPL's purpose can be realized even in those circumstances in which private actors can not file suit). Because the intent of the statute is to protect consumers, I question the Majority's analysis concerning the protection afforded to governmental agencies by a transaction-purpose filter set forth in section 9.2 of the CPL. (Majority op. at 17) Contrary to the Majority's view, I believe it would be reasonable to interpret this language *as a restriction on parties who may bring a private action under the CPL*.

Moreover, holding that *all* governmental entities are persons permitted to bring an action under section 9.2 of the CPL - which specifically authorizes "a private action" - overlooks the very meaning of the word "private," which is "[r]elating or belonging to an individual, as opposed to the public or the government." Black's Law Dictionary 1315 (9th ed. 2009).

Therefore, whereas the Majority *sua sponte* decides that all public entities are "persons" that can bring private actions and can be subject to suit under the CPL, I would simply hold that there is no legal basis to conclude that the College is not subject **[**51]** to the action brought by Students under section 9.2 of the CPL.[12]

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person of a method, act or practice declared unlawful by section 3 **[**49]** of this act, *may bring a private action* to recover actual damages or one hundred dollars ($100), whichever is greater.

[10] 10 Section 4 of the CPL, 73 P.S. §201-4, (emphasis added) provides in pertinent part:

> Whenever the Attorney General ... has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, *he may bring an action in the name of the Commonwealth* against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

[11] In Weinberg v. Sun Company, Inc., 565 Pa. 612, 777 A.2d 442 (2001), our Supreme Court recognized that there is a distinction between Commonwealth actions and private actions brought under the CPL. In Weinberg, purchasers of gasoline filed a consumer class action under the CPL, the consumer fraud laws of all other states, and common law, challenging the corporation's advertising of the gasoline and alleging that the corporation's advertisements induced consumers to purchase the gas when their vehicles did not need the high level of octane the gas contained. The trial court denied class certification **[**50]** on the basis that requirements of numerosity and common questions were not met and individual questions of fact predominated. The Superior Court reversed as to two of the four CPL claims. On further appeal, the issue before the Supreme Court involved the interpretation of section 9.2 of the CPL, permitting a private right of action. The court reviewed section 4 of the CPL, applicable to the attorney general, and section 9.2, governing a private action, and concluded that "Commonwealth actions and private actions are readily distinguishable." Id., 565 Pa. at 617, 777 A.2d at 445.

[12] Thus, unlike the dissenting view expressed by Judge Leavitt, I would not address the question of whether the Commonwealth of Pennsylvania, its agencies, political subdivisions or any other governmental entity engages in "trade" or "commerce" that is regulated by the CPL. However, were this issue raised by either party on appeal, I believe that a statement to the effect that *no* such entity is engaged in trade or commerce, (Dissent, pages 1, 5), is factually and legally incorrect. (See the Pennsylvania Liquor Control Board's website directing users to its "retail page.") Also, I am not persuaded that a breach of contract claim against the College is actionable under 42 U.S.C. §1983.

In addition, I do not believe that it is necessary to revisit our decision in Commonwealth v. TAP Pharmaceutical Products, Inc., 885 A.2d 1127, 1143-44, (Pa. Cmwlth. 2005), and consider again whether the Commonwealth has parens patriae standing to pursue damage claims of individuals under the CPL, where the issue in the present case is whether an action may be brought under the CPL against the College.

Finally, in answer to the query whether **[**52]** accountability under the CPL is needed, (Dissent, page 15), I believe that the egregious conduct alleged here, *see* footnote 4, *infra*, suggests that such accountability is not redundant.

Moreover, in light of the specificity with which the phrase "unfair or deceptive acts or practices" is defined by section 2(4)(i)-(xxi) of the CPL, 73 P.S. §201-2(4)(i)-xxi), and particularly in light of the nature of the conduct described, e.g., passing off goods or services as those of another, I do not share the concerns expressed in Judge Brobson's dissent and do not expect that actions

[*616] Finally, I note that the College raises the issue of treble damages to argue that Students' claims actually sound in tort. According to the College: *section 9.2* allows for an award of treble damages; treble damages have been described as having "a strong punitive dynamic;" and punitive damages are not available for a breach of contract claim; therefore, Students. averments under the CPL are, in fact, tort claims. **[**53]** As previously indicated, I agree with the Majority that Students' averments sound in contract rather than tort. Having so concluded, I would dismiss outright the College's argument "raising the specter of" treble damages.

PATRICIA A. McCULLOUGH, Judge

Dissent by: DAN PELLEGRINI; MARY HANNAH LEAVITT; P. KEVIN BROBSON

Dissent

[*600contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

DISSENTING OPINION BY JUDGE PELLEGRINI

I respectfully dissent. Unlike the majority, I would hold that the Community College of Beaver County (Community College) is immune from suit because the action brought sounds in tort, not in contract. I also dissent because the majority holds that the Community College is engaged in "trade or commerce" as that term is used in the Unfair Trade Practices and Consumer Protection Law (CPL).[1] Because that issue was not raised and briefed, I would not address that issue. Because the majority did, I would hold that the CPL does not apply as a governmental agency does not engage in the business of "trade or commerce" because a governmental agency only engages in the "business" of government.

A group of former students (Students) filed a civil action against the Community College for **[**54]** breach of contract and breach of warranty as well as various unfair or deceptive acts as defined in the CPL. In their complaint, the Students alleged that they had completed a substantial portion of the training when the Community College lost its certification under the governing statute as a result of decertification, the credits they earned could not be recognized elsewhere, and they incurred damages as a result. In *Meyer v. Community College of Beaver County, 606 Pa. 539, 2 A.3d 499 (2010)*, reversing in part this Court, our Supreme Court held that governmental immunity created by the Political Subdivision Torts Claim Act[2] does not extend to all statutory causes of action, regardless of whether they sound in tort or contract. The Supreme Court then remanded the matter to us to address issues previously raised in the Community Colleges' partial motion for summary judgment but not addressed in our opinion.

While it raised many issues in its partial motion for summary judgment, the Community College only addressed two of those issues in its brief. First, the Community College argued that it was not subject to liability under the CPL because it is not a "person" **[**55]** within the definition of *Section 2.2 of the CPL* so as to impose **[*601]** liability under *Section 9.2(a)*.[3] I agree with that portion of the majority's opinion that the Community College is a "person" for the purpose of imposing liability under the CPL if it meets the other preconditions for liability under the CPL.

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will regularly be brought against state or local agencies for the egregious conduct the CPL prohibits. More important, I would not characterize such acts by public entities as causing "purely private injury."

[1] Act of December 17, 1968, P.L. 1224, *as amended*, *73 P.S. §§201-1 - 201-9.3*.

[2] *42 Pa. C.S. §§8541-8541*.

[3] Added by the Act of November 24, 1976, P.L 1166.

The second issue the Community College raised in its brief is that the Students' claims sound in tort, not contract. It argues that a course catalog does not create a contract between the parties upon which to base a contract action. Second, representations made by the Community College staff members cannot create a contractual obligation. Based on an examination of the complaint, the majority finds that those allegations the Students have pled sound in contract, not tort. I disagree with the majority because I do not believe that the Students have made out a contractual claim and would dismiss the action.

Insofar as the Students claim that a contract action can be based on breach of representation contained in the student handbook because the handbook created a contract, we rejected that contention in *Tran v. State System of Higher Education, 986 A.2d 179 (Pa. Cmwlth. 2009)*, **[**56]** where we explicitly held that a student handbook of a public university does not create a contract between the public university and the student. *See also* *Crabtree v. California University of Pennsylvania, 147 Pa. Commw. 1, 606 A.2d 1239, 1240 n. 3 (Pa. Cmwlth. 1990)*. Because community colleges are public colleges, a contract action cannot be maintained on an alleged breach of a student handbook or catalog.

As to whether representations by the Community College staff can create a contract between the parties, ignoring that contracts with bodies have to be entered in compliance with statutory formalities, representations made by staff members are not sufficient to bring a contract claim. In *Matarazzo v. Millers Mutual Group, Inc., 927 A.2d 689 (Pa. Cmwlth. 2007)*, we addressed whether a contract claim could be brought based upon a governmental employee's representation on which a party relied causing them injury. While we agreed that an action could be maintained for private parties, it could not be used to turn negligent actions by governmental employees into contract actions to avoid governmental immunity. If we were to hold otherwise, any guidance counselor who foolishly and negligently promised to **[**57]** a student that if he or she took a course and did well, he or she would get into Harvard, and then the student would take those courses and do well but did not get into Harvard, could bring an action in contract.

Finally, in footnote 16, the majority holds that it sees "nothing in the language or structure of the CPL to suggest a legislative intent to insulate local agencies engaged in trade or commerce from responsibility for unfair or deceptive practices which cause a loss to Pennsylvania Consumers." First, I disagree because this issue was never raised or briefed by any of the parties, and we should not address it *sua sponte*. Second, I disagree with the substance of the holding. The reason that I would hold that the CPL does not apply is not that the Community College is not a person but that is not engaged in the conduct of a "trade or commerce." "Trade or commerce" is mercantile activity in which the person engaged in that business is doing so for private profit which could motivate unfair or deceptive practices for private gain or, more accurately, private greed. All of the provisions of the CPL are aimed at private businesses. The Community College is not engaged in the **[*602]** conduct **[**58]** of "trade or commerce" but is carrying out a public responsibility with tax dollars to provide students with an affordable education to citizens of the Commonwealth. In other words, when a governmental entity is carrying out a public duty, it is not engaged in the conduct of a trade or commerce, but in the conduct of government. If this issue was before us, I would hold that the CPL does not apply.

For the foregoing reasons, I dissent.

DAN PELLEGRINI, JUDGE

DISSENTING OPINION BY JUDGE LEAVITT

The majority holds that the Community College of Beaver County is a "person" that can be held liable for treble damages under the Unfair Trade Practices and Consumer Protection Law (Consumer Protection Law)[1] for engaging in unfair trade practices. I disagree that the Commonwealth of Pennsylvania, its agencies, political subdivisions and state-created institutions of education are engaged in a type of "trade or commerce" that is regulated by the Consumer Protection Law. Accordingly, I must, respectfully, dissent.

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[1] Act of December 17, 1968, P.L. 1224, *as amended*, *73 P.S. §§201-1 - 201-9.3*.

Here, a group of students seek damages because they took police officer training courses based, in part, on the representations **[**59]** of the Community College that its program was certified. The college lost its certification, and the students lost the benefit of their bargain. The students may be entitled to relief, but not under the Consumer Protection Law. To reach this conclusion, I look to the words of the Consumer Protection Law.

The students seek redress under *Section 9.2(a)* of the Consumer Protection Law, which states:

9.2 Private actions

> (a) *Any person who purchases or leases goods or services primarily for personal, family or household purposes* and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by *section 3* of this act, *may bring a private action to recover actual damages* or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

Section 9.2(a) of the Consumer **[**60]** Protection Law, *73 P.S. §201-9.2(a)*, *added by* Act of November 26, 1976, P.L. 1166 (emphasis added). The students assert they are "persons" who purchased "services" for "personal purposes" and thereafter suffered a loss of money as a result of the unlawful act of another "person," i.e., the Community College. The Consumer Protection Law defines "person" as follows:

> "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and *any other legal entities*.

Section 2 of the Consumer Protection Law, *73 P.S. §201-2* (emphasis added). The question is whether the words "any other legal entities" meant to sweep up the Commonwealth, its agencies and Pennsylvania municipal corporations within the reach of "person." There are several reasons why I believe that it does not.

First, the General Assembly knows how to draft legislation to define "person" to designate a Commonwealth agency or political **[*603]** subdivision. For example, The Controlled Substance, Drug, Device and Cosmetic Act[2] defines "person" as follows:

> "Person" means individual, corporation, *government or governmental subdivision or agency*, business trust, estate, trust, partnership or association, **[**61]** or *any other legal entity*.

Section 2 of the Controlled Substance, Drug, Device and Cosmetic Act, *35 P.S. §780-102(b)* (emphasis added). Likewise, *Section 103* of the Solid Waste Management Act,[3] defines a "person" as

> [a]ny individual, partnership, corporation, association, institution, cooperative enterprise, *municipal authority, Federal Government or agency, State institution and agency (including, but not limited to, the Department of General Services and the State Public School Buildings Authority), or any other legal entity* whatsoever which is recognized by law as the subject of rights and duties.

35 P.S. §6018.103 (emphasis added).[4] If the General Assembly had intended to include Commonwealth agencies and community colleges within the ambit of the Consumer Protection Law, it would have so stated. It did not do so in *Section 2* of the Consumer Protection Law.

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[2] Act of April 14, 1972, P.L. 233, *as amended*, *35 P.S. §§780-101 - 780-144*.

[3] Act of July 7, 1980, P.L. 380, *as amended*, *35 P.S. §§6018.101 - 6018.1003*.

[4] There are many more examples. *See, e.g.*, Section 4(a) of the Human Relations Act, Act of October 27, 1955, P.L. 744, *as amended*, *43 P.S. §954(a)* (defining "person" to include "the Commonwealth **[**62]** of Pennsylvania, and all political

Second, the statutory construction maxim *ejusdem generis* must inform our construction of "any other entity." This doctrine "mandates that general expressions used in a statute are restricted to things and persons similar to those specifically enumerated in the language preceding the general expressions." *Petty v. Hospital Service Association of Northeastern Pennsylvania, Pa. , , 23 A.3d 1004, 1009 (2011)* (citation omitted). In *Section 2*, the listed entities are private parties, *i.e.*, "natural persons, corporations, trusts, partnerships [and] incorporated or unincorporated associations." *73 P.S. §201-2*. A Commonwealth agency created by the legislature to administer and enforce a statute bears no similarity **[**63]** to the private parties listed in *Section 2*. Any "other legal entity" might include, for example, a limited liability company, which is a type of legal entity formed to conduct business that is not named in *Section 2*; indeed, this type of legal entity did not exist at the time the Consumer Protection Law was enacted in 1976.[5]

It makes sense that the Commonwealth and its progeny were intentionally omitted from the definition of "person," because the Consumer Protection Law regulates "trade or commerce," which does not describe governmental activities, as noted by Judge Pellegrini in his dissent.[6] *Section 3* states, in relevant part, as follows:

> **[*604]** *Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce* as defined by *subclauses (i) through (xxi) or clause (4) of section 2* of this act and regulations promulgated under *section 3.1* of this act are hereby declared unlawful.

Section 3 of the Consumer Protection Law, *73 P.S. §201-3* (emphasis added). The Commonwealth, **[**64]** its agencies and municipal corporations are not engaged in "trade or commerce." The Community College is a public institution, funded, in part, by the Commonwealth and was not created to "compete" with private educational institutions, whether non-profit or for-profit. Rather, the Community College was created to fill a need not filled by other institutions.

This Court has held that the Commonwealth is a "person" capable of bringing "a private action" to recover treble damages under *Section 9.2* of the Consumer Protection Law. *See* *Commonwealth v. TAP Pharmaceutical Products, Inc., 885 A.2d 1127, 1143 (Pa. Cmwlth. 2005)* (*Tap II*). I agree with the majority that if the Commonwealth or a local agency is a person for purposes of being a plaintiff under the Consumer Protection Law, then it follows that either must also be a "person" for purposes of being a defendant. Stated otherwise, the word "person" must have one meaning for all purposes of the statute. However, I believe we erred in *TAP* ***[**65]*** *II* in holding that the Commonwealth was a "person" for purposes of being a plaintiff in a Section 9.2 action. We should overrule this portion of the decision.

In *TAP II*, the Attorney General filed suit under *Section 9.2* against a number of pharmaceutical companies, asserting that they had engaged in unfair and deceptive marketing practices for the purpose of overcharging consumers for their drug products. To bring a "private action" under *Section 9.2*, the plaintiff "person" must have purchased the drugs for "personal, family or household purposes." *73 P.S. §201-9.2*. We glossed over that point, holding that the "Commonwealth" could bring a "private" action against the named pharmaceutical defendants, even though the Commonwealth did not purchase drugs for "personal, family or household purposes." *73 P.S. §201-9.2*. We also overlooked the title of *Section 9.2*, which creates a "private action," and the fact that an action brought by the Attorney General in the name of the Commonwealth cannot be a "private action." Instead, we accepted the Attorney General's argument that because the Commonwealth acted in a representative, or *parens*

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subdivisions, authorities, boards and commissions thereof"...); Section 1 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, *35 P.S. §691.1* (defining "person" as "any agency, instrumentality or entity of Federal or State Government..."); and *Section 3* of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *35 P.S. §4003* (defining "person" as an "agency of the Commonwealth or Federal Government...").

[5] The Limited Liability Company Law of 1994, Act of December 7, 1994, P.L. 703, *as amended*, ***15 Pa. C.S. §§8901-8998***, authorizes the formation of a limited liability company in Pennsylvania.

[6] State parks offer overnight campsites at state parks, and so do private campgrounds. This does not mean that the Commonwealth has undertaken "trade or commerce" in the creation of its state park system.

patriae capacity, the Commonwealth was a "person" capable **[**66]** of bringing a "private action" under Section 9.2 to recover damages. There are several flaws to our holding in *Tap II*.

The central flaw is that the Attorney General does not have general *parens patriae* authority.[7] The powers of the Attorney General begin with the Pennsylvania Constitution, and it states, in relevant part, as follows:

> An Attorney General shall be chosen by the qualified electors of the Commonwealth...[.] [H]e shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties *as may be imposed by law*.

PA. CONST. art. IV, §4.1 (emphasis added). The law that imposes those powers and duties is the Commonwealth Attorneys **[*605]** Act, Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§732-101 - 732-506. Further, that act is the exclusive source of the Attorney General's powers; stated otherwise, the Attorney General's powers and duties have no basis in the common law, which is the source of the *parens patriae* doctrine.[8]

This was not always the case. Article IV, section 4.1 was added to the Pennsylvania Constitution by amendment in 1978. Prior to that amendment, the Attorney General was appointed by the governor and served as a member of the governor's cabinet as head of the Department of Justice. Pre-1978, the Attorney General's powers and duties were enumerated in The Administrative **[**68]** Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§51 - 732, and they were thought to be augmented by common law powers. In a landmark case, Commonwealth ex. rel. Minerd v. Margiotti, 325 Pa. 17, 188 A. 524 (1936), our Supreme Court reviewed the historic antecedents of the Attorney General's common law power and held that Pennsylvania's Attorney General

> *is clothed with the powers and attributes which enveloped Attorneys General at common law*, including the right ... to supersede and set aside the district attorney when in the Attorney General's judgment such action may be necessary.

Id. at 30-31, 188 A. at 530 (emphasis added).

The Attorney General's common law powers included the power to supersede a district attorney in a criminal matter and to intervene in charitable trust cases on behalf of the citizens of Pennsylvania. *See, e.g.,* Commonwealth v. The Barnes Foundation, 398 Pa. 458, 467, 159 A.2d 500, 505 (1960) (holding that the Attorney General enjoys the common law power to participate in litigation involving charitable trusts).

In 1978, our Supreme Court overruled Minerd, finding "the reasoning in this line of decisions to be erroneous...." Commonwealth v. Schab, 477 Pa. 55, 60, 383 A.2d 819, 821 (1978). **[**69]** Accordingly, the Supreme Court held that the Attorney General lacked the power to supersede a district attorney in a criminal law enforcement matter. That same year, after *Schab* was issued, the voters adopted Article IV, section 4.1 of the Pennsylvania Constitution, which instituted the election of our Attorney General, replacing the selection by gubernatorial appointment.

Thereafter, the newly elected Attorney General attempted to supersede a district attorney in a criminal case, arguing that the holding in *Schab* was no longer viable in light of the constitutional amendment. Specifically, the Attorney General argued that the

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[7] *See also* Pa. Dep't of Banking v. NCAS of Del., LLC, 995 A.2d 422 (Pa. Cmwlth. 2010) (Leavitt, J., concurring).

[8] The origin of the parens patriae doctrine can be traced to medieval England. Conceptually, the **[**67]** doctrine is derived from the king's royal prerogative to act as the guardian of an individual unable to protect his own interests. The attorney general, at common law, was the chief legal representative of the sovereign in the courts and was the only officer who could prosecute on behalf of the people in order to protect the interests of the crown. As in England, a colonial attorney general, acting as the chief legal officer of a British colony, enjoyed broad common law power to bring suit in parens patriae on behalf of colonial citizens. *Jay L. Himes, State Parens Patriae Authority: The Evolution of the State Attorney General's Authority* 1-2, 18-19 (The Institute for Law and Economic Policy Symposium paper, Apr. 23, 2004), *available* at http://www.abanet.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf.

> Commonwealth Attorneys Act is but one source of the Attorney General's powers, and that, moreover, the language of Article 4, section 4.1, of our state constitution **[*606]** and that of the Act evidence *an intent to retain the common law* powers of the Attorney General.

Commonwealth v. Carsia, 512 Pa. 509, 512, 517 A.2d 956, 957-958 (1986) (emphasis added). Our Supreme Court rejected the argument that the Attorney General had any powers not specified in statutory law.

Explaining the meaning of Article IV, section 4.1 of the Pennsylvania Constitution, **[**70]** the Supreme Court explained:

> In our view, the use of the language "as may be imposed" clearly shows an extension of power to the legislature to statutorily define and regulate the powers and duties of the Attorney General.
>
> The General Assembly utilized that grant of constitutional powers in 1980, and enacted the Commonwealth Attorneys Act. That Act made it clear that *the powers of the state Attorney General are* no longer an emanation from some bed of common law precepts, but are *now strictly a matter of legislative designation and enumeration*.

Id. at 513, 517 A.2d at 958 (emphasis added). In sum, under the Pennsylvania Constitution, the powers of the Attorney General are "strictly a matter of legislative designation and enumeration." *Id*.

In reaching this conclusion, the Supreme Court relied upon a report of the Joint State Government Commission that had been prepared on the legislation needed to establish the scope and powers of the new Office of Attorney General. The Commission's final report explained that

> *[l]egislation* enacted by the General Assembly *is the exclusive source of the powers and duties of the elected Attorney General* pursuant to Article IV, Section 4.1....

JOINT STATE GOV'T **[**71]** COMM'N, OFFICE OF ELECTED ATTORNEY GENERAL, FINAL REPORT 4 (1978). The legislation that was the subject of the Joint State Government Commission's report became the Commonwealth Attorneys Act.

The Commonwealth Attorneys Act has limited the Attorney General's *parens patriae* power, *i.e.*, the power to initiate actions on behalf of citizens, to two circumstances. First, the Attorney General may intervene in charitable matters on behalf of citizens. 71 P.S. §732-204(c).[9] Second, the Attorney General may represent "the Commonwealth *and its citizens* in any action brought for violation of the antitrust laws of the United States and the Commonwealth." *Id*. (emphasis added).[10] That is it.

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[9] It states, in relevant part:

> The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and *may intervene in any other action, including those involving charitable bequests and trusts* or the constitutionality of any statute. The *Attorney General shall represent the Commonwealth and its citizens* in any action brought **[**72]** for violation of the antitrust laws of the United States and the Commonwealth.

71 P.S. §732-204(c) (emphasis added).

[10] At the time the Joint State Government Commission filed its report, the General Assembly was considering 1977 House Bill 845, intended to create intrastate antitrust enforcement authority for the Attorney General. JOINT STATE GOV'T COMM'N, OFFICE OF ELECTED ATTORNEY GENERAL, FINAL REPORT 11 (1978). The bill died in committee and never passed the House. Pennsylvania General Assembly, Bill Information, Regular Session 1977-1978, House Bill 845, *available at* http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=1977&sind=0&body=H&type=B&BN=0845.

The Commonwealth has not yet enacted a state antitrust statute. In the meantime, the Attorney General may enforce federal antitrust laws in a representative capacity.

[*607] In *TAP II*, this Court considered none of this antecedent history. Summarily, we relied upon the *parens patriae* analysis of *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*, in which the United States Supreme Court held that, generally, a state may not sue on behalf of its citizens without showing that a separate sovereign interest will also be **[**73]** served. *Id. at 607*. *Snapp* limits a state's *parens patriae* powers, which are assumed to exist. *Snapp* does not, and cannot, invest a state with *parens patriae* authority or require it to be exercised. This question can only be determined by each state in accordance with its own constitution.

In Pennsylvania, our Constitution has limited the Attorney General's powers to those established by "legislative designation and enumeration." *Carsia, 512 Pa. at 513, 517 A.2d at 958*. The legislature has authorized the Attorney General to bring suit "on behalf of citizens," a *parens patriae* power, but only for violations of federal antitrust laws.[11] The Commonwealth Attorneys Act does not authorize the Attorney General to seek damages "on behalf of citizens" for violation of the Consumer Protection Law.

Further, the General Assembly has created a specific role for the Attorney General with respect to the Consumer Protection Law. *Section 4* of the Consumer Protection Law authorizes the Attorney General to "bring an action in the name of the Commonwealth **[**74]** against such person to restrain by temporary or permanent injunction the use of [an unlawful] method, act or practice." *73 P.S. §201-4*.[12] That injunction may include an order of restitution. Section 4.1 of the Consumer Protection Law, *73 P.S. §201-4.1*.[13] Finally, a "person" that violates the injunction may be ordered to pay civil penalties. Section 8 of the Consumer Protection Law, *73 P.S. §201-8*.[14]

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[11] Should Pennsylvania ever enact a state ***antitrust law***, the Attorney General's power to bring suit on behalf of citizens will extend to that law as well.

[12] *Section 4* of the Consumer Protection Law provides:

> Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

73 P.S. §201-4.

[13] *Section 4.1* of the Consumer Protection Law states:

> Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in *section 4* above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real **[**75]** or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

73 P.S. §201-4.1. *Section 4.1* was added by the Act of November 24, 1976, P.L. 1166.

[14] *Section 8* of the Consumer Protection Law provides:

> (a) Any person who violates the terms of an injunction issued under section 4 of this act or any of the terms of an assurance of voluntary compliance duly filed in court under section 5 of this act shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars ($5,000) for each violation. For the purposes of this section the court issuing an injunction or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued; and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.
>
> (b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared **[**76]** unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1,000) per violation, which civil

[*608] Notably absent from the Attorney General's enforcement authority is the power to recover damages on behalf of individual consumers. Absent this legislative "designation and enumeration," it must be concluded that the Attorney General lacks authority to bring a "private action" under *Section 9.2* in the name of the Commonwealth on behalf of private citizens. That conclusion could not be clearer given our Supreme Court's holding in *Carsia, 512 Pa. 509, 517 A.2d 956*, **[**77]** and we erred in otherwise holding in *Tap II*. In sum, a "person" is not the Commonwealth acting in a representative capacity.

The majority's construction of "person" has wide-reaching implications. It would allow the Attorney General to initiate a Section 4.1 injunction action against a "person" that is a Commonwealth agency such as, for example, the Liquor Control Board. This shows the absurdity of construing the statute's definition of "person" to mean a government agency or institution, as either a plaintiff or a defendant. The Consumer Protection Law devolves into a program of government feeding on itself.

There are cogent reasons why the Consumer Protection Law did not designate a Commonwealth agency or municipal corporation as a "person" in *Section 2*. Commonwealth agencies and municipal corporations do not need the protections of the Consumer Protection Law because they are not like private consumers. An individual procurement officer may fall sway to exaggerated claims featured in Superbowl advertisements, but his impressionability is irrelevant. State and local agencies are constrained in how they make purchases. The Commonwealth purchases goods or services through competitive **[**78]** bidding procedures governed by the Commonwealth Procurement Code, *62 Pa. C.S. §§101-4604*. Likewise, municipal corporations make purchases only in accordance with competitive bidding. *See, e.g.*, Section 3102(a) of the Second Class Township Code, *53 P.S. §68102(a)*.[15]

Nor is there an obvious necessity to hold a Commonwealth agency or municipal corporation liable for its actions under the Consumer Protection Law. Persons acting under color of state law can be held accountable for their deceitful acts under *42 U.S.C. §1983*.[16] **[*609]** A loss of property without due process violates the United States

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> penalty shall be in addition to other relief which may be granted under sections 4 and 4.1 of this act. Where the victim of the wilful use of a method, act or practice declared unlawful by section 3 of this act is sixty years of age or older, the civil penalty shall not exceed three thousand dollars ($3,000) per violation, which penalty shall be in addition to other relief which may be granted under sections 2 and 4.1 of this act.

73 P.S. §201-8.

[15] Act of May 1, 1933, P.L. 103, *53 P.S. §68102*, added by the Act of November 9, 1995, P.L. 350. *Section 3102(a)* of the Second Class Township Code identifies the contracts that must be awarded through a competitive bidding process, stating in relevant part:

> All contracts or purchases in excess of the required advertising amount of ten thousand dollars ($10,000), except those specifically excluded, shall not be made except with and from the lowest responsible bidder after due notice in one newspaper of general circulation in the township.

53 P.S. §68102(a).

[16] *Section 1983* provides

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively **[**80]** to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

Constitution and can result in monetary damages. **[**79]** Commonwealth agencies and municipal corporations, unlike private actors, must conduct their "business" in an open and transparent manner. Unlike a private company, they must provide access to their records that relate to their activities. *See* Right-to-Know Law, Act of February 14, 2008, P.L. 6, *65 P.S. §§67.101-67.3104*. Is accountability under the Consumer Protection Law also needed?[17]

In sum, "person" as defined in the Consumer Protection Law does not include a Commonwealth agency or state institution or municipal corporation of any type.[18] To stretch the Consumer Protection Law in that fashion will lead to mischief that is only as wild as the imagination. I defer to Judge Brobson's dissenting opinion for a more thorough discussion of the ramifications of the majority's interpretation of the Consumer Protection Law.

For these reasons, I would reverse the order of the trial court and grant the Community College's motion for partial summary judgment.

MARY HANNAH LEAVITT, Judge

DISSENTING OPINION BY JUDGE BROBSON

I commend my colleagues who penned opinions in this matter for their thorough and thoughtful analyses of the issues before this Court. I write, however, to take a more holistic approach to addressing the general question before this Court—namely, whether governmental entities,[1] as a matter of law, are subject to suit under the Unfair Trade Practices and Consumer Protection Law (CPL).[2] In reviewing the **[*610]** statute as a whole, I conclude that they are not. Thus, I must respectfully disagree with the majority and concurring opinions.

If public agencies can be held liable under the CPL, as the majority reasons, the implications of the majority's holding are far reaching. Under the Liquor Code,[3] for example, the Pennsylvania Liquor Control Board (LCB) engages exclusively in the sale and distribution of alcohol in the Commonwealth. This activity falls within the definition of "trade" and "commerce" in the CPL.[4] Under the majority's analysis, a private citizen of the

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[17] Even if it were needed, it is for the General Assembly to fill that need.

[18] The Statutory Construction Act of 1972 defines "person" for the purpose of "any statute finally enacted after September 1, 1937, unless the context clearly indicates otherwise." *1 Pa. C.S. §1991*. It defines "person" as follows:

> "**Person**." Includes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.

Id. In the Consumer Protection Law, the legislature chose not to follow the default definition of "person" set forth in the Statutory Construction **[**81]** Act of 1972. Instead, it added "natural person," deleted "government entity" and did not add "Commonwealth." These must be presumed conscious decisions.

[1] In *Community College of Allegheny County v. Seibert, 144 Pa. Commw. 616, 601 A.2d 1348 (Pa. Cmwlth. 1992)*, *aff'd*, *533 Pa. 314, 622 A.2d 285 (1992)*, this Court held that community colleges are local agencies for purposes of governmental immunity. Notwithstanding the majority's conspicuous references to local agencies throughout its opinion, **[**82]** the majority's reasoning and result extend with equal force to Commonwealth agencies.

[2] Act of December 16, 1968, P.L. 1224, *as amended*, *73 P.S. §§ 201-1 to -9.3.*

[3] Act of April 12, 1951, P.L. 90, *as amended*, *47 P.S. §§ 1-102 to 10-1001*.

[4] *Section 2(3) of the CPL*, provides, inter alia:

> "**Trade**" and "**commerce**" means the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other **[**83]** article, commodity or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

73 P.S. § 201-2(3) (emphasis in original).

Commonwealth who purchases alcohol for personal, family, or household use could sue the LCB under Section 9.2(a) of the CPL, *73 P.S. § 201-9.2* (creating private right of action),[5] and seek the relief available under that section, which includes, *inter alia*, treble damages, costs, and attorneys' fees.

Under the Real Estate Tax Sale Law,[6] county tax claim bureaus are authorized to advertise and sell real property, an activity which falls within the CPL's definition of "trade" and "commerce." Under the majority's analysis, a private citizen of the Commonwealth who purchases real estate at a tax upset sale or judicial sale could bring suit against the county tax claim bureau that advertised and sold the real property under *Section 9.2(a) of the CPL and* seek treble damages, costs, and attorneys' fees.

There are many more instances where state and local agencies engage in "trade" and "commerce" as these terms are strictly defined in the CPL. Because our state and local governments are authorized to engage in such activities, I **[**84]** am loathe to construe the CPL in such a way as to create a private right of action against government agencies in the absence of clear legislative intent to support such a construction. I do not believe the General Assembly's use of the phrase "any other legal entities," which follows a list of clearly *private* concerns, in the definition of "person" in the CPL[7] is a sufficient expression of legislative intent to subject public entities to private lawsuits, or any other legal action,[8] under the CPL. To the contrary, I believe the doctrine of *ejusdem generis*, most recently applied by our Supreme Court in *Petty v. Hospital Association of Northeastern Pennsylvania,* ***[*611]*** *___ Pa. ___, 23 A.3d 1004 (2011)*,[9] applies and restricts our interpretation of "any other legal entities" to any other *private* legal entities.[10]

Finally, construing "any other legal entity" in such a way as to authorize private litigants to bring suits under the CPL against public entities violates the rule of statutory construction that requires us to presume that the General Assembly does not intend to favor private interests over the public interest. *1 Pa. C.S. § 1922(5)*. The majority's decision in this case, which provides private citizens access to public coffers to remedy purely private injuries under the CPL, ignores this presumption.

For these reasons, I would reverse the trial court.

P. KEVIN BROBSON, Judge

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[5] Of course, this private citizen would need to state a claim under the CPL as a matter of law. In light of footnote 16 to the majority's opinion, however, I find it necessary to state the obvious.

[6] Act of July 7, 1947, P.L. 1368, *as amended*, *72 P.S. §§ 5860.101 to .803*.

[7] "Person" is defined in the CPL as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." Section 2(2) of the CPL, *73 P.S. § 201-2(2)*.

[8] If the majority's analysis stands, for example, the Attorney General could bring a suit to enjoin the LCB or a county tax claim bureau from engaging in acts or practices deemed **[**85]** unlawful under the CPL. Section 4 of the CPL, *73 P.S. § 201-4*. If the LCB or county tax claim bureau violates such an injunction, the Attorney General could petition a court for an order restraining the LCB and the county tax claim bureau from further doing business.

[9] *See* *Summit House Condominium v. Commonwealth, 514 Pa. 221, 227, 523 A.2d 333, 336 (1987)* ("The doctrine of *ejusdem generis* mandates that '[g]eneral expressions used in a statute are restricted to things and persons similar to those specifically enumerated in the language preceding the general expressions.'")).

[10] Indeed, if the phrase "any other legal entities" is so broad that it encompasses *all* legal entities (private and public), the majority opinion fails to explain the General Assembly's express inclusion of "corporations, trusts, partnerships, incorporated or unincorporated associations"—all of which are legal entities—between "natural persons" and "any other legal entities" in the definition of "person." The majority's construction of the definition of "person" in *Section 2(2) of the CPL* renders the language identifying specific private legal entities mere surplusage. Such a construction is to be avoided. *1 Pa. C.S. § 1922(2)* **[**86]** (presumption "[t]hat the General Assembly intends the entire statute to be effective and certain"); *Walker v. Eleby, 577 Pa. 104, 123, 842 A.2d 389, 400 (2004)* (holding that no provision of statute shall be "reduced to mere surplusage").

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Adesokan v. United States Bank, N.A.

United States District Court for the Eastern District of California

October 31, 2011, Decided; October 31, 2011, Filed

CASE NO. 1:11-cv-01236-LJO-SKO

Reporter
2011 U.S. Dist. LEXIS 125591 *; 2011 WL 5241178

ADEGBENGA ADESOKAN, Plaintiff, v. U.S. BANK, N.A., et al., Defendants.

Subsequent History: Magistrate's recommendation at *Adegbenga Adesokan v. U.S. Bank, N.A., 2012 U.S. Dist. LEXIS 15192 (E.D. Cal., Feb. 6, 2012)*

Prior History: *United States Bank Nat'l Ass'n v. Adesokan, 2011 U.S. Dist. LEXIS 114392 (E.D. Cal., Oct. 3, 2011)*

Core Terms

allegations, modification, foreclosure, cause of action, mortgage, trust deed, asserts, trustee sale, lender, unjust enrichment, fair dealing, amended complaint, misrepresentation, covenant of good faith, claim for breach, restitution, fraudulent, borrower, negligent misrepresentation, debt collection practice, leave to amend, good faith, concealment, forbearance, default, reasons, viable

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > In Forma Pauperis > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[] **Pleadings, In Forma Pauperis**

In cases where the plaintiff is proceeding in forma pauperis, the court is required to screen each case and shall dismiss the case at any time if the court determines that the allegation of poverty is untrue, or the action or appeal is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *28 U.S.C.S. § 1915(e)(2)*. If the court determines that the complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment.

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

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

HN2[] **Motions to Dismiss, Failure to State Claim**

In determining whether a complaint fails to state a claim, the court applies the same pleading standard used under *Fed. R. Civ. P. 8(a)*. Under *Rule 8(a)*, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. The pleading standard *Rule 8* announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A complaint that pleads facts that are merely consistent with a defendant's liability stops short of the line between possibility and plausibility of entitlement to relief. Further, although a court must accept as true all factual allegations contained in a complaint, a court need not accept a plaintiff's legal conclusions as true. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN4[] **Heightened Pleading Requirements, Fraud Claims**

A court may dismiss a complaint for failure to comply with *Fed. R. Civ. P. 9(b)*. *Fed. R. Civ. P. 9* provides that in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. *Fed. R. Civ. P. 9(b)*. Such circumstances include the time, place, and specific content of the false representations as well as the identifies of the parties to the misrepresentations. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum identify the role of each defendant in the alleged fraudulent scheme.

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

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

HN5[] **Pleadings, Heightened Pleading Requirements**

Claims subject to *Fed. R. Civ. P. 9(b)* pleading requirements must also satisfy the ordinary pleading requirements of *Fed. R. Civ. P. 8*.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN6[] **Foreclosures, Private Power of Sale Foreclosure**

A party may not without payment of the debt, enjoin a sale by trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale. A default borrower is required to allege tender of the amount of the lender's secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure.

Real Property Law > Financing > Foreclosures > Equitable Foreclosures

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN7[] **Foreclosures, Equitable Foreclosures**

An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, does not state a cause of action which a court of equity recognizes. Moreover, an offer of performance is of no effect if the person making the offer is unable to perform. In other words, if the offeror is without the money necessary to make the offer good and knows it, the tender is without legal force or effect. It would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property. A cause of action implicitly integrated with the irregular sale fails unless the trustor can allege and establish a valid tender.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN8[] **Foreclosures, Private Power of Sale Foreclosure**

The Perata Mortgage Relief Act (Perata), *Cal. Civ. Code § 2923.5*, requires a lender to contact the borrower in good faith, in person or by telephone to assess the borrower's financial situation and explore options to avoid foreclosure, and Perata imposes a duty on the lender to attempt to negotiate with a borrower before recording a notice of sale. *Cal. Civ. Code § 2923.5(a)(2)*, *(c)*. These provisions apply to loans initiated between January 1, 2003, and December 31, 2007. *Cal. Civ. Code § 2923.5(h)(3)(i)*.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN9[] **Foreclosures, Private Power of Sale Foreclosure**

The only remedy available under *Cal. Civ. Code § 2923.5* is a postponement of the sale before it happens.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN10[] **Foreclosures, Private Power of Sale Foreclosure**

To state a claim under the Perata Mortgage Relief Act, *Cal. Civ. Code § 2923.5*, a plaintiff must allege that the lender both failed to explore options that could avoid foreclosure and failed to contact or attempt to contact the plaintiff.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN11[] **Consumer Protection, Fair Debt Collection**

The Fair Debt Collection Practices Act (FDCPA) seeks to remedy abusive, deceptive, and unfair debt collection practices by debt collectors against consumers. *15 U.S.C.S. § 1692(e)*. To plead an FDCPA claim, a plaintiff must allege facts that establish the following: (1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a debt collector under the FDCPA; and (3) the defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN12[] Consumer Protection, Fair Debt Collection

The legislative history of 15 U.S.C.S. § 1692a(6) indicates conclusively that debt collector does not include a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned. Additionally, several courts in the Ninth Circuit concluded that the Fair Debt Collection Practices Act does not apply to foreclosure activities.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Loan Servicing

HN13[] Real Estate Settlement Procedures, Loan Servicing

Under 12 U.S.C.S. § 2605 of the Real Estate Settlement Procedures Act, each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding. 12 U.S.C.S. § 2605(a). Additionally, 12 U.S.C.S. § 2605(e)(1)(A) provides that a loan servicer is required to respond to a qualified written request from the borrower for information relating to the servicing of such loan within 20 days.

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

HN14[] Breach of Contract Actions, Elements of Contract Claims

In California, a cause of action for breach of contract has four elements: (1) allegations that a contract exists between the parties; (2) that plaintiff has performed all the contractual duties or was excused from nonperformance, (3) that defendant has breached the contractual duties, and (4) that plaintiff's damages were a result of the breach.

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

HN15[] Motions to Dismiss, Failure to State Claim

A plaintiff must state claim that is plausible on its face; plausibility requires the plaintiff to plead facts that allow court to draw reasonable inference that the defendant is liable for the misconduct alleged.

Contracts Law > Statute of Frauds > Requirements > Writings

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgage Formalities

HN16[] Requirements, Writings

Any oral modification or oral agreement to forbear from exercising the right of foreclosure would be a modification to the deed of trust which comes within the statute of frauds. Thus, any modification to the deed of trust must be in writing.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN17[] **Contract Interpretation, Good Faith & Fair Dealing**

A claim for breach of the covenant of good faith and fair dealing is predicated upon the existence of an underlying contract.

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

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

HN18[] **Actual Fraud, Elements**

The elements of a claim for fraud include: (1) misrepresentation by way of a false representation, concealment, or nondisclosure; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. In both causes of action, the plaintiff must plead that he or she actually relied on the misrepresentation.

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

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN19[] **Heightened Pleading Requirements, Fraud Claims**

It is well established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet *Fed. R. Civ. P. 9(b)*'s particularity requirement.

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

HN20[] **Heightened Pleading Requirements, Fraud Claims**

Under the requirements of *Fed. R. Civ. P. 9(b)*, in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. *Rule 9(b)* requires more specificity than *Fed. R. Civ. P. 8*, including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.

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

HN21[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) demands that, when averments of fraud are made, the circumstances constituting the allegations of fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong.

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

HN22[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.

Real Property Law > Financing > Foreclosures > Equitable Foreclosures

HN23[] Foreclosures, Equitable Foreclosures

Under California law, the tender rule requires that as a precondition to challenging a foreclosure sale, or any cause of action implicitly integrated to the sale, the borrower must make a valid and viable tender of payment of the secured debt.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN24[] Types of Contracts, Quasi Contracts

California courts are split as to whether a claim for unjust enrichment constitutes a standalone claim. However, the United States District Court for the Northern District of California in Robinson the court determined that even if a claim for unjust enrichment is characterized as a request for restitution, this too is a remedy, not a standalone cause of action. There is no cause of action for restitution, but there are various causes of action that give rise to restitution as a remedy.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN25[] Types of Contracts, Quasi Contracts

Without a cognizable claim under which restitution or unjust enrichment can be sought, restitution cannot be granted.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN26[] Deceptive & Unfair Trade Practices, State Regulation

The unfair competition law, *Cal. Bus. & Prof. Code § 17200 et. seq.*, prohibits any unlawful or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. Even business practices that are merely unfair, and not necessarily unlawful, may violate this section. Pursuant to *§ 17200*, an act is unlawful if it violates an underlying state or federal statute. An act is considered unfair if it threatens an incipient violation of ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law. Claims set forth pursuant to *§ 17200* must state with reasonable particularity the facts supporting the statutory elements of the violation.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN27[] **Pleadings, Amendment of Pleadings**

E.D. Cal. R. 220 requires that an amended complaint be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint.

Counsel: [*1] Adegbenga Adesokan, Plaintiff, Pro se, Madera, CA.

Judges: Sheila K. Oberto, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Sheila K. Oberto

Opinion

ORDER DISMISSING PLAINTIFF'S COMPLAINT

(Docket No. 1)

I. INTRODUCTION

On July 27, 2011, Plaintiff filed a complaint against Defendants U.S. Bank, National Association, People's Choice Home Loans, Inc., NDEX West, LLC, and America's Servicing Company (collectively "Defendants") asserting the following: (1) a claim to set aside a trustee's sale; (2) violation of the Perata Mortgage Relief Act; (3) violation of the Fair Debt Collection Practices Act; (4) violation of the Real Estate Settlement Procedures Act; (5) breach of contract; (6) breach of the covenant of good faith and fair dealing; (7) claims for negligent misrepresentation and fraud (intentional misrepresentation/fraudulent concealment); (8) unjust enrichment; and (9) violation of the *California Business and Professions Code § 17200*.

For the reasons set forth below, the Court DISMISSES Plaintiff's complaint and GRANTS Plaintiff 30 days leave to amend.

II. BACKGROUND

Since April 2000, Plaintiff alleges that he resided at real property located in Madera, California. (Doc. 1, ¶ 12.) On October 1, 2004, Plaintiff obtained **[*2]** title to the property and executed a Deed of Trust, which was recorded in favor of Defendant People's Choice Home Loan, Inc. ("People's Choice"). (Doc. 8, ¶ 12.) In approximately January or February 2008, Plaintiff became delinquent in his payments to People's Choice due to a pay cut and was in default under the terms of the Deed of Trust. (Doc. 8, ¶ 13.)

Although the allegations are unclear, in March 2008, Plaintiff apparently attempted to reinstate his loan with People's Choice. (Doc. 1, ¶ 14.) However, Defendant America's Servicing Company ("ASC") was allegedly servicing loans for People's Choice, and it was ASC that returned Plaintiff's reinstatement check and offered Plaintiff a loan modification. (Doc. 1, ¶ 14.) Between July and October 2008, ASC and Plaintiff engaged in numerous correspondence regarding the loan modification. (Doc. 1, ¶¶ 15-16.) ASC sent Plaintiff a loan modification agreement in November 2008, but it was not compliant "with the spirit and intent of loan modification requirements embodied in Cal. Civil Code [§] 2923 and Perata Mortgage Relief Act." (Doc. 1, ¶ 15-16.) Thus, Plaintiff requested new loan modification documents that met with his approval, and "ASC **[*3]** allegedly stated that [it] would respond to Plaintiff's request for a compliant modification within 60 days, all to naught." (Doc. 1, ¶ 16.)

Before the 60 days passed, during which ASC was assertedly considering Plaintiff's request, Defendant NDEX, acting as the agent for U.S. Bank, conducted a trustee's sale of Plaintiff's property on February 11, 2009. (Doc. 1, ¶ 17.) For purposes of the trustee's sale, U.S. Bank "held itself out as the mortgage owner . . . instead of Plaintiff's mortgage owner - People's Choice . . . [and] appointed NDEX as the Successor Trustee . . . . " (Doc. 1, ¶ 18.) Plaintiff asserts that "U.S. Bank['s] claim to title of Plaintiff['s property] was never determined by evidence nor did People's [C]hoice notify Plaintiff of any assignment to U.S. Bank." **[*4]** (Doc. 1, ¶ 20.) Plaintiff contends that, under the original Deed of Trust, the original lender is People's Choice; there has been no valid assignment and the chain of title does not include U.S. Bank, N.A., ASC, NDEX, or any other entities. (Doc. 1, ¶ 20(b).) Plaintiff argues that he has the right to demand that Defendants provide proof of the chain of title from the original lender to Defendants. (Doc. 1, ¶ 20(c).)

III. DISCUSSION

A. Applicable Standards

1. Screening Standard

HN1[] In cases where the plaintiff is proceeding *in forma pauperis*, the Court is required to screen each case and shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the action or appeal is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *28 U.S.C. § 1915(e)(2)*. If the Court determines that the complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (en banc).

2. Legal Standard

HN2[] In determining whether a complaint fails to state **[*5]** a claim, the Court applies the same pleading standard used under *Federal Rule of Civil Procedure 8(a)*. Under *Rule 8(a)*, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. "[T]he pleading standard *Rule 8* announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. ***HN3***[] "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). "[A] complaint [that] pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). Further, although a court must accept as true all factual allegations contained in a complaint, a court need not accept a plaintiff's legal conclusions as true. *Id.* "Threadbare recitals of the elements of a cause of action, supported **[*6]** by mere conclusory statements, do not suffice." *Id.* (quoting *Twombly, 550 U.S. at 555*).

HN4[] A court may also dismiss a complaint for failure to comply with Federal *Rule 9(b)*. *See* *Vess, v. Ciba-Geigy Corp, USA, 317 F.3d 1097, 1107 (9th Cir. 2003)*. *Rule 9* provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. Such circumstances include the "time, place, and specific content of the false representations as well as the identifies of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (quoting *Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004))*. "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum 'identif[y] the role of [each] defendant[] in the alleged fraudulent scheme.'" *Id. at 765* (quoting *Moore v. Kayport Package Express, 885 F.2d 531, 541 (9th Cir. 1989))*. ***HN5***[] Claims subject to *Rule 9(b)* pleading requirements must also satisfy the ordinary pleading requirements of *Rule 8*.

B. Plaintiff's Claims

1. Claim to [*7] Set Aside Trustee's Sale

Plaintiff's claim to set aside the trustee's sale centers on an allegation that he is not aware of any evidence that U.S. Bank was properly assigned the mortgage from People's Choice. (Doc. 1, ¶ 20 ("U.S. Bank['s] claim to title of Plaintiff was never determined by evidence nor did People's [C]hoice notify Plaintiff of any assignment to U.S. Bank.").)

HN6[] "A party may not without payment of the debt, enjoin a sale by trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale . . . . " *Sipe v. McKenna, 88 Cal. App. 2d 1001, 1006, 200 P.2d 61 (1948)*. A default borrower is "required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure." *Hamilton v. Bank of Blue Valley, 746 F. Supp. 2d 1160, 1169 (E.D. Cal. 2010)*; *Abdallah v. United Sav. Bank, 43 Cal. App. 4th 1101, 1109, 51 Cal. Rptr. 2d 286 (1996)*, *cert. denied, 519 U.S. 1081, 117 S. Ct. 746, 136 L. Ed. 2d 684 (1997)*.

HN7[] An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, does not state a cause of action which a court of equity recognizes. *Karlsen v. Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 117, 92 Cal. Rptr. 851 (1971)*. Moreover, **[*8]** an offer of performance is of no effect if the person making the offer is unable to perform. *Id. at 118*. In other words, if the offeror "is without the money necessary to make the offer good and knows it[,]" the tender is without legal force or effect. *Id.* "It would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property." *U.S. Cold Storage v. Great W. Sav. & Loan Ass'n, 165 Cal. App. 3d 1214, 1224, 212 Cal. Rptr. 232 (1985)*. "A cause of action 'implicitly integrated' with the irregular sale fails unless the trustor can allege and establish a valid tender." *Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 579, 205 Cal. Rptr. 15 (1984)*; *see also* *Anaya v. Advisors Lending Grp., No. 09-cv-1191 LJO DLB, 2009 U.S. Dist. LEXIS 68373, 2009 WL 2424037, at *10 (E.D. Cal. Aug. 3, 2009)* ("Plaintiff offers nothing to indicate that she is able to tender her debt to warrant disruption of non-judicial foreclosure."); *Alicea v. GE Money Bank, No. C 09-00091 SBA, 2009 U.S. Dist. LEXIS 60813, 2009 WL 2136969, at * 3 (N.D. Cal. July 16, 2009)* ("When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or **[*9]** has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for foreclosure.").

There is no allegation in the complaint that Plaintiff has tendered the amount due on the loan or that he has a meaningful ability to do so. The record's silence on Plaintiff's tender or his ability to tender the outstanding amount implies an inability to do so. Further, the allegations do not indicate facts that the sale under the deed of trust could be considered void such that an exception to the tender rule might apply. *See* *Nguyen v. Wells Fargo Bank, N.A., 749 F. Supp. 2d 1022, 1034-35 (N.D. Cal. 2010)* (dismissing wrongful foreclosure claim noting that plaintiff cited no authority that would render tender rule inapplicable where assignment of deed of trust was invalid). Without a meaningful tender from Plaintiff, the remedy sought cannot be granted. Thus, Plaintiff's claims to set aside the trustee's sale pursuant to various sections of the California Civil Code are dismissed. To state a cognizable claim, Plaintiff must allege facts showing that an exception to the tender rule applies.

2. Claim Pursuant to Perata Mortgage Relief Act, *California Civil Code § 2923.5*

Plaintiff **[*10]** also sets forth allegations related to the Perata Mortgage Relief Act codified at *Cal. Civ. Code § 2923.5* ("Perata"). Plaintiff asserts that "Defendant failed in its fiduciary duty by not complying at the minimum in good faith to the statutory guidance on modification. For arguendo, even if Defendant was a bonafide holder of Plaintiff's mortgage, standing, which is currently yet to be validated by evidence, Defendants' modification of Plaintiff's mortgage payment higher to $2900 per month ($600 more than Plaintiff's original mortgage payment of $2293) is woefully inadequate for compliance." (Doc. 1, ¶ 36.)

HN8[] Perata requires a lender to contact the borrower in good faith, in person or by telephone to assess the borrower's financial situation and explore options to avoid foreclosure, and Perata imposes a duty on the lender to attempt to negotiate with a borrower before recording a notice of sale. *Cal. Civ. Code § 2923.5(a)(2)*, *(c)*. These provisions apply to loans initiated between January 1, 2003, and December 31, 2007. *Cal. Civ. Code § 2923.5(h)(3)(i)*.

Plaintiff's claim for relief under *California Civil Code § 2923.5* fails for two reasons. First, ***HN9***[] the only remedy available under *Section 2923.5* **[*11]** is a postponement of the sale before it happens. *Marbry v. Super. Ct., 185 Cal. App. 4th. 208, 221, 110 Cal. Rptr. 3d 201 (2010)*. Here, the trustee's sale has already taken place. Thus, there is no remedy available to Plaintiff under *Section 2923.5*. Second, even assuming there was a remedy beyond postponement of the trustee's sale, ***HN10***[] "[t]o state a claim under Perata, Plaintiff must allege that the lender both failed to explore options that could avoid foreclosure and failed to contact or attempt to contact Plaintiff." *Taylor v. GMAC Mortg., LLC, No. 09-cv-1755 JAH (POR), 2010 U.S. Dist. LEXIS 103925, 2010 WL 3894993, at *4 (S.D. Cal. Sept. 28, 2010)* (citing *Ortiz v. Accredited Home Lenders, Inc., 639 F. Supp. 2d 1159,1166 (S.D. Cal. 2009))*. Here, Plaintiff's allegations indicate that he was contacted about options to avoid foreclosure. For these reasons, Plaintiff's claim for relief under *Section 2923.5* is dismissed.

3. Claim Pursuant to the Fair Debt Collection Practices Act

HN11[] The Fair Debt Collection Practices Act ("FDCPA") seeks to remedy abusive, deceptive, and unfair debt collection practices by debt collectors against consumers. *See* *15 U.S.C. § 1692(e)*. To plead an FDCPA claim, a plaintiff must allege facts that establish the following: **[*12]** (1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a "debt collector" under the FDCPA; and (3) the defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA. *Frazier v. Absolute Collection Serv., Inc., 767 F. Supp. 2d 1354, 1363 (N.D. Ga. 2011)* (citing *Buckley v. Bayrock Mortg. Corp., No. 1:09-cv-1387-TWT, 2010 U.S. Dist. LEXIS 10636, 2010 WL 476673, at *6 (N.D. Ga. Feb. 5, 2010)* (Thrash, J. adopting Vineyard, M.J.)); *Beadle v. Haughey, No. 04-272-SM, 2005 U.S. Dist. LEXIS 2473, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005)*; *Russey v. Rankin, 911 F. Supp. 1449, 1453 (D.N.M. 1995))*; *see also* *McCorriston v. L.W.T., Inc., 536 F. Supp. 2d 1268, 1278 (M.D. Fla. 2008)*.

Although the complaint is unclear, Plaintiff states that "[u]nder the Fair Debt Collection[] Practices Act *(15 [U.S.C. § 1692g])* Plaintiff is hereby disputing the following facts stated in the debt servicing transfer notice IF ANY AS CLAIMED BY THESE DEFENDANTS, the date and amounts of which this Plaintiff, can not currently authenticate nor validate, with legal authentications." (Doc. 1, ¶ 20(b).)

HN12[] "The legislative history of *section 1692a(6)* **[*13]** indicates conclusively that debt collector does not include . . . a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." *Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985)*. Additionally, several courts in the Ninth Circuit have concluded that the FDCPA does not apply to foreclosure activities. *See* *Park v. Wachovia Mortg., FSB, No. 10-cv-1547 WQH (RBB), 2011 U.S. Dist. LEXIS 113011, 2011 WL 4571874, at *5 (S.D. Cal. Sept. 30, 2011)*; *Walker v. Equity 1 Lenders Grp., No. 09-cv-00325 WQH (AJB), 2009 U.S. Dist. LEXIS 40991, 2009 WL*

1364430, at *7 (S.D. Cal. May 14, 2009) ("The activity of foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt within the meaning of the FDCPA . . .") (internal quotation marks omitted).

To the extent that Plaintiff is asserting a claim pursuant to the FDCPA, it is insufficient. Here, each Defendant is identified as a mortgage lender or servicer, and the activities Plaintiff asserts violate the FDCPA arise out of the foreclosure of Plaintiff's property under a deed of trust. As set forth above, the FDCPA does not apply to foreclosure activities. Thus, to the extent that Plaintiff is attempting to state **[*14]** a claim under the FDCPA, it is not viable.

4. Claim Pursuant to the Real Estate Settlement Procedures Act

HN13[] Under *Section 2605* of the Real Estate Settlement Procedures Act ("RESPA"), "[e]ach person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding." *12 U.S.C. § 2605(a)*. Additionally, *Section 2605(e)(1)(A)* provides that a "loan servicer" is required to respond to a "qualified written request from the borrower . . . for information relating to the servicing of such loan . . . within 20 days . . . ." Plaintiff alleges the following in connection with RESPA:

> 1a. This Plaintiff herein demand[s] that: these defendants are to provide proof of the debt owed and full accounting of how this amount was calculated, as well as all documentation[] as required in A QUALIFIED WRITTEN REQUEST, IN THIS CASE AND AS REQUIRED IN THIS LAW COURT PURSUANT TO RESPA LAWS IN CALIFORNIA AND THE FEDERAL TRUTH IN LENDING ACT, TILA.

(Doc. 1, ¶ 20(b).)

To the extent that Plaintiff is attempting to state **[*15]** a claim under RESPA, it is insufficient. It is not clear whether Plaintiff intends his complaint to be a "qualified written request" under the statute - and, in any case, a judicial pleading is an inappropriate vehicle to make such a demand - or whether he is asserting that he was not notified of whether the servicing of the loan could be assigned, sold, or transferred. In any event, there is no cognizable RESPA claim pled.

5. Claim for Breach of Contract

HN14[] In California, a cause of action for breach of contract has four elements: (1) allegations that a contract exists between the parties; (2) that plaintiff has performed all the contractual duties or was excused from nonperformance, (3) that defendant has breached the contractual duties, and (4) that plaintiff's damages were a result of the breach. *Reichert v. Gen. Ins. Co., 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377 (1968)*.

Although unclear, it appears that Plaintiff is attempting to state a cause of action for breach of contract against U.S. Bank and ASC. The only contract Plaintiff asserts is the deed of trust, under which Plaintiff acknowledges he was in default. Plaintiff does not assert what contract ASC or U.S. Bank breached. Although Plaintiff asserts **[*16]** that he "entered into forbearance and modification agreement," Plaintiff contrarily alleges that ASC was in the process of completing a modification that Plaintiff would accept and ASC represented it would "get back to Plaintiff within 60 days." (Doc. 1, ¶ 34.) These allegations are inconsistent and essentially implausible. Specifically, it is not plausible that a modification agreement or forbearance of the trustee's sale was finalized such that a contract was created where Plaintiff alleges that he did not agree to what ASC offered with regard to a modification and was still waiting for ASC to make another modification offer when his property was foreclosed upon. In other words, Plaintiff asserts that a modification or forbearance agreement was in place even though Plaintiff had rejected the modification ASC offered. *See Iqbal, 129 S. Ct. at 1949* (***HN15***[] plaintiff must state claim that is plausible on its face; plausibility requires plaintiff to plead facts that allow court to draw reasonable inference that defendant is liable for the misconduct alleged).

Moreover, ***HN16***[] any oral modification or oral agreement to forbear from exercising the right of foreclosure would be a modification to the deed **[*17]** of trust which comes within the statute of frauds. *Secrest v. Sec. Nat'l Mortg. Loan Trust 2002-2, 167 Cal. App. 4th 544, 547, 84 Cal. Rptr. 3d 275 (2008)* (An "agreement by which a lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real property comes within the statute of frauds"). Thus, any modification to the deed of trust must be in writing. Id. The inconsistency and implausibility of the allegations as well as the application of the statute of frauds indicate no cognizable claim for breach of contract against ASC or against U.S. Bank.

6. Claim for Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff also sets forth a claim for breach of the covenant of good faith and fair dealing, apparently against all the defendants. The only two defendants mentioned in the allegations related to this claim, however, are U.S. Bank and ASC. (Doc.1, ¶ 34.) ***HN17***[] A claim for breach of the covenant of good faith and fair dealing is predicated upon the existence of an underlying contract. *See* *Racine & Laramie, Ltd. v. Dep't of Parks & Rec., 11 Cal. App. 4th 1026, 1031, 14 Cal. Rptr. 2d 335 (1992)* ("The implied covenant of good faith and fair dealing rests upon the existence of **[*18]** some specific contractual obligation."). Plaintiff has not sufficiently alleged that he entered into a contract with ASC or that ASC owed him any contractual duties. Therefore, a claim for breach of the covenant of good faith and fair dealing is not viable with respect to ASC.

Although Plaintiff asserts that "U.S. Bank has a duty to act in good faith, deal fairly and act in ways that maximizes the net recovery to all parties concerned," there are no allegations as to how U.S. Bank actually breached this duty. Further, to the extent that a breach of the covenant of good faith and fair dealing is predicated on U.S. Bank's breach of the terms of the deed of trust, there are no facts indicating how U.S. Bank breached the terms of the contract. [1] Plaintiff makes general allegations that U.S. Bank did not provide evidence that it has a valid assignment of the note, but these are allegations that relate to Plaintiff's claims to set aside the trustee's sale and are not allegations of a breach of the terms of the deed of trust. For these reasons, the claim for breach of the covenant of good faith and fair dealing is insufficiently alleged.

7. Claim for Negligent Misrepresentation/Fraud (Intentional Misrepresentation/Fraudulent Concealment)

HN18[] The elements of a claim for fraud include: (1) misrepresentation by way of a false representation, concealment, or non-disclosure; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. *See* *Cadlo v. Owens-Illinois, Inc., 125 Cal. App. 4th 513, 519, 23 Cal. Rptr. 3d 1 (2004)* (citing *Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173, 132 Cal. Rptr. 2d 490, 65 P.3d 1255 (2003))*. "The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. In both causes of action, the plaintiff must plead that he or she actually relied on the misrepresentation." *Id.*

HN19[] "It is well established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet *Rule 9(b)*'s particularity requirement." *Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)*; *see also* *Lorenz v. Sauer, 807 F.2d 1509, 1511-12 (9th Cir. 1987)* ("Under California law, negligent misrepresentation is a species of actual fraud . . . "). ***HN20***[] Under the requirements **[*20]** of *Rule 9(b)*, "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* "requires more specificity [than *Rule 8*], including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz, 476 F.3d at 764*.

Plaintiff's "second cause of action" (intentional misrepresentation, fraudulent concealment, and violation of foreclosure trustee's duties obligation) asserts that "Defendant told Plaintiff he would be receiving loan modification papers within 60 days, which Plaintiff relied upon, to his own detriment." (Doc. 1, ¶ 23.) Plaintiff also asserts that "Ndex held itself out as a Successor trustee and acted as such in the foreclosure. Ndex was not a trustee of record

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[1] Moreover, Plaintiff asserts that U.S. Bank is not even **[*19]** a party to the deed of trust because no assignment was properly executed.

when they began foreclosure on Plaintiff's property. If the substitution of the trustee is invalid or void, then everything that happened after that is void." (Doc. 1, ¶ 23.) In Plaintiff's "eighth cause of action" (fraudulent concealment), which appears to overlap the "second cause of action," he asserts the following:

> Defendant had exclusive **[*21]** knowledge not accessible to Plaintiff of material facts pertaining to its mortgage activities as it foreclosed on and took possession of Plaintiff's property and primary home as [a] REO. The facts included that U.S. Bank is not the lender; Ndex is not the trustee of record as of the inception of the foreclosure. Without limiting the damages, Plaintiff's damages arising from the cause of action included loss of equity in the home, costs and expenses related to seeking redress and protecting Plaintiff's interest, reducing credit scores, unavailability of credit, increased costs of credit, reduced availability of goods and services tied to credit ratings, increased costs of those services, as well as fees and costs, including without limitation; attorney fees and other costs such as court filing fees.

(Doc. 1, ¶ 37.)

These allegations are not pled with the requisite amount of specificity under *Rule 9(b)*. The complaint lacks specific allegations regarding the fraud. Rather, it refers generally to the invalidity of the assignment of the mortgage to a different lender and servicer. ***HN21***[] "*Rule 9(b)* demands that, when averments of fraud are made, the circumstances constituting the allegations of **[*22]** fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Vess, 317 F.3d at 1106* (internal citations and quotation marks omitted). Further, each Defendant's participation in the fraud is not alleged. ***HN22***[] Federal *Rule 9(b)* "does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Swartz, 476 F.3d at 764-65*. Thus, Plaintiff's claims sounding in fraud lack the requisite specificity required under *Federal Rule of Civil Procedure 9(b)*.

Moreover, Plaintiff's allegations appear to allege fraud with regard to the assignment of the deed of trust to Plaintiff's property and the trustee's sale of the property. To the extent that Plaintiff's claims sounding in fraud are implicitly integrated into the sale of the property, the tender rule applies barring the claims. *Montoya v. Countrywide Bank, 2009 U.S. Dist. LEXIS 53920, 2009 WL 1813973 (N.D. Cal. June 25, 2009)* (***HN23***[] "Under California **[*23]** law, the 'tender rule' requires that as a precondition to challenging a foreclosure sale, *or any cause of action implicitly integrated to the sale*, the borrower must make a valid and viable tender of payment of the secured debt.") (emphasis added). As Plaintiff is essentially asserting fraud in the sale of the property, relief on such claims cannot be granted without a proper tender of indebtedness pursuant to Plaintiff's deed of trust and note, which has not been proffered as explained above. As such, the claims sounding in fraud are dismissed.

8. Claim for Unjust Enrichment

HN24[] California courts are split as to whether a claim for unjust enrichment constitutes a standalone claim. *See In re TFT-LCD (Flat Panel) Antitrust Litigation, 2011 U.S. Dist. LEXIS 105151, 2011 WL 4345435, at *3 (N.D. Cal. Sept. 15, 2011)* (discussing split in California courts as to whether unjust enrichment may constitute a stand-alone claim). However, in *Robinson* the court determined that even if a claim for unjust enrichment is characterized as a request for restitution, this too is a remedy, not a stand-alone cause of action. *Robinson v. HSBC Bank, USA, 732 F. Supp. 2d 976, 987 (N.D. Cal. 2010)* (citing *McBride, 123 Cal. App. 4th 388*). "There **[*24]** is no cause of action for restitution, but there are various causes of action that give rise to restitution as a remedy." *Id.* (citing *McBride v. Boughton, 123 Cal. App. 4th 379, 388, 20 Cal. Rptr. 3d 115 (2004))*.

HN25[] Without a cognizable claim under which restitution or unjust enrichment can be sought, restitution cannot be granted. *See Levine v. Blue Shield of Cal., 189 Cal. App. 4th 1117, 1138, 117 Cal. Rptr. 3d 262 (2010)* (affirming dismissal of unjust enrichment claim after dismissal of other causes of action because the plaintiffs "have not demonstrated any basis on which they would be entitled to restitution pursuant to a theory of unjust enrichment"). Thus, this claim is dismissed.

9. Claim Pursuant to *Cal. Bus. & Prof. Code Section 17200*

HN26[] The unfair competition law ("UCL") codified at *California Business and Professions Code § 17200, et. seq.*, prohibits "any unlawful or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Even business practices that are merely unfair, and not necessarily unlawful, may violate this section. *Gregory v. Albertson's Inc., 104 Cal. App. 4th 845, 850, 128 Cal. Rptr. 2d 389 (2002)*; *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* . Pursuant to *§ 17200*, an act is "unlawful" if **[*25]** it violates an underlying state or federal statute. *Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 180* ("[The UCL's] coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law.") (internal citations and quotation marks omitted). An Act is considered "unfair" if it "threatens an incipient violation of ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law." *Id. at 187*. Claims set forth pursuant to *§ 17200* must state with reasonable particularity the facts supporting the statutory elements of the violation. *Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (1993)*.

As there are no viable underlying claims that can serve as the basis for the UCL claim, this claim is dismissed.

C. Amendment of Pleadings

For the reasons set forth above the Court DISMISSES Plaintiff's complaint without prejudice and with leave to amend. Plaintiff's claims pursuant to the FDCPA and Perata, however, are not viable as a matter of law. To the extent that Plaintiff includes these claims in an amended complaint, they will be recommended for dismissal **[*26]** with prejudice and without leave to amend on the grounds set forth above.

Plaintiff is advised that ***HN27***[] *Local Rule 220* requires that an amended complaint be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967)*. Once Plaintiff files an amended complaint, the original pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each Defendant must be sufficiently alleged. If Plaintiff fails to file an amended complaint or fails to cure the deficiencies identified above, the Court will recommend that the complaint be dismissed with prejudice.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's complaint be DISMISSED without prejudice and with leave to amend; and

2. Plaintiff shall file an amended complaint within 30 days from the date of this order.

IT IS SO ORDERED.

Dated: October 31, 2011

/s/ Sheila K. Oberto

UNITED STATES MAGISTRATE JUDGE

In re Cipro Cases I & II

Court of Appeal of California, Fourth Appellate District, Division One

October 31, 2011, Filed

D056361

Reporter

200 Cal. App. 4th 442 *; 134 Cal. Rptr. 3d 165 **; 2011 Cal. App. LEXIS 1353 ***

IN RE CIPRO CASES I & II. [Nine coordinated cases.[*]]

Notice: NOT CITABLE—SUPERSEDED BY GRANT OF REVIEW

Subsequent History: Application granted by *In re Cipro Cases I & II, 2011 Cal. LEXIS 12937 (Cal., Dec. 15, 2011)*

Application granted by *In re Cipro Cases I & II, 2011 Cal. LEXIS 12947 (Cal., Dec. 15, 2011)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 1075 (Cal., Jan. 23, 2012)*

Time for Granting or Denying Review Extended *In re Cipro Cases I & II, 2012 Cal. LEXIS 1156 (Cal., Feb. 3, 2012)*

Review granted, Depublished by, Request granted *In re Cipro Cases I & II, 137 Cal. Rptr. 3d 248, 269 P.3d 653, 2012 Cal. LEXIS 1740 (Cal., 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 2840 (Cal., Mar. 5, 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 3088 (Cal., Mar. 5, 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 3152 (Cal., Mar. 27, 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 4109 (Cal., Apr. 16, 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 4912 (Cal., May 15, 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 6149 (Cal., June 12, 2012)*

Application granted by *In re Cipro Cases I & II, 2012 Cal. LEXIS 8540 (Cal., Aug. 23, 2012)*

Stay granted by, Request denied by, As moot *In re Cipro Cases I & II, 2012 Cal. LEXIS 8596 (Cal., Sept. 12, 2012)*

Stay vacated by *In re Cipro Cases I & II, 2013 Cal. LEXIS 5523 (Cal., June 26, 2013)*

Stay granted by, Motion denied by *In re Cipro Cases I & II, 2013 Cal. LEXIS 5642 (Cal., July 10, 2013)*

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[*] *McGaughey v. Bayer Corp.* (Super. Ct. San Diego County, No. GIC752290); *Relles v. Bayer Corp.* (Super. Ct. L.A. County, No. BC239083); *Samole v. Bayer AG* (Super. Ct. S.F. City and County, No. 316349); *Garber v. Bayer AG* (Super. Ct. S.F. City and County, No. 316518); *Lee v. Bayer AG* (Super. Ct. S.F. City and County, No. 316670); *Patane v. Bayer AG* (Super. Ct. S.F. City and County, No. 318457); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. SCZ228356); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. 228384); *Senior Action Network v. Bayer AG* (Super. Ct. S.F. City and County, No. 400750).

Stay vacated by *In re Cipro Cases I & II, 2013 Cal. LEXIS 9961 (Cal., Dec. 11, 2013)*

Application granted by *In re Cipro, 2014 Cal. LEXIS 4328 (Cal., Mar. 14, 2014)*

Application granted by *In re Cipro Cases I & II, 2014 Cal. LEXIS 4684 (Cal., Mar. 25, 2014)*

Application granted by *In re Cipro Cases I & II, 2014 Cal. LEXIS 4680 (Cal., Mar. 25, 2014)*

Dismissed by, in part *In re Cipro Cases I & II, 178 Cal. Rptr. 3d 321, 334 P.3d 687, 2014 Cal. LEXIS 8131 (Cal., 2014)*

Reversed by, Superseded by *In re Cipro Cases I & II, 2015 Cal. LEXIS 2486 (Cal., May 7, 2015)*

Prior History: [*1]** APPEAL from a judgment of the Superior Court of San Diego County, JCCP Nos. 4154 & 4220 [Nine coordinated cases.], Richard E. L. Strauss, Judge.

In re Cipro Cases I & II, 121 Cal. App. 4th 402, 17 Cal. Rptr. 3d 1, 2004 Cal. App. LEXIS 1286 (Cal. App. 4th Dist., 2004)

Disposition: Affirmed.

Core Terms

patent, settlement, generic, manufacturer, infringement, exclusionary, anti trust law, plaintiffs', baseless, patent law, inequitable conduct, patent infringement, Cartwright Act, effects, restrain, anticompetitive, sham, summary judgment, district court, Tamoxifen, antitrust, procuring, branded, patentee, invalid, trial court, ciprofloxacin, lawsuit, Sherman Act, parties

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN1[] **Bad Faith, Fraud & Nonuse, Fraud**

A settlement of a lawsuit to enforce a patent does not violate the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, if the settlement restrains competition only within the scope of the patent, unless the patent was procured by fraud or the suit for its enforcement was objectively baseless.

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

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

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

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

HN2[] **Standards of Review, De Novo Review**

Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, the appellate court independently reviews them on appeal, applying the same three-step analysis required of the trial court. First, the appellate court identifies the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. Second, the appellate court determines whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the movant's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.

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

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, prohibits every trust, defined as a combination of capital, skill or acts by two or more persons for specified anticompetitive purposes. *Bus. & Prof. Code, § 16720*. *Section 16720* generally codifies the common law prohibition against restraint of trade. The federal Sherman Act prohibits every contract, combination or conspiracy, in restraint of trade. *15 U.S.C. § 1*. The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance.

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

HN4[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Courts have limited the reach of the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, to restraints of trade that are unreasonable. Generally, in determining whether conduct unreasonably restrains trade, a rule of reason analysis requires a determination of whether its anti-competitive effects outweigh its pro-competitive effects. However, certain restraints of trade which lack redeeming virtue are conclusively presumed to be unreasonable and therefore deemed illegal per se.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN5[] **Bad Faith, Fraud & Nonuse, Fraud**

Unless and until a patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Limitations

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

HN6[] **Regulated Practices, Intellectual Property**

When patents are involved, the exclusionary effect of the patent must be considered before making any determination as to whether the alleged restraint is per se illegal. Therefore, the proper analysis is whether plaintiffs have proven as a matter of law that challenged agreements restrict competition beyond the exclusionary effects of the patent.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Limitations

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

HN7[] **Intellectual Property, Ownership & Transfer of Rights**

A patent grants its owner the lawful right to exclude others. A patentee can choose to exclude everyone from producing the patented article or can choose to be the sole supplier itself. Unlike some kinds of agreements that are per se illegal whether engaged in by patentees or anyone else, such as tying or price-fixing, the exclusion of infringing competition is the essence of the patent grant.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN8[] **Bad Faith, Fraud & Nonuse, Fraud**

The only time the United States Supreme Court has addressed the circumstances under which the patent immunity from antitrust liability can be pierced, it held that the antitrust claimant must prove that the patentee enforced a patent with the knowledge that the patent was procured by fraud. Good faith procurement furnishes a complete defense to the antitrust claim.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

HN9[] **Intellectual Property, Ownership & Transfer of Rights**

Both the rule-of-reason and per-se approach are ill-suited for an antitrust analysis of patent cases because they seek to determine whether the challenged conduct had an anticompetitive effect on the market. By their nature, patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present. What is required is an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects. Therefore, the proper analysis of antitrust liability requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

HN10[] **Intellectual Property, Ownership & Transfer of Rights**

Although the exclusionary power of a patent may seem incongruous with the goals of ***antitrust law***, a delicate balance must be drawn between the two regulatory schemes. Indeed, application of ***antitrust law*** to markets affected by the exclusionary statutes set forth in patent law cannot discount the rights of the patent holder. Therefore, a patent holder does not incur antitrust liability when it chooses to exclude others from producing its patented work. What patent law does not do, however, is extend the patentee's monopoly beyond its statutory right to exclude.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Patent Law > Infringement Actions > General Overview

HN11[] **Settlements, Settlement Agreements**

The general policy of the law is to favor the settlement of litigation, and the policy extends to the settlement of patent infringement suits. Patent owners should not be in a worse position, by virtue of the patent right, to negotiate and settle surrounding lawsuits.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

HN12[] **Intellectual Property, Ownership & Transfer of Rights**

Where all anticompetitive effects of a settlement agreement are within the exclusionary power of the patent, the outcome is the same whether the court begins its analysis under ***antitrust law*** by applying a rule of reason approach to evaluate the anti-competitive effects, or under patent law by analyzing the right to exclude afforded by the patent. The essence of the inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN13[] **Intellectual Property, Ownership & Transfer of Rights**

Pursuant to statute, a patent is presumed to be valid, *35 U.S.C. § 282*, and patent law bestows the patent holder with the right to exclude others from profiting by the patented invention. A settlement is not unlawful if it serves to protect that to which the patent holder is legally entitled - a monopoly over the manufacture and distribution of the patented invention. If there is nothing suspicious about the circumstances of a patent settlement, then to prevent a cloud from being cast over the settlement process, a third party should not be permitted to haul the parties to the settlement over the hot coals of antitrust litigation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN14[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

The right to enter into reverse exclusionary payment agreements falls within the terms of the exclusionary grant conferred by a branded drug manufacturer's patent. A reverse payment agreement settling patent litigation between a branded drug manufacturer and a generic drug manufacturer does not exceed the scope of the patent where (1) there is no restriction on marketing non-infringing products; (2) a generic version of the branded drug would necessarily infringe the branded firm's patent; and (3) the agreement does not bar other generic manufacturers from challenging the patent.

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

HN15[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, the "illegal per se" designation is reserved for agreements or practices that have a pernicious effect on competition and lack any redeeming virtue.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

HN16[] **Regulated Practices, Intellectual Property**

Simply because a brand-name pharmaceutical company holding a patent paid its generic competitor money cannot be the sole basis for a violation of ***antitrust law***.

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

HN17[] **Noerr-Pennington Doctrine, Sham Exception**

To prove sham litigation, a plaintiff must show (1) the lawsuit to be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) that the litigant's subjective motivation for bringing the action was a sham seeking to conceal a knowing attempt to interfere with a competitor.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN18[] **Opposing Materials, Accompanying Documentation**

The pleadings set the boundaries of the issues to be resolved at summary judgment. A plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. A summary judgment or summary adjudication motion that is otherwise sufficient cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings. Thus, a plaintiff wishing to rely upon unpleaded theories to defeat summary judgment must move to amend the complaint before the hearing.

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

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

A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore is not a sham.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN20[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

See *28 U.S.C. § 1338(a)*.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN21[] **Federal Questions, Well Pleaded Complaint Rule**

Federal jurisdiction over cases arising under patent law extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Torts > Business Torts > Unfair Business Practices > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

HN22[] **Bad Faith, Fraud & Nonuse, Fraud**

When a state law claim involves a patent holder's conduct in obtaining its patent, the claim is preempted by federal patent law unless the plaintiff pleads and proves that the patent holder engaged in fraud before the U.S. Patent and Trademark Office. More specifically, a determination of whether alleged inequitable conduct in the procurement of a patent constitutes unfair competition is within the exclusive jurisdiction of the federal circuit court of appeals.

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN23[] **Removal, Postremoval Remands**

In making its jurisdictional determination on a motion for remand, the federal district court looks no further than the complaint and the motion for removal. This limitation is one aspect of the well-pled complaint rule which holds a plaintiff is the master of his or her complaint and the plaintiff may craft his or her causes of action, if he or she so desires, to exclude federal jurisdiction. Under the rule, a federal question must appear from the complaint and not from any preemption defense which might be raised in state court and which might ultimately defeat the cause of action. However, an independent corollary to the well-pled complaint rule is the artful pleading rule or the doctrine of complete preemption. This doctrine states that while couched in state contract or tort terms, federal jurisdiction exists if the issues actually raise an essentially federal question. When a federal court grants a motion for remand in the present context, it does nothing more than determine the complaint fails, either directly or by operation of the artful pleading doctrine, to state a question arising under federal law. It does not determine whether a preemption defense can be successfully offered in state court when the entire case is considered.

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

Torts > Business Torts > Unfair Business Practices > General Overview

HN24[] **Regulated Practices, Price Fixing & Restraints of Trade**

Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably impairs competition and harms consumers. If the same conduct is alleged to be both an antitrust violation and an "unfair" business act or practice for the same reason - because it unreasonably restrains competition and harms consumers - the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not "unfair" toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct.

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

Governments > Courts > Common Law

HN25[] **Regulated Practices, Monopolies & Monopolization**

The common law tort of monopolization is not cognizable under California law. Conduct that has been determined not to unreasonably restrain competition under statutory ***antitrust law*** cannot logically be deemed to unreasonably restrain competition under a common law monopolization theory.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN26[] **Appellate Review, Appealability**

When a trial court ruling on a summary judgment motion fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of a summary judgment motion, and the objections are preserved on appeal.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs sued defendants, a brand-name drug manufacturer and generic drug manufacturers, alleging violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) and unfair competition law (UCL) (*Bus. & Prof. Code, §*

17200 et seq.) and common law monopolization. Plaintiffs' causes of action arose from an agreement settling litigation between the brand-name manufacturer and one of the generic manufacturers concerning the validity of the brand-named manufacturer's patent and related agreements involving the other defendants. The trial court granted summary judgment in favor of defendants. (Superior Court of San Diego County, JCCP Nos. 4154 and 4220, Richard E. L. Strauss, Judge.)

The Court of Appeal affirmed the judgment. The court concluded that the agreements did not violate the Cartwright Act because the agreements undisputedly did not restrain competition beyond the exclusionary scope of the patent. Because the agreements did not lack any redeeming virtue, they were not unlawful per se. The agreements also did not violate the Cartwright Act under a rule-of-reason analysis. Plaintiffs' contention that there was a triable issue of fact as to whether the brand-name manufacturer's infringement suit was objectively baseless due to inequitable conduct in procuring the patent was not a basis for reversal. To the extent a sham litigation claim was sufficiently pleaded, it arose from and was preempted by federal patent law. The court's conclusion that defendants were not liable under the Cartwright Act for entering into the agreements was also dispositive of plaintiffs' causes of action for violation of the UCL and common law monopolization. (Opinion by Nares, J., with Benke, Acting P. J., and Aaron, J., concurring.) **[*443]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Settlement of Lawsuit—Enforcement of Patent—Exclusionary Scope of Patent—Fraudulent Procurement.

A settlement of a lawsuit to enforce a patent does not violate the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) if the settlement restrains competition only within the scope of the patent, unless the patent was procured by fraud or the suit for its enforcement was objectively baseless. Thus, where settlement agreements between a brand-name drug manufacturer and generic drug manufacturers undisputedly did not restrain competition beyond the exclusionary scope of the brand-name manufacturer's patent, they did not violate the Cartwright Act.

[Cal. Forms of Pleading and Practice (2011) ch. 565, Unfair Competition, § 565.70.]

CA(2)[] **(2)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Sherman Act—Protection of Competition.

The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) prohibits every trust, defined as a combination of capital, skill or acts by two or more persons for specified anticompetitive purposes. *Bus. & Prof. Code, § 16720*, generally codifies the common law prohibition against restraint of trade. The federal Sherman Act (*15 U.S.C. §§ 1–7 et seq.*) prohibits every contract, combination or conspiracy, in restraint of trade (*15 U.S.C. § 1*). The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance.

CA(3)[] **(3)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Rule of Reason—Illegal Per Se.

Courts have limited the reach of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) to restraints of trade that are unreasonable. Generally, in determining whether conduct unreasonably restrains trade, a rule of reason analysis requires a determination of whether its anti-competitive effects outweigh its pro-competitive effects. However, certain restraints of trade which lack redeeming virtue are conclusively presumed to be unreasonable and therefore deemed illegal per se.

CA(4)[] **(4)**

Monopolies and Restraints of Trade § 6—Patent—Fraudulent Procurement—Suit for Enforcement.

Unless and until a patent is shown to have been procured by fraud, or a suit for its enforcement is shown to **[*444]** be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.

CA(5)[] **(5)**

Monopolies and Restraints of Trade § 6—Patent—Exclusionary Effect—Illegal Per Se.

When patents are involved, the exclusionary effect of the patent must be considered before making any determination as to whether the alleged restraint is per se illegal. Therefore, the proper analysis is whether plaintiffs have proven as a matter of law that challenged agreements restrict competition beyond the exclusionary effects of the patent.

CA(6)[] **(6)**

Monopolies and Restraints of Trade § 6—Patent—Right to Exclude.

A patent grants its owner the lawful right to exclude others. A patentee can choose to exclude everyone from producing the patented article or can choose to be the sole supplier itself. Unlike some kinds of agreements that are per se illegal whether engaged in by patentees or anyone else, such as tying or price-fixing, the exclusion of infringing competition is the essence of the patent grant.

CA(7)[] **(7)**

Monopolies and Restraints of Trade § 6—Patent—Piercing of Immunity—Fraudulent Procurement.

The only time the United States Supreme Court has addressed the circumstances under which the patent immunity from antitrust liability can be pierced, it held that the antitrust claimant must prove that the patentee enforced a patent with the knowledge that the patent was procured by fraud.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 6—Patent—Exclusionary Effect—Illegal Per Se—Rule of Reason.

Both the rule-of-reason and per se approach are ill-suited for an antitrust analysis of patent cases because they seek to determine whether the challenged conduct had an anticompetitive effect on the market. By their nature, patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present. What is required is an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects. Therefore, the proper analysis of antitrust liability requires an examination of (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects.

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 6—Patent—Right to Exclude.

Although the exclusionary power of a patent may seem incongruous with the goals of ***antitrust law***, a delicate balance must be drawn **[*445]** between the two regulatory schemes. Indeed, application of ***antitrust law*** to markets affected by the exclusionary statutes set forth in patent law cannot discount the rights of the patent holder. Therefore, a patent holder does not incur antitrust liability when it chooses to exclude others from producing its patented work. What patent law does not do, however, is extend the patentee's monopoly beyond its statutory right to exclude.

CA(10)[] **(10)**

Compromise, Settlement, and Release § 7—Patent Infringement Suits.

The general policy of the law is to favor the settlement of litigation, and the policy extends to the settlement of patent infringement suits. Patent owners should not be in a worse position, by virtue of the patent right, to negotiate and settle surrounding lawsuits.

CA(11)[] **(11)**

Monopolies and Restraints of Trade § 6—Patent—Rule of Reason—Right to Exclude.

Where all anticompetitive effects of a settlement agreement are within the exclusionary power of the patent, the outcome is the same whether the court begins its analysis under ***antitrust law*** by applying a rule of reason approach to evaluate the anticompetitive effects, or under patent law by analyzing the right to exclude afforded by the patent. The essence of the inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent.

CA(12)[] **(12)**

Monopolies and Restraints of Trade § 6—Patent—Settlement Agreements.

Pursuant to statute, a patent is presumed to be valid (*35 U.S.C. § 282*), and patent law bestows the patent holder with the right to exclude others from profiting by the patented invention. A settlement is not unlawful if it serves to protect that to which the patent holder is legally entitled—a monopoly over the manufacture and distribution of the patented invention. If there is nothing suspicious about the circumstances of a patent settlement, then to prevent a cloud from being cast over the settlement process, a third party should not be permitted to haul the parties to the settlement over the hot coals of antitrust litigation.

CA(13)[] **(13)**

Monopolies and Restraints of Trade § 6—Patent—Branded and Generic Drug Manufacturers—Reverse Exclusionary Payment Agreements.

The right to enter into reverse exclusionary payment agreements falls within the terms of the exclusionary grant conferred by a branded drug manufacturer's patent. A reverse payment agreement settling patent litigation between a branded drug manufacturer and a generic drug manufacturer does not exceed the scope of the patent where (1) there is no restriction on marketing non-infringing products; (2) a generic version of the branded drug would necessarily infringe the branded firm's patent; and (3) the agreement does not bar other generic manufacturers from challenging the patent.

[*446] ***CA(14)***[] **(14)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Illegal Per Se.

Under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the “illegal per se” designation is reserved for agreements or practices that have a pernicious effect on competition and lack any redeeming virtue.

CA(15)[] **(15)**

Monopolies and Restraints of Trade § 6—Patent—Branded and Generic Drug Manufacturers.

Simply because a brand-name pharmaceutical company holding a patent paid its generic competitor money cannot be the sole basis for a violation of ***antitrust law***.

CA(16)[] **(16)**

Monopolies and Restraints of Trade § 6—Sham Litigation—Proof.

To prove sham litigation, a plaintiff must show (1) the lawsuit to be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) that the litigant's subjective motivation for bringing the action was a sham seeking to conceal a knowing attempt to interfere with a competitor.

CA(17)[] **(17)**

Monopolies and Restraints of Trade § 6—Sham Litigation—Winning Lawsuit.

A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.

CA(18)[] **(18)**

Patents § 1—Federal Jurisdiction—Well-pleaded Complaint.

Federal jurisdiction over cases arising under patent law extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

CA(19)[] **(19)**

Patents § 1—State Law Claim—Federal Preemption—Unfair Competition.

When a state law claim involves a patent holder's conduct in obtaining its patent, the claim is preempted by federal patent law unless the plaintiff pleads and proves that the patent holder engaged in fraud before the United States Patent and Trademark Office. More specifically, a determination of whether alleged inequitable conduct in the procurement of a patent constitutes unfair competition is within the exclusive jurisdiction of the federal circuit court of appeals.

CA(20)[] **(20)**

Federal Courts § 3—Jurisdiction and Venue—Removal of Causes from State Courts—Remand.

In making its jurisdictional determination on a motion for remand, the federal district court looks no further than the complaint and the motion for removal. This limitation is one aspect of the well-pled complaint rule which holds a plaintiff is the **[*447]** master of his or her complaint and the plaintiff may craft his or her causes of action, if he or she so desires, to exclude federal jurisdiction. Under the rule, a federal question must appear from the complaint and not from any preemption defense which might be raised in state court and which might ultimately defeat the cause of action. However, an independent corollary to the well-pled complaint rule is the artful pleading rule or the doctrine of complete preemption. This doctrine states that while couched in state contract or tort terms, federal jurisdiction exists if the issues actually raise an essentially federal question. When a federal court grants a motion for remand in the present context, it does nothing more than determine the complaint fails, either directly or by operation of the artful pleading doctrine, to state a question arising under federal law. It does not determine whether a preemption defense can be successfully offered in state court when the entire case is considered.

CA(21)[] **(21)**

Unfair Competition § 1—Antitrust Laws—Unreasonable Restraints of Trade.

Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably impairs competition and harms consumers. If the same conduct is alleged to be both an antitrust violation and an “unfair” business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not “unfair” toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct.

CA(22)[] **(22)**

Monopolies and Restraints of Trade § 6—Common Law Tort of Monopolication—Statutory *Antitrust Law*.

The common law tort of monopolization is not cognizable under California law. Conduct that has been determined not to unreasonably restrain competition under statutory ***antitrust law*** cannot logically be deemed to unreasonably restrain competition under a common law monopolization theory.

CA(23)[] **(23)**

Appellate Review § 39—Preservation of Issues—Summary Judgment Motion—Evidentiary Objections.

When a trial court ruling on a summary judgment motion fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal.

[*448]

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Judges: Opinion by Nares, J., with **[***2]** Benke, Acting P. J., and Aaron, J., concurring.

Opinion by: Nares

Opinion

[169] NARES, J.**—The plaintiffs in this coordinated class action proceeding sued brand-name drug manufacturer Bayer AG and its subsidiary Bayer Corporation (collectively Bayer); generic drug manufacturers Barr Laboratories, Inc. (Barr), Hoechst Marion Roussel, Inc. (HMR), and HMR's former subsidiary The Rugby Group, Inc. (Rugby) (collectively the generic defendants); and Watson Pharmaceuticals, Inc. (Watson), which purchased Rugby from HMR. Bayer manufactures and markets Cipro, the brand name for ciprofloxacin hydrochloride (ciprofloxacin), an antibiotic prescribed for the treatment of infections. Bayer owned U.S. Patent No. 4,670,444 (the ’444 patent), which claimed the ciprofloxacin hydrochloride molecule, until the patent expired in December 2003. Plaintiffs asserted causes of action against all defendants for violation of the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*); violation of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*); and common law monopolization, arising from an agreement settling litigation between Bayer and Barr concerning the validity of Bayer's ’444 patent and related agreements involving **[***3]** the other defendants (collectively, the Cipro agreements or Cipro settlement). Plaintiffs appeal from a judgment **[*449]** entered in favor of defendants after the court granted summary judgment motions filed by Bayer, the generic defendants, and Watson.

Plaintiffs contend (1) the court erred by not ruling that the Cipro agreements are unlawful per se; (2) if the Cipro agreements are not unlawful per se, there is a triable issue of fact as to whether they violate the Cartwright Act under the “rule of reason applied in antitrust cases”; (3) the court followed incorrectly decided federal court decisions in ruling that the Cipro agreements were lawful because they did not restrict competition outside the exclusionary zone of the ’444 patent; (4) there is a triable issue of fact under the case law the court followed; (5) the court erred in ruling that it did not have jurisdiction to determine whether Bayer engaged in fraud or inequitable conduct in obtaining the ’444 patent because that determination involves substantial questions of patent law; (6) the court erred in granting Watson's motion for summary judgment; and (7) the court erred by not providing any explanation for overruling all of plaintiffs' **[***4]** evidentiary objections.

CA(1)[] **(1)** We hold that *HN1*[] a settlement of a lawsuit to enforce a patent does not violate the Cartwright Act if the settlement restrains competition only within the scope of the patent, unless the patent was procured by fraud or the suit for its enforcement was objectively baseless. Because the Cipro agreements undisputedly did not restrain competition beyond the exclusionary scope of the ’444 patent, we conclude they do not violate the

Cartwright Act. We further conclude that plaintiffs' claim that Bayer's infringement suit against Barr was objectively baseless due to Bayer's inequitable conduct before the U.S. Patent and Trademark Office (PTO) in procuring the patent is preempted by federal patent law because plaintiffs' right to relief on that claim necessarily depends on resolution of **[**170]** a substantial question of federal patent law. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The ’444 Patent*

Bayer's ’444 patent covers or “claims” the ciprofloxacin hydrochloride molecule, which is the active ingredient in Cipro. The ’444 patent expired in December 2003, but the United States Food and Drug Administration (FDA) granted Cipro pediatric exclusivity until **[***5]** June 9, 2004. Consequently, no generic ciprofloxacin product could be lawfully marketed before June 9, 2004, under federal law. (*21 U.S.C. § 355a*.)

B. *Hatch-Waxman Act*

In 1991 Barr sought FDA approval of a generic version of Cipro under the federal Drug Price Competition and Patent Term Restoration Act of 1984 (the **[*450]** Hatch-Waxman Act) (*21 U.S.C. § 355*). The Hatch-Waxman Act streamlined the process of obtaining approval of generic versions of branded drugs by allowing a generic manufacturer to file an abbreviated new drug application (ANDA) under *21 United States Code section 355(j)*. (*Merck KGaA v. Integra Lifesciences I, Ltd. (2005) 545 U.S. 193, 196, fn. 1 [162 L. Ed. 2d 160, 125 S. Ct. 2372]*.) The generic manufacturer does not have to make an independent showing that the generic drug is safe and effective; it need only show that the drug contains the same active ingredients as, and is bioequivalent to, the branded drug. (*Ibid.*, citing *21 U.S.C. §§ 355(j)(2)(A)(ii)* & *(iv)*, *355(j)(8)(B)*.)

Regarding any patents that claim the branded drug, the generic manufacturer's ANDA must certify one of the following: “(I) that such patent information has not been filed, [¶] (II) that such patent has expired, [¶] (III) … the date on **[***6]** which such patent will expire, or [¶] (IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted.” (*21 U.S.C. § 355(j)(2)(A)(vii)*.)

A generic manufacturer that files a paragraph IV certification (ANDA IV) must give notice of the certification to any affected patent owners. (*21 U.S.C. § 355(j)(2)(B)*.) The service of the ANDA IV gives an affected patent owner 45 days to file a patent infringement lawsuit against the generic manufacturer. (*21 U.S.C. § 355(j)(5)(B)(iii)*.) If the patent owner files an infringement suit within the 45-day period, FDA approval of the generic manufacturer's ANDA is stayed for 30 months or until a federal district court enters a decision that patent is invalid or not infringed. (*21 U.S.C. § 355(j)(5)(B)(iii)(I)*; *In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2003) 261 F.Supp.2d 188, 193* (*Cipro I*).)

As an incentive for generic manufacturers to file ANDA IV certifications and challenge patents on brand-name drugs, the first ANDA IV filer has the right to exclusively market its generic version of the branded drug for 180 days from the date it begins to commercially **[***7]** market the drug or the date of a final court decision finding the branded drug's patent to be invalid or not infringed. (*21 U.S.C. § 355(j)(5)(B)(iv)*; *21 C.F.R. § 314.107(c)(1) (2009)*; *Cipro I, supra, 261 F.Supp.2d at p. 193*.)

C. *Barr's ANDA and the Ensuing Patent Litigation*

In October 1991 Barr filed an ANDA for a generic version of Cipro with an ANDA IV certification asserting that Bayer's ’444 patent was invalid or would not be infringed by the manufacture, use or sale of **[**171]** Barr's generic ciprofloxacin. After receiving notice of Barr's ANDA IV, Bayer filed a patent infringement suit against Barr in the United States District Court for the **[*451]** Southern District of New York. Barr filed affirmative defenses and counterclaims alleging that the ’444 patent was invalid and unenforceable due to Bayer's inequitable conduct before the PTO in procuring the patent.

In March 1996 Barr and Rugby entered into an agreement under which Rugby agreed to finance a portion of the cost of Barr's patent litigation and Barr agreed to provide Rugby half of the profits from its sale of generic ciprofloxacin. In December 1996 Barr, Rugby, and HMR executed an amendment to that agreement **[***8]** providing that HMR succeeded to all of the rights and obligations of Rugby under the agreement.

D. *The Cipro Agreements*

In January 1997, after the district court in the patent litigation had denied cross-motions for partial summary judgment filed by Bayer and Barr and the case had been set for trial, Bayer settled the patent litigation with Barr and other generic drug manufacturers by entering into the Cipro agreements, which consisted of three separate settlement agreements—one with Barr, one with nonparties HMR and Rugby, and one with nonparties Bernard Sherman (Sherman) and Apotex, Inc. (Apotex)—and a "supply agreement" with Barr and HMR.

Under the settlement agreements, Barr, HMR, Rugby, Sherman, and Apotex acknowledged the validity of the '444 patent and related patents held by Bayer. In the settlement agreement between Bayer and Barr, Barr agreed to amend its ANDA to change its ANDA IV certification to an ANDA III certification, precluding Barr from obtaining FDA approval to market generic Cipro until the '444 patent expired. The agreement also provided for an immediate payment of $49.1 million from Bayer to a "Barr Escrow Account."

Under the supply agreement, Barr and HMR agreed **[***9]** not to manufacture ciprofloxacin or have it manufactured in the United States. The supply agreement gave Bayer the option of either supplying ciprofloxacin that it manufactured to Barr and HMR for distribution in the United States or making quarterly payments to Barr from January 1998 until the '444 patent expired. Bayer chose to make the payments. By December 2003 when Bayer ceased making payments, its payments to Barr totaled approximately $398 million, including the initial payment of $49.1 million.

E. *Reexamination of and Subsequent Challenges to the '444 Patent*

After settling the patent litigation, Bayer filed a request for reexamination of the '444 patent with the PTO. The PTO issued a reexamination certificate confirming the patent's validity, including the validity of claim 12, which covered **[*452]** the ciprofloxacin hydrochloride molecule. (See *In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2005) 363 F.Supp.2d 514, 519* (*Cipro II*).) Subsequently, four generic manufacturers—Ranbaxy Pharmaceuticals, Inc., and Ranbaxy Laboratories Limited (collectively Ranbaxy), Schein Pharmaceutical, Inc. (Schein), Mylan Pharmaceuticals, Inc., and Mylan Laboratories, Inc. (collectively **[***10]** Mylan), and Carlsbad Technology, Inc.—filed ANDA's for ciprofloxacin with ANDA IV certifications and challenged the validity of the reexamined '444 patent in infringement actions that Bayer filed against them.

Ranbaxy withdrew its ANDA IV certification and stipulated with Bayer to the dismissal of the claims and counterclaims **[**172]** in the patent action between them after entering into a licensing agreement with Bayer. Bayer successfully moved for summary judgment against Schein, Mylan and others on the validity of the '444 patent. (*Bayer AG & Bayer Corp. v. Schein Pharmaceuticals (D.N.J. 2001) 129 F.Supp.2d 705*, affd. *(Fed.Cir. 2002) 301 F.3d 1306*.) After a bench trial, a federal district court upheld the validity of the '444 patent and ruled in favor of Bayer in its infringement action against Carlsbad Technology, Inc.

F. *Federal Cipro Litigation*

In 2000 and 2001, direct and indirect purchasers of Cipro and advocacy groups filed a number of antitrust actions in federal courts challenging the Cipro agreements. The actions were consolidated as ?Multidistrict Litigation" (MDL) in the Eastern District of New York. Thereafter, the MDL plaintiffs filed a consolidated complaint against Bayer and the same **[***11]** manufacturers that are generic defendants in the present case, alleging that the Cipro agreements constituted an illegal restraint of trade in violation of the Sherman Act (*15 U.S.C. §§ 1–7 et seq.*) and various state antitrust and consumer protection laws. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation (Fed.Cir. 2008) 544 F.3d 1323, 1329* (*Cipro III*).) After the district court denied the MDL plaintiffs' motion for partial summary judgment that the Cipro agreements were illegal per se under the Sherman Act and state antitrust laws, the plaintiffs amended their complaint to add a state law claim that Bayer violated state ***antitrust law*** through fraud on the PTO and sham litigation in bringing its patent infringement suit against Barr.[1] (Cipro III, supra, 544 F.3d at pp. 1329–1330.)

[*453]

The parties filed cross-motions for summary judgment and the district court denied the plaintiffs' motion and granted the defendants' motion. (Cipro II, supra, 363 F.Supp.2d 514.) In the district court's view, the "ultimate question" in the case was "not whether Bayer and Barr had the power to adversely affect competition for ciprofloxacin as a whole, but whether any adverse effects on competition stemming from the [Cipro agreements] were outside the exclusionary zone of the '444 [p]atent." (Id. at p. 523.) The court stated that "[u]nless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent." (Id. at p. 535.) The court noted that because "[a]t least four generic companies filed ANDA IVs after Bayer and Barr entered the [Cipro agreements,] … it cannot be reasonably argued that **[***13]** the [a]greements created a bottleneck to future generic challenges." (Id. at p. 540.)

The *Cipro II* court concluded that "in the absence of any evidence that the [Cipro agreements] created a bottleneck on challenges to the **[*454]** '444 [p]atent, or that they otherwise restrained competition beyond the scope of the claims of the '444 [p]atent, the [a]greements have not had any anti-competitive effects on the market **[**173]** for ciprofloxacin beyond that which are permitted under the '444 [p]atent. The fact that Bayer paid what in absolute numbers is a handsome sum to Barr to settle its lawsuit does not necessarily reflect a lack of confidence in the '444 [p]atent, but rather the economic realities of what was at risk. There is simply no precedent for plaintiffs' argument that the parties to a settlement are required to preserve the public's interest in lower prices. Such a rule would only result in parties being less likely to reach settlements, aside from undermining well-settled principles of patent law. Finally, to even attempt to quantify the public's interest in a patent settlement between private parties would require devaluing patents across the board, a result that would contravene the presumption **[***14]** of [patent] validity afforded by Congress and impact the very way patent licenses are handled in countless daily transactions." (Cipro II, supra, 363 F.Supp.2d at pp. 540–541.)

The *Cipro II* court also granted the defendants' motion to dismiss the indirect purchaser plaintiffs' state law *Walker Process* type claim on the ground it was preempted by federal patent law (28 U.S.C. § 1338(a)) because it depended entirely on a showing of misconduct before the PTO and rested entirely on patent law. (Cipro II, supra, 363 F.Supp.2d at pp. 542–546.) The court further found that "Bayer's success in its [patent infringement] litigations against Schein, Mylan and Carlsbad forecloses any argument that its lawsuits were shams." (Id. at p. 547.) The court rejected the plaintiffs' argument that Bayer's success in those actions was immaterial because the '444 patent had undergone reexamination, stating: "[R]eexamination does not cure inequitable conduct, and the defense was available to all of the generic challengers." (*Ibid.*)

The plaintiffs timely appealed to the Second Circuit Court of Appeals, which retained jurisdiction over the direct purchaser plaintiffs' appeal but transferred the indirect purchaser **[***15]** and advocacy group plaintiffs' appeal to the federal circuit. (Arkansas Carpenters Health & Welfare Fund v. Bayer AG (2d Cir. 2010) 604 F.3d 98, 103 (*Arkansas Carpenters*); Cipro III, supra, 544 F.3d at p. 1327.) The federal circuit affirmed the dismissal of the indirect purchasers' state *Walker Process* type claims and the ?grant of summary judgment … that the [Cipro agreements] were not in violation of … the Sherman Act because any anti-competitive effects caused by the [a]greements were within the exclusionary zone of the ['444] patent." (Cipro III, supra, 544 F.3d at p. 1341.)

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[1] The *Cipro III* court referred to the MDL plaintiffs' fraud-on-the-PTO claim as a "*Walker Process* type" state law claim. The court explained: "In Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp. [(1965) 382 U.S. 172 [15 L. Ed. 2d 247, 86 S. Ct. 347]], the Supreme Court held that the enforcement of a patent procured by fraud on the patent office may be a violation of the Sherman Act provided that the other **[***12]** elements necessary to a Sherman Act claim are present. [Citation.] Here, however, the plaintiffs alleged a violation of state antitrust laws." (Cipro III, supra, 544 F.3d at pp. 1329–1330, fn. 6.)

In the direct purchasers' appeal, the Second Circuit likewise affirmed the judgment, noting that most courts considering the issue, including the Second Circuit in In re Tamoxifen Citrate Antitrust Litigation (2d Cir. 2006) 466 F.3d 187 (*Tamoxifen*) “have held that the right to enter into reverse exclusionary payment[2] agreements fall[s] within the terms of the exclusionary grant conferred by the branded manufacturer's patent.” (Arkansas Carpenters, supra, 604 F.3d at p. 105.) The *Arkansas Carpenters* court noted that the *Tamoxifen* court ruled that a reverse payment agreement settling patent litigation between **[***16]** a branded drug manufacturer and a generic drug manufacturer “did not exceed **[**174]** the scope of the patent where (1) there was no restriction on marketing non-infringing products; (2) a generic version of the branded drug would necessarily infringe the branded firm's patent; and (3) the agreement did not bar other generic manufacturers from challenging the patent.” (Arkansas Carpenters, supra, 604 F.3d at p. 106, citing Tamoxifen, supra, 466 F.3d at pp. 213–215.) The *Arkansas Carpenters* court concluded that “as long as *Tamoxifen* is controlling law, plaintiffs' claims cannot survive.” (Arkansas Carpenters, supra, 604 F.3d at p. 110.) The court invited the plaintiffs to file a petition for rehearing en banc (*ibid*.) and the plaintiffs did so, but the petition was denied. (Arkansas Carpenters Health & Welfare Fund v. Bayer AG (2d Cir. 2010) 625 F.3d 779.)
[*455]

G. *The Present Action*

Plaintiffs' operative pleading in this action is a second amended complaint they filed after this and other state actions were removed to federal court and remanded back to state court in In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2001) 166 F.Supp.2d 740. As noted, the second amended complaint includes causes of action for violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.); violation of the UCL (Bus. & Prof. Code, § 17200 et seq.); and common law monopolization arising from the Cipro agreements. The trial court granted plaintiffs' motion for class certification and this court upheld a modified certification in In re Cipro Cases I & II (2004) 121 Cal.App.4th 402 [17 Cal. Rptr. 3d 1].[3]

In November 2004 the trial court vacated the trial date and continued the hearing date it had set for defendants' **[***18]** motions for summary judgment pending the federal district court's decision on defense motions for summary judgment filed in the MDL. In March 2005 the district court granted the motions for summary judgment and dismissed the MDL case in the Cipro II decision. The parties in the present action then stipulated to stay the action pending the MDL plaintiffs' appeal of the summary judgment. After the federal circuit issued its decision in Cipro III affirming the summary judgment, the parties stipulated, and the court ordered, that the defendants would file new motions for summary judgment.

The court granted motions for summary judgment filed by Bayer, the generic defendants, and Watson, and entered judgment in favor of defendants. The court ruled that the Cipro agreements did not violate the Cartwright Act because “[t]he undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the [’444] patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff[s] cannot establish that the settlement was otherwise unlawful.” The court ruled the agreements were not illegal **[***19]** per se and did not violate the Cartwright Act under the “rule of reason” applied in antitrust cases. The court found that as a matter of law, plaintiffs could not establish that the Cipro settlement unreasonably restrained trade because there was no triable issue of fact as to whether it had “anticompetitive effects on competition beyond the exclusionary scope of the [’444] patent itself.” The court stated that “[t]his finding also precludes Plaintiffs' **[**175]** UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim.”
[*456]

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[2] The *Arkansas Carpenters* court explained that the terms “reverse exclusionary payment” and “pay-for-delay” refer to a settlement in which “the patent holder (Bayer) agree[s] to pay the alleged infringer to settle the lawsuit, and in exchange, the alleged infringer agree[s] not to enter the market.” (Arkansas Carpenters, supra, 604 F.3d at p. 102.) **[***17]** The *Tamoxifen* court referred to such payments as “reverse payments.” (Tamoxifen, supra, 466 F.3d at p. 205.)

[3] The modification was to exclude all Cipro purchasers who paid a flat copayment and would have paid the same copayment for generic ciprofloxacin under the terms of their health coverage. (In re Cipro Cases I & II, supra, 121 Cal.App.4th at p. 419.)

The court ruled that its summary judgment ruling as to Bayer and the generic defendants was dispositive as to Watson's summary judgment motion as well. The court additionally found there was no triable issue of fact as to whether Watson did anything to restrain trade as to ciprofloxacin. The court noted, among other facts, that Watson was not involved in the Cipro agreements and had no relationship to HMR or Rugby when those agreements were made.

DISCUSSION

HN2[] " ' "Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, we independently **[***20]** review them on appeal, applying the same three-step analysis required of the trial court. [Citations.] First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. [Citations.] [¶] [Second], we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in [the] movant's favor. … [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." ' " (*Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal.App.4th 1045, 1054 [73 Cal. Rptr. 2d 164]*.)

I. *Legality of the Cipro Agreements*

CA(2)[] **(2)** Plaintiffs first contend the court erred by not ruling that the Cipro agreements are illegal per se under the Cartwright Act. *HN3*[] The Cartwright Act (*Bus. & Prof. Code,*[4] *§ 16700 et seq.*) "prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. (*§ 16720*.) **[***21]** *Section 16720* generally codifies the common law prohibition against restraint of trade. [Citation.][5] [¶] The federal Sherman Act prohibits every 'contract, combination … or conspiracy, in restraint of trade.' (*15 U.S.C. § 1*.) 'The similar language of the two acts reflects their common objective to protect and promote competition. [Citations.] Since the Cartwright Act and the federal Sherman Act share similar **[*457]** language and objectives, California courts often look to federal precedents under the Sherman Act for guidance.' " (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal.App.4th 309, 334 [7 Cal. Rptr. 3d 628]*.)

HN4[] *CA(3)*[] **(3)** Courts have limited the reach of the Cartwright Act to restraints of trade that are *unreasonable*. **[***22]** (*UAS Management, Inc. v. Mater Misericordiae Hospital (2008) 169 Cal.App.4th 357, 364 [87 Cal. Rptr. 3d 81]*.) "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether … its anti-competitive effects outweigh its **[**176]** pro-competitive effects.' " (*Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048 [219 Cal. Rptr. 203]*, disapproved on other grounds in *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 389–390, 394, fn. 2 [46 Cal. Rptr. 3d 668, 139 P.3d 56]*.) However, " '[c]ertain restraints [of trade] which lack redeeming virtue are conclusively presumed to be unreasonable' " and therefore deemed illegal per se. (*UAS Management, Inc. v. Mater Misericordiae Hospital, supra, 169 Cal.App.4th at p. 364*; see *Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540 [78 Cal. Rptr. 2d 133]*.)

Plaintiffs contend the Cipro agreements are illegal per se, and the trial court would have found them so if it had not followed *Tamoxifen* and other federal cases supporting the proposition that a reverse payment settlement between a patent holder and an alleged infringer in Hatch-Waxman litigation is legal as long as the settlement does not restrain competition beyond the exclusionary scope of the patent, and there **[***23]** is no showing that the patent

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[4] All further statutory references are to the Business & Professions Code unless otherwise noted.

[5] *Section 16720, subdivision (a)* specifies as a trust purpose a combination "[t]o create or carry out restrictions in trade or commerce." *Subdivisions (b) through (e) of section 16720* specify various anticompetitive schemes and agreements constituting trusts, and *section 16726* states that, except as otherwise specified in the Cartwright Act, "every trust is unlawful, against public policy and void."

was procured by fraud or that the suit for its infringement was objectively baseless. Plaintiffs contend these cases were wrongly decided. We disagree.

CA(4)[] **(4)** In *Tamoxifen*, branded drug manufacturer and patent holder Zeneca, Inc., and related entities (collectively Zeneca) and generic drug manufacturer Barr entered into a reverse exclusionary payment settlement after a federal district court rendered a judgment declaring Zeneca's patent for the drug tamoxifen invalid, and while Zeneca's appeal of that judgment was pending. (*Tamoxifen, supra, 466 F.3d at pp. 193–194*.) The plaintiffs in *Tamoxifen* alleged the settlement violated antitrust laws. (*Id. at pp. 196–197*.) Considering the sufficiency of the plaintiffs' complaint, the *Tamoxifen* court declined to conclude, and noted that the plaintiffs did not ask it to conclude, "that reverse payments are *per se* violations of the Sherman Act such that an allegation of an agreement to make reverse payments suffices to assert an antitrust violation." (*Id. at p. 206*, original italics.) The *Tamoxifen* court adopted the holding in *Cipro II* that **HN5**[] " '[u]nless and until the patent is shown to have been procured by fraud, or a suit for **[***24]** its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under **[*458]** existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.' " (*Tamoxifen, supra, 466 F.3d at p. 213*, quoting *Cipro II, supra, 363 F.Supp.2d at p. 535*.) Affirming the district court's judgment dismissing the complaint and denying the plaintiffs leave to amend, the *Tamoxifen* court concluded that "in the absence of any plausible allegation that Zeneca's patent infringement lawsuit was baseless or that the Settlement Agreement otherwise restrained competition beyond the scope of the tamoxifen patent, [the plaintiffs'] complaint would fail to state a claim on which relief can be granted." (*Tamoxifen, supra, 466 F.3d at p. 221*.)

Before *Tamoxifen* was decided, the district court in *Cipro I*, addressing the Cipro settlement challenged here, noted that "*per se* analysis is reserved for a small number of cases involving agreements in restraint of trade that experience teaches have no redeeming value and a pernicious anticompetitive effect. This case involves the rights of a patent holder whose patent has been scrutinized on reexamination by the PTO and repeatedly **[***25]** challenged in court, but has never been found invalid. This case also involves the Hatch-Waxman Amendments—a new statutory scheme creating a novel, low-cost method for challenging the validity of drug patents. Lastly, this case involves settlement agreements, the type of agreements, generally speaking, encouraged by the legal system **[**177]** and entered into with great frequency. These circumstances pose significant obstacles to *per se* treatment of the challenged agreements." (*Cipro I, supra, 261 F.Supp.2d at p. 233*.)

CA(5)[] **(5)** The *Cipro I* court stated that**HN6**[] "when patents are involved, case law directs that the exclusionary effect of the patent must be considered before making any determination as to whether the alleged restraint is *per se* illegal. Therefore, the proper analysis in this case is whether the plaintiffs have proven as a matter of law that the challenged agreements restrict competition beyond the exclusionary effects of the 444 Patent." (*Cipro I, supra, 261 F.Supp.2d at p. 249*.) The court observed that because the '444 patent covered the active ingredient in all Cipro products, until the patent "either is invalidated or expires, it lawfully precludes the manufacture and use of any generic **[***26]** product containing the compound ciprofloxacin hydrochloride regardless of the form or method of delivery. Therefore, the restrictions in the Supply Agreement on manufacturing Cipro appear within the confines of Bayer's lawful patent monopoly." (*Id. at p. 250*.) The court concluded that the Cipro agreements, including the supply agreement, "do not restrict competition in areas other than those protected by Bayer's 444 Patent and, thus, are not *per se* illegal under the Sherman Act." (*Ibid.*)

Noting that the policies underlying patent law and the Sherman Act conflict to some extent, the *Cipro I* court reasoned that "[t]he flexibility necessary to balance these competing policies, particularly in the context of a new **[*459]** statutory scheme, suggests that a rule of reason rather than a *per se* analysis should be employed in this case." (*Cipro I, supra, 261 F.Supp.2d at p. 255*.) The court noted incentives created by the Hatch-Waxman Act "have led to generic investment in product development, patent review and product challenges through litigation. … To maximize these incentives, a generic company should be permitted to choose not only when to commence patent litigation, but also when to terminate **[***27]** it. Otherwise, the incentives to mount an ANDA IV challenge could be reduced." (*261 F.Supp.2d at p. 256*.)

The *Cipro I* court also recognized that the public policy favoring the settlement of disputes was an important factor in its analysis, stating: "[T]he American legal process encourages the settlement of lawsuits where possible, and unless the law explicitly states otherwise, neither party is obligated to litigate to a final conclusion. Nothing in the legislative history supports a conclusion that Hatch-Waxman lawsuits cannot be settled. Moreover, a rule that makes it *per se* illegal to settle a Hatch-Waxman lawsuit, like the Bayer/Barr patent litigation, limits the options available to both generic and brand-name manufacturers. If brand-name manufacturers are unable to control or limit their risk by settling Hatch-Waxman litigation, they, like generic manufacturers, may be less inclined to invest the research and development ('R&D') costs associated with bringing new drugs to the market. The pharmaceutical industry depends greatly on R&D and the economic returns to intellectual property created when a successful new drug is brought to market. … A rule prohibiting settlements of Hatch-Waxman **[***28]** patent litigation can have grave consequences for R&D and, in turn, severe consequences for consumers … ." (*Cipro I, supra, 261 F.Supp.2d at p. 256*, citation omitted.) "Although a policy in favor of settlement of litigation cannot save a *per se* violation from the [strictures] of the Sherman Act, a rule that too quickly condemns actions as *per se* illegal, potentially chilling efforts to research and develop new drugs and challenge the patents on brand-name **[**178]** drugs, does competition—and thus, the Sherman Act—a disservice." (*Ibid.*)

CA(6)[] **(6)** In another decision predating *Tamoxifen*, the Eleventh Circuit Court of Appeals, considering a reverse payment settlement of a Hatch-Waxman infringement suit that the district court had found to be illegal per se, stated: "If this case merely involved one firm making monthly payments to potential competitors in return for their exiting or refraining from entering the market, we would readily affirm the district court's order [granting summary judgment]. This is not such a case, however, because one of the parties owned a patent." (*Valley Drug Co. v. Geneva Pharmaceuticals, Inc. (11th Cir. 2003) 344 F.3d 1294, 1304* (*Valley Drug*).) The *Valley Drug* court noted that ***HN7***[] "[a] patent grants its owner **[***29]** the lawful right to exclude others" (*ibid.*) and that "a patentee can choose to exclude everyone from producing the patented article or can choose to be the sole supplier itself … ." (*Id. at p. 1305*.) "Unlike some kinds of agreements that are *per se* illegal whether engaged in by **[*460]** patentees or anyone else, such as tying or price-fixing, the exclusion of infringing competition is the essence of the patent grant. … '[W]hen patents are involved … the exclusionary effect of the patent must be considered before making any determination as to whether the alleged restraint is *per se* illegal.' " (*Id. at p. 1306*, quoting *Cipro I, supra, 261 F.Supp.2d at p. 249*.)

CA(7)[] **(7)** The *Valley Drug* court noted that ***HN8***[] the only time the United States Supreme Court "has addressed the circumstances under which the patent immunity from antitrust liability can be pierced, it held that the antitrust claimant must prove that the patentee enforced a patent with the knowledge that the patent was procured by fraud on the Patent Office." (*Valley Drug, supra, 344 F.3d at p. 1307*, citing *Walker Process, supra, 382 U.S. at p. 177*.) "Good faith procurement furnishes a complete defense to the antitrust claim. [Citation.] Justice **[***30]** Harlan's concurrence [in *Walker Process*] explained that the effect of antitrust liability on the incentives for innovation and disclosure created by the patent regime must be taken into account when a court considers whether a patentee is stripped of its immunity from the antitrust laws: 'It is well also to recognize the rationale underlying this decision, aimed of course at achieving a suitable accommodation in this area between the differing policies of the patent and antitrust laws. To hold, as we do, that private suits may be instituted under *§ 4 of the Clayton Act* to recover damages for *Sherman Act* monopolization knowingly practiced under the guise of a patent procured by deliberate fraud, cannot well be thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure. Hence, as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play. On the other hand, to hold, as we do not, that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent, **[***31]** might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits. Hence, this private antitrust remedy should not be deemed to reach § 2 monopolies carried on under a nonfraudulently procured patent.' " (*Valley Drug, supra, 344 F.3d at p. 1307*, quoting *Walker Process, supra, 382 U.S. at pp. 179–180* (conc. opn. of Harlan, J.).)

Further addressing the need to balance the conflicting policies behind patent law and ***antitrust law***, the *Valley Drug* court noted that although patent and antitrust **[**179]** laws necessarily clash, " 'the two regimes seek the same object: the welfare of the public … [.] ***Antitrust law*** forbids certain agreements tending to restrict output and elevate prices and profits above the competitive level. Patent law also serves the interests of consumers by protecting invention against prompt imitation in order to encourage more innovation than would otherwise occur.' " (*Valley Drug, supra, 344 F.3d at pp. 1307–1308*.) The *Valley Drug* court concluded that the fact the district court found the **[*461]** patent at issue in that case to be invalid alone was "insufficient to render the patent's potential exclusionary **[***32]** effects irrelevant to the antitrust analysis." (*Id. at p. 1309*.)

The plaintiffs in *Valley Drug* argued that patent rights do not include the right to pay infringers—an argument the *Valley Drug* court viewed as implying "that any exclusion resulting from payment rather than judicial enforcement is not protected from *per se* antitrust liability by the patent laws." (*Valley Drug, supra, 344 F.3d at p. 1309*.) The court rejected that argument based on the important role settlement plays in the enforcement of patent rights, stating: "Appellees have not explained why a monetary payment as part of a patent litigation settlement should be flatly prohibited as a *per se* violation, particularly where the alleged infringer has not yet caused the patentee any harm and the patentee does not have a damages claim to bargain with. [Citations.] [¶] We cannot conclude that the exclusionary effects of the Agreements not to enter the market were necessarily greater than the exclusionary effects of the '207 patent merely because Abbott paid Geneva and Zenith in return for their respective agreements. If Abbott had a lawful right to exclude competitors, it is not obvious that competition was limited more than **[***33]** that lawful degree by paying potential competitors for their exit. The failure to produce the competing terazosin drug, rather than the payment of money, is the exclusionary effect, and litigation is a much more costly mechanism to achieve exclusion, both to the parties and to the public, than is settlement. [Citation.] To hold that an ostensibly reasonable settlement of patent litigation gives rise to *per se* antitrust liability if it involves any payment by the patentee would obviously chill such settlements, thereby increasing the cost of patent enforcement and decreasing the value of patent protection generally. We are not persuaded that such *a per se* rule would be an appropriate accommodation of the competing policies of the patent and antitrust laws." (*Ibid.*)

Although the *Valley Drug* court stated that the size of a reverse or "exit" payment may raise suspicion that the settling parties lacked faith in the validity of the patent in question, the court also noted that "[g]iven the asymmetries of risk and large profits at stake, even a patentee confident in the validity of its patent may pay a potential infringer a substantial sum in settlement." (*Valley Drug, supra, 344 F.3d at p. 1310*.) **[***34]** As an example, the court noted the $398 million that Bayer paid Barr in the Cipro settlement even "though the ['444] patent was subsequently approved by the PTO on reexamination and unsuccessfully challenged in court three times." (*Ibid.*, citing *Cipro I, supra, 261 F.Supp.2d at p. 234*.)

The *Valley Drug* court, in remanding the case to the district court, concluded that neither per se analysis nor the rule of reason was an **[*462]** appropriate approach for determining whether the settlement at issue violated ***antitrust law***, stating: "Rule of reason and *per se* analysis are both aimed at assessing the anticompetitive effects of particular conduct; what is required here is an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, **[**180]** or the extent to which the patent laws prevent antitrust liability for such exclusionary effects." (*Valley Drug, supra, 344 F.3d at p. 1311, fn. 27*.)

In *Schering-Plough Corp. v. FTC (11th Cir. 2005) 402 F.3d 1056* (*Schering*), the Eleventh Circuit Court of Appeals vacated a decision by the Federal Trade Commission (FTC) finding that Hatch-Waxman settlements between branded drug manufacturer Schering-Plough Corporation **[***35]** (Schering) and generic manufacturers Upsher-Smith Laboratories, Inc. (Upsher) and ESI Lederle, Inc. (ESI), violated the FTC Act (*15 U.S.C. § 41 et seq.*) and the Sherman Act. (*402 F.3d at p. 1062*.) Schering manufactured and marketed an extended release potassium chloride product called K-Dur 20, and owned a formulation patent on the extended-release coating that surrounds the potassium chloride on the product. **[*463]** (*Schering, supra, 402 F.3d at p. 1058*.) Upsher filed an ANDA IV seeking FDA approval of a generic version of K-Dur 20 and Schering filed a patent infringement suit against Upsher. (*Id. at pp. 1058–1059*.) Schering and Upsher entered into a settlement of the infringement suit that included Schering's agreeing to an early entry date for Upsher's generic version of K-Dur 20, and Upsher's granting Schering licenses to market five other Upsher products, including a time-release niacin product used to reduce cholesterol. (*Id. at p. 1059*.) The settlement involved a "three-part license deal, which called for Schering to pay [Upsher] (1) $60 million in initial royalty fees; (2) $10 million in milestone royalty payments; and (3) 10% or 15% royalties on sales." (*Id. at p. 1060*.)

ESI also sought FDA approval for a generic version **[***36]** of K-Dur 20 and was sued by Schering for patent infringement. (*Schering, supra, 402 F.3d at p. 1060*.) Schering and ESI entered into a settlement agreement under which Schering allowed ESI to market its competing generic three years before Schering's patent expired (*ibid.*) and "agreed to pay ESI a $5 million noncontingent payment, representing legal fees, and an additional $10 million contingent on ESI's FDA approval. Schering and ESI also entered into a contemporaneous license agreement whereby ESI granted Schering the licenses to [two ESI drugs] in exchange for $15 million." (*Id. at p. 1061, fn. 8*.)

The FTC filed an administrative complaint challenging the legality of the settlements under the FTC Act and the Sherman Act, and the complaint was tried before an administrative law judge (ALJ) who rejected the FTC's theories that the settlement agreements at issue were anticompetitive. (*Schering, supra, 402 F.3d at p. 1061*.) Noting that the FTC's theories required either a presumption that Schering's patent in question was invalid or that Upsher's and ESI's generic products did not infringe it, the ALJ ruled that the presumptions had no basis in law or fact. (*Ibid.*) The ALJ found that **[***37]** the fact the settlements included payments did not make them anticompetitive per se. "Rather, the strength of the patent itself and its exclusionary power needed to be assessed. The [ALJ's] decision highlighted the FTC's failure to prove that, absent a payment, either better settlement agreements or litigation results would have effected an earlier entry date for the generics. Finally, the ALJ found no proof that Schering maintained an illegal monopoly within the relevant … market." (*Id. at pp. 1061–1062*.)

On appeal of the ALJ's decision to the full commission (Commission), the Commission reversed the ALJ, ruling the settlements included agreements to defer generic entry dates that injured competition and consumers. (*Schering, supra, 402 F.3d at p. 1062*.) Regarding the settlement payments, "the **[**181]** Commission determined that neither the $60 million to Upsher nor the $30 million to ESI represented legitimate consideration for the licenses granted by Upsher or ESI's ability to secure FDA approval of its generic. Consequently, the Commission prohibited settlements under which the generic receives anything of value and agrees to defer its own research, development, production or sales activities." (*Id. at p. 1062*, **[***38]** fn. omitted.)

CA(8)[] **(8)** The *Schering* court noted that both the ALJ and the Commission applied the rule of reason in analyzing the Schering settlements, albeit under two different methodologies. (*Schering, supra, 402 F.3d at p. 1064*.) Following *Valley Drug*, the court stated: "We think that neither the rule of reason nor the *per se* analysis is appropriate in this context. We are bound by our decision in *Valley Drug* where we held ***HN9***[] both approaches to be ill-suited for an antitrust analysis of patent cases because they seek to determine whether the challenged conduct had an anticompetitive effect on the market. [Citation.] By their nature, patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present. 'What is required here is an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects.' [Citation.] Therefore, in line with *Valley Drug*, we think the proper analysis of antitrust liability requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent **[***39]** to which the agreements exceed that scope; and (3) the resulting anticompetitive effects." (*Schering, supra, 402 F.3d at pp. 1065–1066*, fn. omitted.)

CA(9)[] **(9)** The *Schering* court noted that ***HN10***[] "[a]lthough the exclusionary power of a patent may seem incongruous with the goals of ***antitrust law***, a delicate **[*464]** balance must be drawn between the two regulatory schemes. Indeed, application of ***antitrust law*** to markets affected by the exclusionary statutes set forth in patent law cannot discount the rights of the patent holder. [Citation.] … Therefore, a patent holder does not incur antitrust liability when it chooses to exclude others from producing its patented work." (*Schering, supra, 402 F.3d at p. 1067*.) "What patent law does not do, however, is extend the patentee's monopoly beyond its statutory right to exclude." (*Ibid.*)

CA(10)[] **(10)** The *Schering* court also addressed the policy favoring settlement, stating: ***HN11***[] "The general policy of the law is to favor the settlement of litigation, and the policy extends to the settlement of patent infringement suits. [Citations.] Patent owners should not be in a worse position, by virtue of the patent right, to negotiate and settle surrounding lawsuits. We find the terms of the settlement **[***40]** to be within the patent's exclusionary power, and 'reflect a reasonable implementation' of the protections afforded by patent law." (Schering, supra, 402 F.3d at p. 1072.)

In considering whether the settlements at issue had anticompetitive effects—i.e., were an " 'unfair method of competition' " (Schering, supra, 402 F.3d at p. 1072)—the *Schering* court elaborated on the policy favoring settlement of litigation and the detriment that would result from a rule prohibiting reverse payment settlements in patent litigation. The court reiterated that "[t]he efficiency-enhancing objectives of a patent settlement are clear, and '[p]ublic policy strongly favors settlement of disputes without litigation.' " (Id. at pp. 1072–1073.) The court stated that "[t]he Commission's inflexible compromise-without-payment theory neglects to understand that '[r]everse payments are a natural by- **[**182]** product of the Hatch-Waxman process.'[6] [Citation.] … A prohibition on reverse-payment settlements would 'reduce the incentive to challenge patents by reducing the challenger's **[*465]** settlement options should he be sued for infringement, and so might well be thought anticompetitive.' [Citation.] [¶] There is no question **[***41]** that settlements provide a number of private and social benefits as opposed to the inveterate and costly effects of litigation. [Citation.] Patent litigation breeds a litany of direct and indirect costs, ranging from attorney and expert fees to the expenses associated with discovery compliance. Other costs accrue for a variety of reasons, be it the result of uncompromising legal positions, differing strategic objectives, heightened emotions, lawyer incompetence, or sheer moxie. [Citations.] [¶] Finally, the caustic environment of patent litigation may actually decrease product innovation by amplifying the period of uncertainty around the drug manufacturer's ability to research, develop, and market the patented product or allegedly infringing product." (Id. at pp. 1074–1075.)

The *Schering* court found that the settlement agreements at issue "fell well within the protections of the [subject] patent, and were therefore not illegal." (Schering, supra, 402 F.3d at p. 1076.) The court concluded: "Simply because a brand-name pharmaceutical company holding a patent paid its generic competitor money cannot be the sole basis for a violation of ***antitrust law***. This alone underscores the need to evaluate the strength of the patent. Our conclusion, to a degree, and we hope that the FTC is mindful of this, reflects policy. Given the costs of lawsuits to the parties, the public problems associated with overcrowded court dockets, and the correlative public and private benefits of settlements, we fear and reject a rule of law that would automatically invalidate any agreement where a patent-holding pharmaceutical manufacturer **[***44]** settles an infringement case by negotiating the generic's entry date, and, in an ancillary transaction, pays for other products licensed by the generic. Such a result does not represent the confluence of patent and ***antitrust law***." (*Ibid.*)

[183]** ***CA(11)***[] **(11)** In the same month that *Schering* was decided, the district court in *Cipro II* granted defendant's motions for summary judgment and dismissal. As noted above, the *Cipro II* judgment was affirmed in *Cipro III* as to the indirect purchaser and advocacy group plaintiffs and *Arkansas Carpenters* as to the direct

[6] The *Tamoxifen* court explained that "reverse payments are particularly to be expected in the drug-patent context because the Hatch-Waxman Act created an environment that encourages them." (Tamoxifen, supra, 466 F.3d at p. 206.) The court noted that "under the Hatch-Waxman Act, the patent holder ordinarily brings suit shortly after the paragraph IV ANDA has been filed—before the filer has spent substantial sums **[***42]** on the manufacturing, marketing, or distribution of the potentially infringing generic drug. The prospective generic manufacturer therefore has relatively little to lose in litigation precipitated by a paragraph IV certification beyond litigation costs and the opportunity for future profits from selling the generic drug. … [¶] Accordingly, a generic marketer has few disincentives to file an ANDA with a paragraph IV certification. The incentive [to file an ANDA IV], by contrast, may be immense: the profits it will likely garner in competing with the patent holder without having invested substantially in the development of the drug, and, in addition, possible entitlement to a 180-day period (to be triggered at its inclination) during which it would be the exclusive seller of the generic drug in the market." (Id. at pp. 206–207, fn. omitted.) On the other hand, "[t]he patent holder's risk if it loses the resulting patent suit is correspondingly large: It will be stripped of its patent monopoly. At the same time, it stands to gain little from winning other than the continued protection of its lawful monopoly over the manufacture and sale of the drug in question. [¶] 'Hatch-Waxman essentially **[***43]** redistributes the relative risk assessments and explains the flow of settlement funds and their magnitude. Because of the Hatch-Waxman scheme, [the generic challengers] gain[] considerable leverage in patent litigation: the exposure to liability amount[s] to litigation costs, but pale[s] in comparison to the immense volume of generic sales and profits.' " (Id. at p. 207.)

purchaser plaintiffs. The *Cipro III* court stated: "[I]n cases such as this, ***HN12***[] wherein all anticompetitive effects of the settlement agreement are within the exclusionary power of the patent, the outcome is the same whether the court begins its analysis under ***antitrust law*** by applying a rule of reason approach to evaluate the anti-competitive effects, or under patent law by analyzing the right to exclude afforded by the patent. The essence of the **[*466]** inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent. This analysis has been adopted by the Second and the Eleventh Circuits and by the district court below and we find **[***45]** it to be completely consistent with Supreme Court precedent." (*Cipro III, supra, 544 F.3d at p. 1336*, citing *Walker Process, supra, 382 U.S. at pp. 175–177* [although the Sherman Act may be violated when a patent is procured by fraud, a patent is an exception to the general rule against monopolies].)

CA(12)[] **(12)** The *Cipro III* court concluded: ***HN13***[] "Pursuant to statute, a patent is presumed to be valid, [*35 United States Code section 282*], and patent law bestows the patent holder with 'the right to exclude others from profiting by the patented invention.' [Citation.] A settlement is not unlawful if it serves to protect that to which the patent holder is legally entitled—a monopoly over the manufacture and distribution of the patented invention. [Citation.] Thus, the district court correctly concluded that there is no legal basis for restricting the right of a patentee to choose its preferred means of enforcement and no support for the notion that the Hatch-Waxman Act was intended to thwart settlements. [Citation.] … [I]f 'there is nothing suspicious about the circumstances of a patent settlement, then to prevent a cloud from being cast over the settlement process a third party should not be permitted **[***46]** to haul the parties to the settlement over the hot coals of antitrust litigation.' " (*Cipro III, supra, 544 F.3d at p. 1337*, quoting *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc. (N.D.Ill. 2003) 289 F.Supp.2d 986, 992*.) Accordingly, the *Cipro III* court found "the analysis by the district court to be fully supported in law and to demonstrate that it was cognizant of the legal standards applied by the regional circuits and government agencies in addressing agreements involving exclusion payments in the context of the Hatch-Waxman Act." (*Cipro III, supra, 544 F.3d at p. 1337*.)

CA(13)[] **(13)** The *Arkansas Carpenters* court likewise affirmed the *Cipro II* judgment based on the holding in *Tamoxifen* and other courts that ***HN14***[] "the right to enter into reverse exclusionary payment agreements fall[s] within the terms of the exclusionary grant conferred by the branded manufacturer's patent." (*Arkansas Carpenters, supra, 604 F.3d at p. 105*.) The *Arkansas Carpenters* court followed the *Tamoxifen* court's analysis that a reverse payment agreement settling patent litigation between a branded drug manufacturer and a generic drug manufacturer does "not exceed the scope of the patent where (1) there [is] no restriction on marketing **[***47]** non-infringing products; (2) a generic version of the branded drug would necessarily infringe the branded firm's patent; and (3) the agreement [does] not bar other generic manufacturers from challenging the patent." (*Arkansas Carpenters, supra, 604 F.3d at p. 106*, citing *Tamoxifen, supra, 466 F.3d at pp. 213–215*.)

[184]** ***CA(14)***[] **(14)** We agree with the reasoning of these cases and conclude that it applies equally to antitrust claims under the Cartwright Act. ***HN15***[] Under the **[*467]** Cartwright Act, as under the Sherman Act, the "illegal per se" designation is reserved for agreements or practices that have a pernicious effect on competition and *lack any redeeming virtue*. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 853 [94 Cal. Rptr. 785, 484 P.2d 953]*; see *Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540 [78 Cal. Rptr. 2d 133]*; *MacManus v. A. E. Realty Partners (1983) 146 Cal.App.3d 275, 285 [194 Cal. Rptr. 567]*.) Considering the important public policies underlying patent law (*Valley Drug, supra, 344 F.3d at pp. 1307–1308*) and favoring the settlement of patent litigation (*Schering, supra, 402 F.3d at pp. 1074–1075*) and the fact that the Cipro agreements did not restrain competition outside the exclusionary zone of the '444 patent, we cannot view the Cipro agreements **[***48]** as lacking any redeeming virtue. Accordingly, we conclude they are not unlawful per se.

We further conclude that the Cipro agreements do not violate the Cartwright Act under rule-of-reason analysis or the analysis the Eleventh Circuit Court of Appeals held to be applicable to settlements of Hatch-Waxman litigation in *Valley Drug* and *Schering*, which requires "examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects." (*Schering, supra, 402 F.3d at pp. 1065–1066*, fn. omitted.) We find the reasoning of the federal cases discussed above regarding the legality of settlements of Hatch-Waxman patent litigation to be sound and applicable to plaintiffs' cause of action under the Cartwright Act. We agree with the *Cipro III* court that because a patent is presumed to be valid and gives the patent holder the right to exclude others from marketing the patented invention, a settlement of patent infringement litigation "is not unlawful if it serves to protect that to which the patent holder is legally entitled—a **[***49]** monopoly over the manufacture and distribution of the patented invention." (*Cipro III, supra, 544 F.3d at p. 1337*.) Therefore, in accordance with *Cipro II* and *Tamoxifen*, we conclude that unless a patent was procured by fraud, or a suit for its enforcement was objectively baseless, a settlement of the enforcement suit does not violate the Cartwright Act if the settlement restrains competition only within the scope of the patent. (*Tamoxifen, supra, 466 F.3d at p. 213*; *Cipro II, supra, 363 F.Supp.2d at p. 535*.)

The principle that an agreement is not unlawful under California and federal ***antitrust law*** if it restrains competition only within the exclusionary scope of a patent is reflected in *Fruit Machinery Co. v. F. M. Ball & Co. (1953) 118 Cal.App.2d 748 [258 P.2d 852]* (*Fruit Machinery*). In *Fruit Machinery*, the plaintiff licensee of a patent holder successfully sued the defendant for breach of a contractual obligation to pay plaintiff royalties for use of a patented machine, and the defendant claimed it was absolved of that obligation because, among other reasons, the plaintiff had created a monopoly in violation of state and federal ***antitrust law***. (*Fruit Machinery, supra, 118* ***[*468]*** *Cal.App.2d at pp. 750, 760*.) In **[***50]** rejecting that claim, the *Fruit Machinery* court noted that the licensing arrangement in question was not "beyond the scope of the patent rights and within the proscription of the antitrust laws … ." (*Id. at p. 762*.) The court noted it would not "be legally improper or incompetent for the patentee, his exclusive licensee, and the latter's sublicensees, by agreements such as these parties have made, to give themselves a commercial **[**185]** advantage over others in industry. The very purpose of the patent law is to encourage inventive effort by according the inventor and his assigns control over the invention and protection in the exercise of the rights accorded him as patentee. *Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercised rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law*." (*Ibid.*, italics added.) The *Fruit Machinery* court found various ***antitrust law*** decisions cited by the defendant to be inapplicable, noting that "[t]he greater number of them dealt with situations in which no patent rights were involved. In those in which the exercise of patent rights was involved, **[***51]** it appeared that the patentee or his assignee went beyond that which was necessary or incidental to the scope of his patent and brought himself within the proscription of the antitrust laws." (*Fruit Machinery, supra, 118 Cal.App.2d at pp. 762–763*.)

Plaintiffs and amici curiae[7] focus on the reverse exclusionary payment or pay-for-delay aspect of the Cipro settlement in arguing that the settlement violates ***antitrust law***. Plaintiffs argue that Hatch-Waxman litigation can and should be settled without reverse payments. However, we agree with the *Valley Drug* court's view that deeming an ostensibly reasonable settlement of patent litigation illegal per se under ***antitrust law*** if the settlement "involves any payment by the patentee would obviously chill such settlements, thereby increasing the cost of patent enforcement and decreasing the value of patent protection generally." (*Valley Drug, supra, 344 F.3d at p. 1309*.) As the *Schering* court noted, "the size of the payment, or the mere presence of a payment, should not dictate the availability of a settlement remedy. Due to the 'asymmetrics of risk and large profits at stake, even a patentee confident in the validity of its patent may pay a potential **[***52]** infringer a substantial sum in settlement.' " (*Schering, supra, 402 F.3d at p. 1075*, quoting *Valley Drug, supra, 344 F.3d at p. 1310*.)

CA(15)[] **(15)** We agree with the *Schering* court's observation that reverse payment settlements are a natural byproduct of patent litigation under the Hatch-Waxman Act and that a rule prohibiting them could harm competition by reducing the incentive to challenge patents by reducing the challenger's **[*469]** settlement options in a suit for infringement. (*Schering, supra, 402 F.3d at pp. 1074–1075*.) Emphasizing the private and social benefits that the settlement of patent litigation provides, the *Schering* court appropriately concluded that***HN16***[] "[s]imply because a brand-name pharmaceutical company holding a patent paid its generic competitor money cannot be the sole basis for a violation of ***antitrust law***." (*Id. at p. 1076*.)

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[7] A group of professors filed an amici curiae brief entitled: "Brief Amici Curiae of 78 Intellectual Property Law, ***Antitrust Law***, Economics, and Business Professors in Support of Appellant."

Plaintiffs and amici curiae point to *In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896* (*Cardizem*) as showing a conflict in the federal circuits regarding the legality **[***53]** of reverse payment settlements of Hatch-Waxman patent litigation. In that case the district court found that a reverse-payment settlement between branded drug manufacturer HMR and generic manufacturer Andrx Pharmaceuticals, Inc., was illegal per se and the *Cardizem* court affirmed. However, the *Cardizem* court noted that in condemning the HMR/Andrx agreement, the district court " 'emphasized that the **[**186]** agreement … restrained Andrx from marketing other bioequivalent or generic versions of Cardizem that were not at issue in the pending litigation … . Thus, the court found that the agreement's restrictions extended to noninfringing and/or potentially noninfringing versions of generic Cardizem.' " (*332 F.3d at p. 908, fn. 13*, quoting *Cipro I, supra, 261 F.Supp.2d at p. 242*.)

In other words, the reverse payment settlement in *Cardizem* restrained competition beyond the exclusionary zone of the subject patent. As the *Cipro III* court noted, "although the Sixth Circuit found a per se violation of the antitrust laws in *In re Cardizem*, the facts of that case are distinguishable from this case and from the other circuit court decisions. In particular, the settlement in that case included, in addition **[***54]** to a reverse payment, an agreement by the generic manufacturer to not relinquish its 180-day exclusivity period, thereby delaying the entry of other generic manufacturers. [Citation.] Furthermore, the agreement provided that the generic manufacturer would not market non-infringing versions of the generic drug. [Citation.] *Thus, the agreement clearly had anticompetitive effects outside the exclusion zone of the patent*." (*Cipro III, supra, 544 F.3d at p. 1335*, italics added.)[8] We further note that unlike the *Valley Drug*, *Schering* and *Tamoxifen* courts, and the trial and appellate courts in the federal Cipro litigation, the *Cardizem* court did not consider, much less attempt to balance, the competing policies underlying ***antitrust law*** and patent law or address the policy favoring settlement of litigation.

Contrary to amici curiae's assertion that "[t]he Second Circuit rule endorsed by the trial court is far outside the mainstream of judicial … analysis **[*470]** of exclusionary settlements," **[***55]** every reported decision to date addressing the legality of a reverse payment settlement of Hatch-Waxman litigation *that does not restrain competition beyond the exclusionary scope of the patent* has concluded that the settlement does not violate ***antitrust law***. We conclude that because the Cipro agreements undisputedly did not restrain competition beyond the exclusionary scope of the '444 patent, they do not violate the Cartwright Act.[9]

II. *Sham Litigation Claim*

CA(16)[] **(16)** Plaintiffs contend that even if the Cipro settlement does not violate California law unless the '444 patent is shown to have been procured **[***56]** by fraud or a suit for its enforcement is shown to be objectively baseless, the court erred in granting summary judgment because there is a triable issue of fact as to whether Bayer's patent infringement action against Barr was an objectively baseless or "sham" lawsuit. ***HN17***[] "To prove sham litigation, a plaintiff must show (1) 'the lawsuit [to] be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,' and (2) that the litigant's 'subjective motivation' for bringing the action **[**187]** was a sham seeking to conceal a knowing attempt to interfere with a competitor." (*Cipro II, supra, 363 F.Supp.2d at p. 547*, quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (1993) 508 U.S. 49, 60–61 [123 L. Ed. 2d 611, 113 S. Ct. 1920]*.) Plaintiffs' position on appeal appears to be that they could show Bayer's patent infringement suit was objectively baseless based on evidence of Bayer's inequitable conduct in procuring the '444 patent—an issue they contend was not litigated in Bayer's suits against generic manufacturers for infringement of the '444 patent following the Cipro settlement.

[8] The *Cipro III* court added: "To the extent that the Sixth Circuit may have found a per se antitrust violation based solely on the reverse payments, we respectfully disagree." (*Cipro III, supra, 544 F.3d at p. 1335*.)

[9] We acknowledge that amici curiae, the FTC, and the Department of Justice have advocated various approaches under which reverse payment settlements of patent infringement litigation under the Hatch-Waxman Act could be deemed to violate ***antitrust law*** even when they do not restrain competition beyond the exclusionary scope of a patent. However, considering the necessity of maintaining a proper balance between the competing policies underlying patent law and ***antitrust law***, we believe that any rule prohibiting such settlements of Hatch-Waxman litigation should be made by Congress rather than the courts.

Bayer argues, and the trial court ruled, that plaintiffs' sham litigation **[***57]** claim was not a proper basis for opposing defendants' summary judgment motions because it was not pleaded in plaintiffs' second amended complaint. The trial court further ruled that "[e]ven if such allegations were included in the [second amended complaint], there is no evidence or legal support the suit was objectively baseless or was a sham." The trial court quoted the *Cipro II* court's finding that "Bayer's success in its [patent infringement] litigations against Schein, Mylan and Carlsbad forecloses any argument that its lawsuits were shams." (*Cipro II, supra, 363 F.Supp.2d at p. 547*.) **[*471]**

Regarding plaintiffs' inequitable conduct claim, the trial court ruled: "Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the [second amended complaint] does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. [Citation.] As such, Bayer's alleged inequitable conduct in procuring the patent is **[***58]** not relevant to the case at hand as it pertains to [p]laintiffs' antitrust claims." The trial court also decided that the "determination of … inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide."

It is difficult to fault the trial court's ruling that "[p]laintiffs failed to allege that Bayer's infringement suit was objectively baseless, [or] was sham litigation … and [p]laintiffs cannot defeat the motion for summary judgment by doing so now." It is well settled that ***HN18***[] "the pleadings set the boundaries of the issues to be resolved at summary judgment. [Citations.] A 'plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]' [Citations.] A summary judgment or summary adjudication motion that is otherwise sufficient 'cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings.' [Citation.] Thus, a plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (*Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648 [32 Cal. Rptr. 3d 266]*.)

It **[***59]** is a stretch to interpret the second amended complaint as raising the issue of whether Bayer's patent infringement suit against Barr was objectively baseless due to inequitable conduct or for any other reason. The allegations of the second amended complaint reflect plaintiffs' theory that the Cipro agreements injure competition in violation of the Cartwright Act regardless of the validity of Bayer's '444 patent or the merits of its infringement suit against Barr, and merely suggest that the '444 patent might have been ruled **[**188]** invalid but for the Cipro settlement. The second amended complaint alleges that the patent holder and ANDA IV filer "must be adversaries" and that "the former presumes the patent is valid, enforceable and infringed, while the latter must assert that the patent is invalid, unenforceable and/or not infringed." Thus, plaintiffs' allegations that Barr asserted the patent was invalid or unenforceable do not constitute an allegation by *plaintiffs* that Bayer's infringement suit was baseless; they merely reflect that Barr assumed the adversarial role it was required to assume in filing an ANDA IV. The closest the second amended complaint comes to expressly alleging that **[***60]** Bayer's infringement suit lacked merit is the allegation that **[*472]** "[b]ut for the Cipro Agreements and other agreements between Bayer and Barr: … *the finder-of-fact in the patent litigation could have found that the 444 patent was invalid, unenforceable or not infringed*."[10] (Italics & underscoring added.) This allegation, which essentially avers that Bayer *might have* lost its infringement suit had it been litigated to completion, is not reasonably construed as an allegation that the suit was objectively baseless or a sham.

CA(17)[] **(17)** In any event, assuming the complaint sufficiently pleads the claim that Bayer's patent infringement suit was objectively baseless due to inequitable conduct, we agree with the trial court and the *Cipro II* court that "Bayer's success in its [patent infringement] litigations against Schein, Mylan and Carlsbad forecloses any argument that its lawsuits were shams."[11] (*Cipro II, supra, 363 F.Supp.2d at p. 547*.) As the *Cipro II* court noted:

[10] Plaintiffs also suggest that Bayer's infringement suit would not have been successful by alleging that "[b]ut for the Cipro Agreements, generic ciprofloxacin would have been on the United States market by January 1997."

HN19[] " 'A winning lawsuit **[***61]** is by definition a reasonable effort at petitioning for redress and therefore not a sham.' " (*Ibid.*, quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., supra, 508 U.S. at p. 61, fn. 5*.)

Plaintiffs assert that none of the challenges to the '444 patent by generic manufacturers following the Cipro settlement and the patent's reexamination involved the issue of **[*473]** Bayer's inequitable conduct. However, as the *Cipro II* court noted, "reexamination does not cure inequitable conduct, and the defense was available to all of the generic challengers." (*Cipro II, supra, 363 F.Supp.2d at p. 547*.) It seems highly unlikely that a generic manufacturer motivated to challenge the '444 patent would overlook or forgo a meritorious defense to Bayer's infringement suit that would render the suit objectively baseless.[12]

[189]** ***CA(18)***[] **(18)** Further, even if there is evidence creating a triable issue of fact as to whether Bayer's patent infringement suit was objectively baseless due to Bayer's inequitable conduct in procuring the '444 patent, we conclude that plaintiffs' sham litigation claim is preempted by federal patent law. ***HN20***[] "The district courts [of the United States] **[***63]** shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents … . Such jurisdiction shall be exclusive of the courts of the states in patent … cases." (*28 U.S.C. § 1338(a)*.) ***HN21***[] Federal jurisdiction over cases arising under patent law " 'extend[s] only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action *or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law*, in that patent law is a necessary element of one of the well-pleaded claims.' " (*Holiday Matinee, Inc. v. Rambus, Inc. (2004) 118 Cal.App.4th 1413, 1422 [13 Cal. Rptr. 3d 766]*, italics added, quoting *Christianson v. Colt Industries Operating Corp. (1988) 486 U.S. 800, 808–809 [100 L. Ed. 2d 811, 108 S. Ct. 2166]*.)

CA(19)[] **(19)** Plaintiffs' right to relief under the Cartwright Act and UCL, under their sham litigation theory, depends on the resolution of whether Bayer engaged in inequi **[**190]** table conduct in the procurement of its '444 patent that rendered its infringement suit against Barr objectively baseless. ***HN22***[] When a state law claim involves a patent holder's conduct in obtaining its patent, the claim is preempted by federal patent **[***64]** law unless the plaintiff pleads and proves that the patent holder engaged in fraud before the PTO.[13] (*Hunter Douglas, Inc. v. Harmonic Design, Inc. (Fed.Cir. 1998) 153 F.3d 1318, 1336–1337*, overruled on other grounds in *Midwest Industries, Inc. v. Karavan Trailers, Inc. (Fed.Cir. 1999) 175 F.3d 1356, 1358–1359*; see also *Nobelpharma AB v. Implant Innovations, Inc. (Fed.Cir. 1998) 141 F.3d 1059, 1068* ["[W]hether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." (Fn. omitted.)].) More specifically, a determination of whether alleged inequitable conduct in the procurement of a patent constitutes unfair competition is within the exclusive jurisdiction of the Federal Circuit Court of Appeals. (*Lockwood v. Sheppard, Mullin, Richter & Hampton (2009) 173 Cal.App.4th 675, 686 [93 Cal. Rptr. 3d 220]*, citing *Pro-Mold & Tool Co. v. Great Lakes Plastics (Fed.Cir. 1996) 75 F.3d 1568, 1574*.) Thus, plaintiffs' claim that Bayer's infringement suit against Barr was objectively baseless due to inequitable conduct is preempted by federal patent law because it necessarily depends on resolution of a substantial **[***65]** question of federal patent law—i.e., whether Bayer engaged in inequitable conduct in the procurement of its patent.

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[11] The *Cipro II* court was addressing Bayer's motion "for summary judgment that Bayer's suits against Barr and the subsequent '444 Patent challengers were not sham litigation as a matter of law." (*Cipro II, supra, 363 F.Supp.2d at p. 547*.)

[12] The *Cipro II* court addressed this point, stating: "At oral argument, plaintiffs asserted that the court should give little **[***62]** weight to these subsequent failed attacks because none of them raised what plaintiffs believe to be the most forceful attack on the '444 Patent—namely, inequitable conduct. Plaintiffs argue that this defense required extensive discovery and would take a long period of time to prepare and try, and that this explains why none of the subsequent challengers raised this issue. [¶] But this argument is not very convincing in light of the fact that one of the challenges—Carlsbad's, on the ground of obviousness—also required extensive discovery and resulted in a nine-day bench trial. It is difficult to accept the notion that Carlsbad abandoned a stronger argument because it would have presumably required a greater effort, especially since Barr had already done most of the preparatory work on the inequitable conduct issue." (*Cipro II, supra, 363 F.Supp.2d at p. 530*.)

[13] Plaintiffs emphasize on appeal that they are not asserting a claim of fraud on the PTO.

Plaintiffs argue they are not seeking to hold Bayer liable for its conduct in procuring or enforcing the '444 patent, but rather are challenging the "collusive payment" that ended the patent suit. However, it is immaterial to **[*474]** the federal jurisdiction issue that plaintiffs' claims do not *directly* seek to hold Bayer liable for inequitable conduct in procuring the '444 patent; plaintiffs' antitrust and unfair competition claims are preempted by federal patent law because a necessary element of those claims is that Bayer's infringement suit against Barr was objectively baseless due to Bayer's inequitable conduct in the procurement of the patent and, accordingly, the '444 patent was invalid. In their reply brief, plaintiffs similarly contend their claims "are not premised on Bayer's conduct before the [PTO]; **they are premised on Bayer's conduct in settling its own patent case with a payment not to compete**." (Original boldface.) However, because the payment in question did not restrain **[***66]** competition beyond the exclusionary scope of the '444 patent, it does not subject defendants to antitrust liability unless plaintiffs can prove their claim that Bayer's infringement suit was objectively baseless, which claim *is* premised on Bayer's conduct before the patent office.

Plaintiffs argue that state courts have jurisdiction to determine patent law issues such as patent validity when such determination is ancillary and necessary to the main action, citing, among other authority, *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps (2002) 99 Cal.App.4th 1179, 1186 [121 Cal. Rptr. 2d 794]*. The *Mattel* court concluded that a state claim against the law firm for malicious prosecution was not preempted by federal copyright law even though the defendant asserted that the underlying trademark infringement action could have been brought only in federal court. The court relied in part on cases holding that " 'if the suit is to enforce or to revoke a patent licensing or other similar agreement, it "is not a suit under the patent laws of the United States, and cannot be maintained in a federal court as such." [Citations.] It follows … that in an action in a state court based upon such an agreement, the state **[***67]** court can, where it becomes necessary for it to do so in order to decide the case before it, pass upon the meaning, the scope, the validity, or the infringement of the patent.' " (*Id. at p. 1187*.) However, the present action is not a contract action seeking to enforce or revoke a patent licensing agreement; it arises from a settlement of patent litigation, and plaintiffs' sham litigation claim requires adjudication of the validity of the patent in the context of the determination of whether Bayer's patent infringement suit against Barr was objectively baseless.

Plaintiffs also rely on *ClearPlay, Inc. v. Abecassis (Fed.Cir. 2010) 602 F.3d 1364*, which involved state law claims by ClearPlay, Inc. (ClearPlay), a manufacturer of DVD players against patent holder Nissim Corp. (Nissim) arising from a patent licensing agreement that the parties entered into in settlement of a patent infringement suit that Nissim brought against ClearPlay. Nissim claimed that ClearPlay breached the license agreement and filed a motion to enforce the parties' settlement. While that motion was pending, Nissim informed retailers selling ClearPlay's products that the products were not licensed and the retailer's **[***68]** continuing to sell them could **[*475]** constitute patent infringement. (*Id. at pp. 1364–1365*.) ClearPlay responded by bringing a state law action against Nissim that included claims for tortious interference with contractual relationships, tortious interference with potentially advantageous business relationships, breach of the license agreement by interfering with ClearPlay's business operations, breach of the covenant of good faith and fair dealing, and violation of Florida's Deceptive and Unfair Trade Practices Act. (*602 F.3d at pp. 1365, 1367–1368*.) The *ClearPlay* court decided that although "questions of patent infringement are addressed at various points in the communications that are at issue in ClearPlay's complaint, and while it is possible that patent law issues could arise in the course of litigating any one of ClearPlay's claims, it is equally clear that none of those claims necessarily turns on an issue of patent law. That is, in the case of each **[**191]** asserted claim, there is at least one theory of relief that would not require the resolution of a patent law issue." (*Id. at p. 1368*.) *ClearPlay* is inapposite. Because the Cipro settlement did not restrain competition beyond the exclusionary **[***69]** scope of the '444 patent, plaintiffs' claims here, unlike the state law claims in *ClearPlay*, necessarily turn on the patent law issue of whether Bayer's infringement suit was objectively baseless due to inequitable conduct.

CA(20)[] **(20)** Plaintiffs argue it is error to revisit the federal jurisdiction issue decided by the district court in *In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 166 F.Supp.2d 740*, when it remanded this action to state court. However, as this court explained in *Moreau v. San Diego Transit Corp. (1989) 210 Cal.App.3d 614 [258 Cal. Rptr. 647]* (*Moreau*):***HN23***[] "In making its jurisdictional determination on a motion for remand, the [federal] district court looks no further than the complaint and the motion for removal. This limitation is one aspect of the 'well-pled complaint' rule which holds a plaintiff is the 'master' of his complaint and he may craft his causes of action, if he so desires, to exclude federal jurisdiction. Under the rule a federal question must appear from the complaint and not from any preemption defense which might be raised in state court and which might ultimately defeat the cause of action. [Citation.] [¶] However, an independent corollary to the 'well-pled complaint' **[***70]** rule is the 'artful pleading' rule or the 'doctrine of complete preemption.' This doctrine states that while couched in state contract or tort terms, *federal jurisdiction exists if the issues actually raise an essentially federal question*. … [¶] When a federal court grants a motion for remand in the present context, it does nothing more than determine the complaint fails, either directly or by operation of the 'artful pleading' doctrine, to state a question arising under federal law. It does not determine whether a preemption defense can be successfully offered in state court when the entire case is considered." (*Id. at pp. 620–621*, italics added; accord, *Ruiz v. Sysco Food Services (2004) 122 Cal.App.4th 520, 531–532 [18 Cal. Rptr. 3d 700]* ["[T]he trial court was not required or allowed to accord any **[*476]** collateral estoppel effect to the federal district court's remand order, which was not a final judgment but rather a procedural order concerning the appropriate forum."]; *McCormick v. Travelers Ins. Co. (2001) 86 Cal.App.4th 404 [103 Cal. Rptr. 2d 258]* [after removal of state tort claims to federal court and federal court's subsequent remand to state court, state court properly granted defendant's motion for judgment on the pleadings **[***71]** on the ground of federal preemption]; *AT&T Communications, Inc. v. Superior Court (1994) 21 Cal.App.4th 1673, 1680 [26 Cal. Rptr. 2d 802]* [doctrine of law of the case applies only to appellate court decisions and a remand ruling is a jurisdictional ruling, not a final judgment on the merits of a preemption defense]; *United Airlines, Inc. v. Superior Court (1991) 234 Cal.App.3d 1085, 1090 [286 Cal. Rptr. 159]* ["The exercise of a federal district court's unreviewable power to remand claims to state court … is not necessarily the same as a determination of whether those claims on their merits—even though not removable to federal court—would nonetheless be preempted by federal law if asserted by way of defense in state court."]; *Coker v. Purdue Pharma Co. (Tenn.Ct.App., Nov. 30, 2006, No. W2005-02525-COA-R3-CV) 2006 Tenn.App.Lexis 757* [after federal court remanded case to state court on the ground the complaint's allegations of misrepresentation to the PTO in the procurement of a patent could be proven without resorting to question of **[**192]** federal law, state trial court properly determined federal preemption was a valid defense to the misrepresentation claims and granted judgment on the pleadings].)[14]

[*477]

Plaintiffs' contention that there is a triable issue of fact as to whether Bayer's infringement suit against Barr was objectively baseless due to inequitable conduct in procuring the '444 patent is not a basis to reverse the judgment.

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[14] Although it is not essential **[***72]** to our preemption analysis, we note that the theory of liability alleged in plaintiffs' second amended complaint that caused the federal district court to remand this case to state court in *In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 166 F.Supp.2d 740* lacks merit, as the district court later acknowledged. The court remanded the case based on its conclusion "that plaintiffs have asserted at least one theory by which they may establish state antitrust violations without resorting to a determination of patent law. Plaintiffs' complaints allege there would have been generic competition in the market for ciprofloxacin prior to the expiration of Bayer's patent if Bayer had not reached an unreasonably anti-competitive agreement with Barr, HMR, and Rugby. … [Plaintiffs] asserted that, as a matter of fact, Bayer would have authorized Barr to distribute ciprofloxacin by granting Barr a license, or by other means, had Barr not agreed to drop its challenge to the validity of the '444 patent in exchange for large cash payments." (*Id. at p. 748*, citations omitted.)

This theory of liability fails because any restraint on competition resulting from Bayer's decision to enter into the Cipro agreements **[***73]** instead of some other licensing agreement was within the exclusionary zone of the '444 patent and thus is not a basis for imposing antitrust or unfair competition liability on defendants. As the *Cipro II* court explained: "[P]laintiffs' assertion that Bayer's payment to Barr is anti-competitive because, without it, Bayer and Barr would have agreed on an earlier entry date for Barr or would have otherwise fashioned a more pro-competitive agreement must also fail. This assertion ignores the fact that, if defendants were within their rights (more specifically, the patent right) in reaching the settlement they did, consumers have no right to second-guess whether some different agreement would have been more palatable." (*Cipro II, supra, 363 F.Supp.2d at p. 536*.) Regarding its basis for remanding the case, the district court stated that "[u]pon further reflection, I have concluded that patent law imposes no such restriction against cash payments by a patent holder, and, accordingly, ***antitrust law*** does not impose such a restriction." (*Id. at p. 536, fn. 21*.) In other words, Bayer was not restricted by patent or ***antitrust law*** to settlement options more favorable to competition than the settlement **[***74]** it reached.

To the extent a sham litigation claim is sufficiently pleaded in plaintiffs' second amended complaint, it arises from and is preempted by federal patent law.[15]

III. *Unfair Competition and Common Law Monopoly Claims*

CA(21)[] **(21)** Our conclusion that defendants are not liable under the Cartwright Act for entering into the Cipro agreements is also dispositive of plaintiffs' causes of action for violation of the UCL and common law monopolization. “The purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers. [Citations.] ***HN24***[] Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably **[***75]** impairs competition and harms consumers. [Citations.] If the same conduct is alleged to be both an antitrust violation and an ‘unfair’ business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not **[**193]** ‘unfair’ toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct.” (*Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375 [113 Cal. Rptr. 2d 175]*; accord, *Drum v. San Fernando Valley Bar Assn. (2010) 182 Cal.App.4th 247, 254 [106 Cal. Rptr. 3d 46]* [conduct that is deemed reasonable and condoned under ***antitrust law*** does not violate the UCL].)

CA(22)[] **(22)** Regarding plaintiffs' cause of action for common law monopolization, it is questionable whether **[*478]** such a cause of action exists under California law. The federal district court in *In re Intel Corp. Microprocessor Antitrust Litigation (D.Del. 2007) 496 F.Supp.2d 404* dismissed a common law monopolization claim on the ground that ***HN25***[] “the common law tort of monopolization is not **[***76]** cognizable under California law … .” (*Id. at p. 420*; accord, *Lorenzo v. Qualcomm, Inc. (S.D.Cal. 2009) 603 F.Supp.2d 1291*; *Luxpro Corp. v. Apple, Inc. (W.D.Ark. 2009) 658 F.Supp.2d 921, 933*.) To the extent such a cause of action is cognizable under California law, it fails for the same reason plaintiffs' UCL cause of action fails—i.e., because it is based on the same conduct alleged to be a violation of the Cartwright Act. Conduct that has been determined not to unreasonably restrain competition under statutory ***antitrust law*** cannot logically be deemed to unreasonably restrain competition under a common law monopolization theory.

The trial court properly granted summary judgment on plaintiffs' causes of action for violation of the UCL and common law monopolization as well as their cause of action for violation of the Cartwright Act. The court also properly ruled that its summary judgment ruling as to Bayer and the generic defendants was also dispositive as to Watson's summary judgment motion, since plaintiffs sought to hold Watson liable solely as a conspirator for the allegedly unlawful conduct of the other defendants.

IV. *Evidentiary Objections*

Plaintiffs contend the court erred by **[***77]** not providing any explanation for overruling all of their evidentiary objections, relying on *Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 254–257 [100 Cal. Rptr. 3d 296]* in which the Court of Appeal held that the trial court abused its discretion by issuing a blanket ruling *sustaining* all but one of the defendants' 764 evidentiary objections in a summary judgment proceeding.

CA(23)[] **(23)** Here, the court did not sustain the evidentiary objections in question; it overruled them. In *Reid v. Google, Inc. (2010) 50 Cal.4th 512, 534 [113 Cal. Rptr. 3d 327, 235 P.3d 988]*, the California Supreme Court held that ***HN26***[] when a trial court ruling on a summary judgment motion “fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal.” Thus, the trial court's blanket ruling overruling plaintiffs' evidentiary objections left plaintiffs in no worse a position than they would have been in if the court had failed to issue any ruling at all on the objections. The objections were preserved on appeal

[15] We do not hold that the issue of whether a patent infringement suit is objectively baseless can never be decided by a state court; there may be cases where a suit can be shown to be objectively baseless without the necessity of resolving a substantial question of federal patent law.

and plaintiffs were free to challenge the trial court's consideration of **[***78]** specific items of objected-to evidence on appeal. Because plaintiffs have not argued that the admission of any specific evidence constituted prejudicial error, the court's ruling on plaintiffs' evidentiary objections provides **[**194]** no basis to disturb the judgment.[16] **[*479]**

DISPOSITION

The judgment is affirmed.

Benke, Acting P. J., and Aaron, J., concurred.

End of Document

[16] We note that plaintiffs complain that the court improperly considered evidence concerning the litigation challenging the ’444 patent that occurred after the Cipro settlement and the reexamination of the patent. We do not find the admission of this evidence to be prejudicial, however, because the essential facts of those suits were established as undisputed by plaintiffs’ responses to Bayer's separate statement of undisputed facts in support of its motion for summary judgment (Nos. 29–33).

Rose Acre Farms, Inc. v. Columbia Cas. Co.

United States Court of Appeals for the Seventh Circuit

September 26, 2011, Argued; November 1, 2011, Decided

No. 11-1599

Reporter
662 F.3d 765 *; 2011 U.S. App. LEXIS 22063 **; 2011-2 Trade Cas. (CCH) P77,666

ROSE ACRE FARMS, INC., Plaintiff-Appellant, v. COLUMBIA CASUALTY CO. and NATIONAL FIRE INSURANCE CO. OF HARTFORD, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. 4:09-cv-00135-SEB-WGH—-Sarah Evans Barker, Judge..

Rose Acre Farms, Inc. v. Columbia Cas. Co., 772 F. Supp. 2d 994, 2011 U.S. Dist. LEXIS 16730 (S.D. Ind., 2011)

Disposition: AFFIRMED.

Core Terms

eggs, antitrust, chickens, advertising, insurer, advertising injury, Producers, website, misappropriation, insurance policy, coverage, conspiracy, guidelines

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

HN1[] **Sherman Act, Claims**

Participation in a conspiracy to violate federal ***antitrust law*** is both deliberate and criminal.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Refusals to Defend

HN2[] **Bad Faith & Extracontractual Liability, Refusals to Defend**

If an insured asks its liability insurer to defend a suit that alleges conduct that is potentially covered by the policy as well as conduct that is not, the insurer must defend the entire suit.

Counsel: For ROSE ACRE FARMS, INCORPORATED, Plaintiff - Appellant: David A. Gauntlett, Attorney, GAUNTLETT & ASSOCIATES, Irvine, CA.

For COLUMBIA CASUALTY COMPANY, an Illinois Corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a Connecticut Corporation, Defendants - Appellees: Christopher R. Carroll, Attorney, CARROLL MCNULTY & KULL, Basking Ridge, NJ.

Judges: Before CUDAHY, POSNER, and WOOD, Circuit Judges.

Opinion by: POSNER

Opinion

[*766] POSNER, *Circuit Judge*. The plaintiff, Rose Acre, the nation's second-largest producer of eggs, has along with other egg producers been charged in a number of class action suits with conspiring to fix the price of eggs, in violation of *section 1* of the Sherman Act. (It has been embroiled in antitrust litigation before, perhaps because it has been so successful. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989)*.) Other violations are charged as well in some of the class action suits, but they are similar to the Sherman Act violations and need not be discussed separately. The class actions **[**2]** were consolidated and transferred for pretrial proceedings to the Eastern District of Pennsylvania, where they are pending. Rose Acre asked its liability insurers to defend it in the class action suits, arguing that the complaints sought damages for what Rose Acre's policies call "personal and advertising injury." As the policies are identical, differing only in the coverage period, to simplify this opinion we'll pretend there's only one insurer, one insurance policy, and, because the antitrust complaints do not differ from each other in any respect relevant to the appeal, one antitrust complaint.

The insurer (for remember we're pretending there's just one) refused to defend Rose Acre, on the ground that the antitrust complaint alleged nothing that could be regarded as "personal and advertising injury." This suit, a diversity suit governed by Indiana law, followed. The district court granted summary judgment in favor of the insurer.

The insurance policy defines "personal and advertising injury" as "injury . . . arising out of one or more of the following offenses," and a list of torts follows that includes "the use of another's advertising idea in your 'advertisement.'" We'll call this **[**3]** coverage "advertising injury."

Rose Acre tries to connect its advertising to the antitrust suit in the following convoluted manner. The company belongs **[*767]** to United Egg Producers, Inc., the trade association of egg producers. The association publishes animal husbandry guidelines, see United Egg Producers, *Animal Husbandry Guidelines for U.S. Egg Laying Flocks* (2010 ed.), *www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf* (visited Oct. 5, 2011), and permits producers who comply with its guidelines to market their eggs as "United Egg Producers Certified." Rose Acre does that, and it also advertises its compliance with the guidelines on its website, *www.roseacre.com*/ (visited Sept. 26, 2011), where it points out that it sells not only eggs produced by caged chickens, but also eggs produced by "free-roaming" chickens-chickens that are not caged (they have nests in their hen houses but are free to run around) and subsist on a vegetarian diet. (See the excerpt from the website at the end of this opinion.)

The website states (along with much else-including an answer to the question which came first, the chicken or the egg[*]) that "eggs from the 'Free-Roaming' farms cost much more **[**4]** than regular eggs because the eggs must be gathered by hand from the individual hen's nest. All of our chickens are kept in a humane and friendly environment. Plenty of fresh water, fresh air, and fresh feed are available to each chicken at all times, with plenty of space for each chicken to move about and socialize with the other chickens." *www.roseacre.com/eggfaq.html* (visited Oct. 27, 2011). This statement could be thought intended to throw consumers suspicious of the high price of eggs laid by

[*] "Answers to 11 Frequently Asked Questions about Chickens," *www.roseacre.com/eggfaq.html* (visited Sept. 26, 2011): "11. Which came first, the chicken or the egg? Answer: According to the Bible, the chicken came first. 'And the evening and the morning were the fourth day. And God said, "Let the waters bring forth abundantly the moving creature that hath life, and **[**5]** fowl that may fly above the earth in the open firmament of heaven.'" Genesis 1:19-20."

free-roaming chickens off the scent, and make them think the high price the result not of a conspiracy among egg producers but instead of the chickens' healthful and humane living conditions; those conditions increase labor costs (the eggs must be gathered by hand) and probably other costs as well, since the chickens have more space.

But that interpretation is not alleged in any of the 353 paragraphs of the antitrust complaint. The complaint doesn't mention Rose Acre's website, or any other advertising on defendants' websites; it doesn't quote the passage we quoted from the website about eggs from "free-roaming" chickens being more costly. It says that "Rose Acre has participated in and profited from UEP's and its [presumably the "its" is "Rose Acre's"] efforts to reduce supply and fix prices," that "Rose Acre has agreed to the conspiracy by selling UEP certified eggs," that "UEP Certified companies [such as Rose Acre] are permitted to display the UEP Certified logo on their packaging and to market their eggs as 'United Egg Producers Certified,'" and finally that "all UEP Certified eggs must also be marketed with the phrase 'Produced in Compliance with the United Egg Producers' Animal Husbandry Guidelines.'" But the antitrust complaint complains only about conspiring to fix the price of eggs from caged chickens, and nowhere does Rose Acre's website state that the cost of *those* eggs is increased by the measures taken to make the **[**6]** chickens that lay them healthy and happy—though remember that it does say that *all* its chickens have a healthy and friendly environment, so perhaps there's a faint implication that all Rose Acre's eggs are more **[*768]** expensive than they would be if the company did not give more weight to its chickens' mobility and social opportunities than to the cost of their eggs.

But this suit would fail even if one could tease out of the antitrust complaint a charge that Rose Acre's advertising was in furtherance of the alleged antitrust conspiracy. Coverage of liability for an "offense" defined as "the use of another's advertising idea" in one's own advertising cannot extend to using another's advertising idea with that other's consent. Suppose Rose Acre published on its website the following ad, written by its director of marketing: "We are socialists, we abhor profits, and we sell all our eggs at cost." Although the ad might be thought in furtherance of the antitrust conspiracy, any antitrust liability that it created would not be "advertising injury" because the company's marketing director is not "another." What difference could it make if instead the ad had been written by Rose Acre's advertising **[**7]** agency?

Antitrust liability, moreover, is a major business risk, especially for one of the largest companies in a major market. It is hardly likely that parties to an insurance contract would seek to cover such a serious risk indirectly through an "advertising injury" provision aimed at misappropriation and other intellectual-property torts.

It is a standard provision, as so many provisions in insurance policies are; it was drafted by ISO (Insurance Services Office, Inc.), a coalition of insurance companies that among other things drafts standardized insurance policies for its members and other insurance companies, see "Company Background," www.iso.com/About-ISO/ ISO-Services-for-Property-Casualty-Insurance/Company-Background.html (visited Oct. 27, 2011), including liability insurance policies. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). The provision, which has been approved by Indiana's insurance commissioner, replaces an earlier provision that defined advertising injury as "misappropriation of advertising ideas or style of doing business." 4 David A. Gauntlett, *New Appleman on Insurance Law* §§ 30.01(4)(a)(ii)(B)(3)-(C) (2011); State Farm Fire & Casualty Co. v. Steinberg, 393 F.3d 1226, 1231 n. 2 (11th Cir. 2004). **[**8]** Rose Acre points out that "use" does not carry the pejorative connotation of "misappropriation." True; but the reason for the change of wording had nothing to do with Rose Acre's argument. The reason was that a conflict had developed in the courts over whether "misappropriation" was used in the policy in its common law sense, which does not include trademark infringement, or should be read in a broader, layperson's sense. Compare State Auto Property & Casualty Ins. Co. v. Travelers Indemnity Co., 343 F.3d 249, 255-57 (4th Cir. 2003) (North Carolina law), with Advance Watch Co., Ltd. v. Kemper National Ins. Co., 99 F.3d 795, 802-03 (6th Cir. 1996) (Michigan law); see also United States Golf Ass'n v. St. Andrews Systems, Data-Max, Inc., 749 F.2d 1028, 1034-35 (3d Cir. 1984); 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 10:72, pp. 10-190 to 10-193. To resolve the conflict, ISO replaced "misappropriation" with "use" and, for good measure, added explicit coverage for trademark infringement. Gauntlett, *supra*, § (4)(a)(ii)(C).

This history makes clear that coverage is limited to liability to the "other" whose advertising idea is used by the insured without the "other's" **[**9]** permission. That is what "misappropriation" is; and the question whether as used in an insurance policy it might embrace trademark infringement does not alter the understanding that using someone else's idea with that **[*769]** someone's consent is not misappropriation.

Furthermore, the policy does not apply to advertising injury that is "caused by or at the direction of the insured with the knowledge that the act [triggering liability] would violate the rights of another and would inflict 'personal and advertising injury'" or that "aris[es] out of a criminal act committed by or at the direction of any insured." ***HN1***[] Participation in a conspiracy to violate federal ***antitrust law*** is both deliberate and criminal, and is thus excluded from coverage by both provisions. See *Del Monte Fresh Produce, N.A., Inc. v. Transportation Ins. Co., 500 F.3d 640, 642-44 (7th Cir. 2007)*; *Curtis-Universal, Inc. v. Sheboygan Emergency Medical Services, Inc., 43 F.3d 1119, 1123 (7th Cir. 1994)*; *Trailer Marine Transport Corp. v. Chicago Ins. Co., 791 F. Supp. 809, 812 (N.D. Cal. 1992)*.

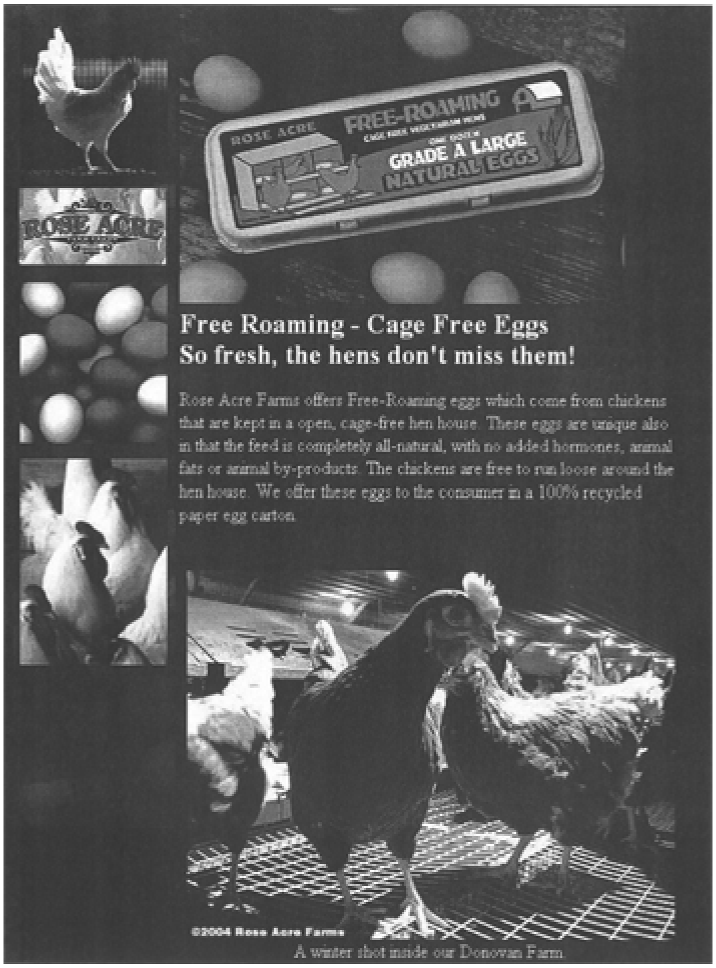
It is true as noted in the *Curtis-Universal* opinion that ***HN2***[] if an insured asks its liability insurer to defend a suit that alleges conduct that **[**10]** is potentially covered by the policy as well as conduct that is not, the insurer must defend the entire suit. *43 F.3d at 1122*; see also *Transamerica Ins. Services v. Kopko, 570 N.E.2d 1283, 1285 (Ind. 1991)*; *Liberty Mutual Ins. Co. v. OSI Industries, Inc., 831 N.E.2d 192, 200 (Ind. App. 2005)*; *Aearo Corp. v. American Int'l Specialty Lines Ins. Co., 676 F. Supp. 2d 738, 745 (S.D. Ind. 2009)* (Indiana law). But the antitrust suit for which Rose Acre wants a defense makes no claim that the policy could be thought to cover.

We note finally that the Eleventh Circuit, in a case decided a week before the oral argument in this case, rejected an identical claim by a firm represented by Rose Acre's counsel in this case. *Trailer Bridge, Inc. v. Illinois National Ins. Co., 657 F.3d 1135, 2011 U.S. App. LEXIS 19230, 2011 WL 4346579 (11th Cir. Sept. 19, 2011)* (per curiam).

The judgment of the district court is

AFFIRMED.

[*770] Rose Acre Farms—Cage Free



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Burgess v. Williams

United States District Court for the Middle District of North Carolina

November 2, 2011, Decided; November 2, 2011, Filed

1:11CV316

Reporter

2011 U.S. Dist. LEXIS 127085 *; 2011 WL 5290155

ALBERT C. BURGESS, JR., Plaintiff, v. DAVID B. WILLIAMS, et al., Defendant(s).

Subsequent History: Magistrate's recommendation at *Burgess v. Williams, 2012 U.S. Dist. LEXIS 52699 (M.D.N.C., Apr. 16, 2012)*

Core Terms

new complaint, allegations, severance, places, venue, jail, unidentified, unspecified, files, Screening, memorandum, subject matter jurisdiction, magistrate judge, filing fee, occurrence, pages, show cause, breach of contract, place and time, join, cruel and unusual punishment, diversity jurisdiction, factual allegations, separate memorandum, cause of action, contemporaneously, reside, lack of standing, district court, due process

Counsel: **[*1]** ALBERT C. BURGESS, JR., Plaintiff, Pro se, BUTNER, NC.

Judges: L. Patrick Auld, United States Magistrate Judge.

Opinion by: L. Patrick Auld

Opinion

MEMORANDUM OPINION AND ORDER

This case comes before the undersigned United States Magistrate Judge for review of Plaintiff's "Amended Complaint-Objection to Order of this Court" (Docket Entry 5), pursuant to *28 U.S.C. § 1915A(a)* and *(b)*. For the reasons that follow:

1) for each of the 33 "Counts" or "Claims" in the "Amended Complaint-Objection to Order of this Court" (see Docket Entry 5, ¶¶ 6-235) that Plaintiff wishes to pursue, he will be ordered to submit: A) a separate, new complaint; and B) either a $350.00 filing fee or an application to proceed as a pauper;

2) Plaintiff will be ordered to file a separate memorandum of not more than five pages with each new complaint as to "Count One" (id., ¶¶ 6-16), "Count Two" (id., ¶¶ 17-22), "Count Three" (id., ¶¶ 23-37), "Claim Four" (id., ¶¶ 38-45), "Claim Five" (id., ¶¶ 46-55), "Claim Seven" (id., ¶¶ 63-69), "Claim Eleven" (id., ¶¶ 86-93), "Claim Twelve" (id., ¶¶ 94-100), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), or "Claim Twenty Five" (id., ¶¶ 169-77) of the "Amended **[*2]** Complaint-Objection to Order of this Court," and to show cause in each such memorandum why each such new complaint should not be transferred to another district via *28 U.S.C. § 1406(a)*;

3) Plaintiff will be ordered to file a separate memorandum of not more than five pages along with each new complaint as to "Claim Twenty Nine" (Docket Entry 5, ¶¶ 196-201), "Claim Thirty" (id., ¶¶ 202-07), or "Claim Thirty One" (id., ¶¶ 208-13) of the "Amended Complaint-Objection to Order of this Court," and to show cause in each such memorandum why each such new complaint should not be dismissed for want of subject matter jurisdiction due to Plaintiff's lack of standing;

4) Plaintiff will be ordered to file a separate memorandum of not more than five pages along with each new complaint as to "Claim Nine" (id., ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id., ¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim **[*3]** Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Five" (id., ¶¶ 169-77), "Claim Twenty Six" (id., ¶¶ 178-83), "Claim Twenty Nine" (id., ¶¶ 196-201), or "Claim Thirty Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court," and to show cause in each such memorandum why each such new complaint should not be dismissed for want of subject matter jurisdiction due to the fact that each such "Claim" asserts only state law causes of action and lacks sufficient allegations to support the Court's exercise of diversity jurisdiction under *28 U.S.C. § 1332(a)*;

5) Plaintiff will be ordered to include factual allegations as to the place(s) of occurrence of the events alleged in "Claim Six" (Docket Entry 5, ¶¶ 56-62), "Claim Eight" (id., ¶¶ 70-78), "Claim Nine" (id., ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id., ¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Four" (id., ¶¶ 166-68), "Claim Twenty Five" (id., ¶¶ 169-77), "Claim Twenty **[*4]** Six" (id., ¶¶ 178-83), "Claim Twenty Seven" (id., ¶¶ 184-87), "Claim Twenty Eight" (id., ¶¶ 188-95), "Claim Thirty Two" (id., ¶¶ 214-25), or "Claim Thirty Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court," in each new complaint as to each such "Claim";

6) Plaintiff will be ordered to include factual allegations as to the time(s) of occurrence of events alleged in "Count Three" (id., ¶¶ 23-37), "Claim Four" (id., ¶¶ 38-45), "Claim Five" (id., ¶¶ 46-55), "Claim Six" (id., ¶¶ 56-62), "Claim Eight" (id., ¶¶ 70-78), "Claim Nine" (id., ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Twelve" (id., ¶¶ 94-100), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id., ¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Four" (id., ¶¶ 166-68), "Claim Twenty Six" (id., ¶¶ 178-83), "Claim Twenty Eight" (id., ¶¶ 188-95), "Claim Thirty Two" (id., ¶¶ 214-25), or "Claim Thirty **[*5]** Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court," in each new complaint as to each such "Count" or "Claim"; and

7) the portion of the "Amended Complaint-Objection to Order of this Court" that falls under the heading "Objections to the Order of this Court" (id. at 46-47 (with paragraphs numbered one through seven))[1] will be disregarded as an untimely objection to a non-dispositive, pretrial ruling by a United States Magistrate Judge under *Federal Rule of Civil Procedure 72(a)*.

BACKGROUND

"On November 18, 2009, [Plaintiff] was convicted, after a trial by jury, of violating *18 U.S.C. § 2252(a)(4)(B)* and *18 U.S.C. § 2252(a)(2)*." *Burgess v. United States, No. 1:09CV451-1-MU, 2010 U.S. Dist. LEXIS 5738, 2010 WL 92441, at *1 (W.D.N.C. Jan. 6, 2010)* (unpublished). He has since remained "in custody based upon [those] conviction[s] in the Western District of North Carolina . . . [for which he] was sentenced to a total of 292

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[1] Because Plaintiff commenced a new paragraph-numbering sequence under said heading, the Court will cite to page numbers (rather than to paragraph numbers) as to that portion of the "Amended Complaint-Objection to Order of this Court" in an effort to minimize confusion.

[*6] months' imprisonment." *Burgess v. Lappin, C/A No. 2:11-2074-CMC-BHH, 2011 U.S. Dist. LEXIS 120519, 2011 WL 4950061, at *2 (D.S.C. Oct. 18, 2011)* (unpublished). Plaintiff "is well-versed in the filing requirements of a variety of actions in the courts, having filed over thirty (30) actions in th[e] District [of South Carolina] alone." *2011 U.S. Dist. LEXIS 120519, [WL] at *2 n.4*.

Those filings in the District of South Carolina included a case Plaintiff brought "under *42 U.S.C. § 1983* on April 4, 2002." *Burgess v. Taylor, No. C/A 8:02-1090-22, 2003 WL 22937930, at *1 (D.S.C. Mar. 18, 2003)* (unpublished), aff'd, *67 Fed. Appx. 820 (4th Cir. 2003)*. "At that time, Plaintiff was incarcerated by the United States Bureau of Prisons . . . pursuant to [an] order revoking [his] supervised release . . . dated September 21, 2001." Id. at *1 n.1.[2] A United States Magistrate Judge "recommend[ed] that [said] action be dismissed for failure to state a claim." Id. at *5. The assigned United States District Judge "agree[d] with the conclusions and reasoning of the Magistrate Judge . . . [and] the Report and Recommendation of the Magistrate Judge [wa]s adopted . . . ." Id. at *1. The United States Court of Appeals for the Fourth Circuit thereafter "affirm[ed] for **[*7]** the reasons stated by the district court." *Burgess, 67 Fed. Appx. at 821*.

In addition to his litigation in the District of South Carolina and his instant case, Plaintiff also has another pending case in this Court, Burgess v. Ebay, Inc., No. 1:11CV193 (M.D.N.C.) (complaint docketed on March 7, 2011, and notarized as signed on February 14, 2011), and recently had a case dismissed as frivolous and for failure to state a claim in the District of Massachusetts, see *Burgess v. Ebay, Inc., Civil Action No. 11-10334-RGS, 2011 U.S. Dist. LEXIS 38470, 2011 WL 1344167 (D. Mass. Apr. 8, 2011)* (unpublished) (incorporating reasoning from *Burgess v. Ebay, Inc., Civil Action No. 11-10334-RGS, 2011 U.S. Dist. LEXIS 22934, 2011 WL 841269 (D. Mass. Mar. 8, 2011)* (unpublished)).[3]

The instant case began when Plaintiff paid a $350.00 filing fee (see Docket Entry dated May 25, 2011 (documenting receipt of payment on April 20, 2011)) and submitted a 14-page Complaint (docketed on April 21, 2011 (see Docket Entry 1 at 1) and notarized as signed on April 12, 2011 (see id. at 14)) which purported to name 43 Defendants in connection with claims of "breach of contract, negligence, violation of civil rights, fraud and misrepresentation" (id. at 1-3). After five paragraphs addressing (in conclusory fashion) the alleged basis for the Court's jurisdiction and venue, as well as the citizenship and/or residence of the putative parties (id. at 2-3), the Complaint sets forth 29 paragraphs of allegations (under the heading "Statement of the Facts") asserting (in conclusory fashion) that Defendants harmed Plaintiff in various ways (see id. at 3-12).

The Complaint identifies some of the putative Defendants as government officers or employees. (Id. at 5 (alleging that Defendant Asa McNeely "is the jail administrator at McDowell **[*10]** County"), 7 (referring to Defendants Steve Shortell and Don W. Farley as employees of "the Rockingham, VA., jail"), and 10 (describing Defendant A. Thompson as "a police officer").) This Court has an obligation to "review, before docketing, if feasible or, in any

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[2] Said term of supervised release arose from a federal perjury conviction Plaintiff obtained in connection with federal litigation he pursued while serving a state prison sentence. See *Burgess, 2003 WL 22937930, at *2* ("[O]n August 20, 1985, . . . [Plaintiff] entered a plea in state court of 'guilty but mentally ill' to various charges of criminal sexual conduct involving minors. He was sentenced to an aggregate term of 25 years and was committed to the South Carolina Department of Corrections. In 1997, [Plaintiff] was released into federal custody to begin serving a sentence for perjury."); see also ***United States v. Burgess, Nos. 93-5571, 93-7268, 21 F.3d 425*** (table), [published in full-text format at *1994 U.S. App. LEXIS 7804*] 1994 WL 137007, at *1 & n.1 (4th Cir. Apr. 18, 1994) (unpublished) (stating that Plaintiff "pled guilty to one count of knowingly making a false material declaration in an application to proceed in forma pauperis in violation of *18 U.S.C. § 1623* . . . [and received a sentence of] sixteen months incarceration to run consecutively to the state sentence which he [was then] serving . . . [and] three years of supervised release" and identifying state **[*8]** sentence in question as follows: "[Plaintiff] was convicted in a South Carolina state court on August 20, 1985, of conspiring to commit criminal sexual conduct on minors, committing or attempting lewd acts upon a child under 14, and committing sexual battery of a child under 16. The court sentenced [him] to 25 years imprisonment.").

[3] Said dismissal has become final because the docket for said case reflects that, following the court's denial of Plaintiff's motion for reconsideration on May 5, 2011, Plaintiff failed to file a notice of appeal within 30 days **[*9]** as required by ***Federal Rule of Appellate Procedure 4(a)(1)(A)***. See Docket, Burgess, Civil Action No. 11-10334-RGS (Docket Entries dated May 5, 2011, to present).

event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." *28 U.S.C. § 1915A(a)* (emphasis added). As previously noted, see supra, pp. 4-5, 7, at the time he filed the Complaint, Plaintiff was incarcerated as a result of a sentence imposed for a federal criminal conviction and thus qualified as a "prisoner" within the meaning of *Section 1915A*, see *28 U.S.C. § 1915A(c)*.

The Court therefore reviewed the Complaint under *Section 1915A*, which provides, in relevant part, that: "On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint — (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." *28 U.S.C. § 1915A(b)* (emphasis added). **[*11]** After completing that review, the Court entered a Screening Order on May 20, 2011, that states, in relevant part, as follows:

> Plaintiff's claims seem to lack any recognizable connection. He has raised claims related to, among other things, jail conditions, legal malpractice, bad business deals, disputes over insurance payments and car parts, landlord/tenant or real estate issues, banking problems, stolen property, and a disagreement over a deposit with an electric power company.
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> . . . .
>
> . . . Plaintiff's claims lack sufficient factual support to state a claim for relief or to allow the involved defendants to formulate a response. Many claims consist more of legal conclusions than factual statements. Nor does it appear that many of the claims belong in the same lawsuit. Overall, Plaintiff has . . . set out exactly the sort of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that do not state a claim under [*Ashcroft v. Iqbal, 556 U.S. 662, ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)]*.
>
> Because of his failure to plead a proper claim for relief, Plaintiff's Complaint is subject to dismissal. . . . However, it appears that Plaintiff is near or beyond **[*12]** the statute of limitations as to some or all of his claims. For that reason, the better course of action is to stay this case for thirty days and allow Plaintiff to amend his Complaint. In filing the amended complaint, Plaintiff must set out specific facts as to each claim and defendant to establish that a viable claim for relief exists. He must make the cause of action clear as to each claim and defendant and state to the best of his ability when and where the alleged facts occurred.
>
> . . . .
>
> Venue in a civil action "wherein jurisdiction is not founded solely on diversity of citizenship" . . . [must satisfy] *28 U.S.C. § 1391(b)*. Here, according to the Complaint, Defendants reside in multiple states. Nothing in the Complaint suggests that any of them reside in the Middle District of North Carolina. In the few instances where the Complaint mentions locations, it references other states or places in the Western District of North Carolina. . . . [N]othing in the Complaint alleges that any of the acts or omissions occurred in the Middle District of North Carolina. . . .
>
> . . . Plaintiff should be aware of the potential venue problems in drafting his amended complaint and should allege enough **[*13]** facts for the Court to make a venue determination if one becomes necessary or appropriate.

(Docket Entry 2 at 3-8 (emphasis added).)

In response to that Screening Order, Plaintiff filed the instant, 49-page "Amended Complaint-Objection to Order of this Court" which, in its caption and initial Defendant-identification paragraphs, purports to name as Defendants 42 of the 43 entities and individuals named as Defendants in the Complaint (i.e., all except Aramark Corp.), along with 12 additional individuals. (Compare Docket Entry 1 at 1-3, with Docket Entry 5, Caption and ¶¶ 3-5.)[4] The

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[4] Despite the omission of Aramark Corp. from the Caption and opening designation **[*14]** of Defendants, the "Amended Complaint-Objection to Order of this Court" still contains a claim against Aramark Corp. (See Docket Entry 5, ¶¶ 169-77.) In addition, the body of the "Amended Complaint-Objection to Order of this Court" purports to assert claims against John Morgan

"Amended Complaint-Objection to Order of this Court" alleges in conclusory fashion that this Court has jurisdiction "under *28 U.S.C.A. §1331*, and *§1332*," as well as venue "under *28 U.S.C.A. §1391*." (Docket Entry 5, ¶ 1.) It states that Plaintiff "is a citizen and resident of Virginia" (id., ¶ 1), but its signature block lists an address in Florida for Plaintiff (id. at 48). Moreover, Plaintiff subsequently mailed the Clerk a letter stating "[m]y address is listed below" followed by an address in North Carolina. (Docket Entry 6 at 1.)

The "Amended Complaint-Objection to Order of this Court" identifies 21 of the putative individual Defendants as "citizens and residents of North Carolina" and alleges, without detail, that "[s]ome reside in the Middle District of North Carolina." (Docket Entry 5, ¶ 3.) It describes 12 additional putative individual Defendants as "citizens of other states [who] have made more than minimum contacts with the State of North Carolina . . . ." (Id., ¶ 5.) According to the "Amended Complaint-Objection to Order of this Court," 21 putative organizational Defendants are "licensed to do business in North Carolina or are doing business in North Carolina and . . . **[*15]** have all made minimum contacts with the State of North Carolina . . . ." (Id., ¶ 4.)

The bulk of the "Amended Complaint-Objection to Order of this Court" consists of 33 separate "Counts" or "Claims," each of which identifies between one and eight of the 54 (or 56) putative Defendants. (See id., ¶¶ 6-230.) The consecutively-numbered paragraphs of the "Amended Complaint-Objection to Order of this Court" concludes with sections labeled "Statement of Claims" and "Relief Demanded" that purport to summarize the federal statutes and other laws Defendants violated, as well as the damages and other relief to which Plaintiff claims entitlement. (See id., ¶¶ 231-44.) The "Amended Complaint-Objection to Order of this Court" then begins a new paragraph-numbering-sequence under the heading "Objections to the Order of the Court," wherein Plaintiff "objects to the application of *28 U.S.C. §1915A* to his [C]omplaint . . . [and asks] that the application of *28 U.S.C.A. §1915* or *1915A* be declared unconstitutional." (Docket Entry 5 at 46-47.) It ends with a signature page dated June 20, 2011 (id. at 48) and a "Verification" notarized as signed on June 17, 2011 (id. at 49).[5]

DISCUSSION

As an initial matter, the Court notes that the portion of the "Amended Complaint-Objection to Order of this Court" in which (under the heading "Objections to Order of this Court") Plaintiff "objects to the application of *28 U.S.C. §1915A* to his [C]omplaint . . . [and] moves to this Court that the application of *28 U.S.C.A. §1915* or *1915A* be declared unconstitutional" (id. at 46-47), is untimely under *Federal Rule of Civil Procedure 72(a)*. Said Rule states:

> When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the **[*17]** decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

Fed. R. Civ. P. 72(a) (emphasis added).

The Screening Order did not dispose of any of Plaintiff's claims, but instead merely directed him to amend his Complaint within 30 days. (See Docket Entry 2 at 9.) *Rule 72(a)*'s 14-day time limit for objections therefore applied

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although neither its Caption nor its Defendant-identification paragraphs mention him. (Compare id., Caption and ¶¶ 3-5, with id., ¶¶ 6-16, 38-45.) The "Amended Complaint-Objection to Order of this Court" thus names a total of either 54 or 56 putative Defendants.

[5] The 30-day amendment period authorized **[*16]** by the Screening Order ended on Sunday, June 19, 2011, and thus, by operation of *Federal Rule of Civil Procedure 6(a)(1)(C)* and *(d)*, Plaintiff had until June 23, 2011, to amend his Complaint. The Clerk docketed Plaintiff's "Amended Complaint-Objection to Order of this Court" on that date (see Docket Entry 5 at 1) and, therefore, Plaintiff complied with the Screening Order's deadline without considering the prison-mailbox rule, see generally *Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988)*.

to the Screening Order and commenced on May 20, 2011, when Plaintiff was served by mail with the Screening Order. (See Docket Entry dated May 20, 2011.) That 14-day period ended on June 3, 2011, but, due to the use of mail to effect service of the Screening Order, Plaintiff received an additional three days (until June 6, 2011) to file any objections, see *Fed. R. Civ. P. 6(d)*. Even if the Court set the filing date of the "Amended Complaint-Objection to Order of this Court" at the earliest possible point, i.e., June 17, 2011 (the date, according to the notarization on the "Verification" **[*18]** page, on which Plaintiff signed said filing (see Docket Entry 5 at 49)), Plaintiff did not comply with *Rule 72(a)*'s time limitation. Accordingly, under the plain language of *Rule 72(a)*, the Court need not consider the portion of Plaintiff's "Amended Complaint-Objection to Order of this Court" in which he objects to the Screening Order. See, e.g., *Federal Election Comm'n v. Christian Coal., 178 F.R.D. 456, 459 n.3 (E.D. Va. 1998)* ("*Rule 72(a)* additionally provides that failure to serve timely objections waives the right to do so in the future.").

Turning to the remainder of Plaintiff's "Amended Complaint-Objection to Order of this Court," the Court observes that, in amending his Complaint, Plaintiff added and maintained claims against government officials and employees. (See Docket Entry 5, ¶¶ 7 (describing newly-added Defendant Jack Pierce as a "guard" at the jail in Henderson County, North Carolina), 8 (identifying newly-added Defendant Ricky Davis as "Sheriff of Henderson County" and claiming that he adopted policies of denying medical treatment, "being unduly harsh and cruel to inmates[,] allowing daily beatings of inmates by the 'Beat Squad', and disallowing any books or magazines **[*19]** or legal materials into the jail"), 16 (listing claims against Defendant Davis, Defendant Pierce, and newly-added Defendant Pat Redden (who allegedly bore liability because "[h]er false imprisonment of the Plaintiff is the direct cause of th[e] treatment [Plaintiff experienced at the jail in Henderson County]"), including denial of medical care, as well as reading and legal materials, and subjection to cruel and unusual punishment), 17 (denominating newly-added Defendant Greg McCloud as official "responsible for the proper performance and running of the North Carolina Sex Offender Registry"), 18-19 (claiming that Defendant Redden submitted false information about Plaintiff to keep him on North Carolina's Sex Offender Registry thereby depriving Plaintiff of due process), 21 (labeling Defendant Redden as a "rogue cop"), 22 (alleging that Defendants McCloud and Redden "violat[ed] the Plaintiff's Constitutional Rights"), 40 (asserting that Defendant McNeely "is the person in charge of the McDowell County Jail"), 45 (contending that Defendant McNeely violated Plaintiff's rights to due process of law and freedom from cruel and unusual punishment), 63 (alleging that Defendants Shortell and **[*20]** Farley took custody of Plaintiff at the jail in Rockingham County, Virginia), 68 (positing that Defendants Shortell and Farley "violated the rights of the Plaintiff under *42 U.S.C.A. §1983*"), 94 (describing Defendant Thompson as "a detective with the Brevard, N.C. Police Department" and Defendant Redden as a "rogue detective with Henderson County, N.C."), 99 (stating that Defendants Thompson and Redden denied Plaintiff "due process"), 208 (identifying newly-added Defendants K.B. Kernodle and Deputy Tilley as "police officers [who] cause[d] the [unlawful] arrest and confinement of [Joe L. Brady, who assigned said claim to Plaintiff]").

For reasons set forth above, see supra, pp. 7-8, the Court therefore must review Plaintiff's "Amended Complaint-Objection to Order of this Court" under *28 U.S.C. § 1915A*. Having conducted that review, the Court concludes that this case cannot go forward for at least six reasons:

1) the "Amended Complaint-Objection to Order of this Court" joins claims against multiple defendants in contravention of *Federal Rule of Civil Procedure 20(a)(2)*, requiring either the dropping of the vast majority of the putative Defendants (and thus the "Counts" or "Claims" against **[*21]** those Defendants) or severance under *Federal Rule of Civil Procedure 21*;

2) the allegations as to 12 of the "Counts" and "Claims" in the "Amended Complaint-Objection to Order of this Court" appear to establish that this Court lacks venue over said "Counts" and "Claims," such that Plaintiff must show cause why, if severed into separate actions, each new action containing each such "Count" or "Claim" should not be transferred to another district under *28 U.S.C. § 1406(a)*;

3) the allegations as to three of the "Claims" in the "Amended Complaint-Objection to Order of this Court" appear to establish that Plaintiff lacks standing to assert said "Claims," such that Plaintiff must show cause why, if severed into separate actions, each new action containing each such "Claim" should not be dismissed for want of subject matter jurisdiction;

4) 17 of the "Claims" in the "Amended Complaint-Objection to Order of this Court" appear to assert only state law causes of action and to allege insufficient facts to support the Court's exercise of diversity jurisdiction, such that Plaintiff must show cause why, if severed into separate actions, each new action containing each such "Claim" should not be dismissed **[*22]** for want of subject matter jurisdiction;

5) 19 of the "Claims" in the "Amended Complaint-Objection to Order of this Court" lack sufficient factual allegations as to the place(s) of occurrence of the events alleged; and

6) 24 of the "Counts" and "Claims" in the "Amended Complaint-Objection to Order of this Court" lack sufficient factual allegations as to the time(s) of occurrence of the events alleged.

Improper Joinder

As set out in the Background section (see supra, pp. 9-11 & n.4), the "Amended Complaint-Objection to Order of this Court" purports to assert 33 separate "Counts" or "Claims" against entirely disparate groupings of between one and eight of the total number of 54 or 56 putative Defendants. "A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party." *Fed. R. Civ. P. 18(a)* (emphasis added). "Thus multiple claims against a single party are fine . . . ." *George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007)*.

However, where, as here, a plaintiff seeks to join not multiple claims against a single defendant, but multiple claims against multiple defendants, another provision of the Federal Rules of Civil Procedure **[*23]** comes into play, i.e., the limitation that "[p]ersons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." *Fed. R. Civ. P. 20(a)(2)* (emphasis added). In other words, "[u]nrelated claims against different defendants belong in different suits . . . ." *George, 507 F.3d at 607*.[6]

The "Counts" and "Claims" in Plaintiff's "Amended Complaint-Objection to Order of this Court" run too wide a temporal, geographic, and subject matter gamut to permit joinder under *Rule 20(a)(2)*, as shown by this summary of said "Counts" and "Claims":

1) denial of medical care and imposition of other forms of cruel and unusual punishment in the jail in Henderson County, North Carolina, in June 2008 (Docket Entry 5, ¶¶ 6-16 ("Count One"));

2) unconstitutional submission and inclusion of false information in North Carolina's Sex Offender Registry at unidentified places from April 2008 to August 2010 (id., ¶¶ 17-22 ("Count Two"));

3) breach of contract, as well as denial of due process and equal protection, arising from the handling of property in a storage unit in Hendersonville, North Carolina, at unspecified times (id., ¶¶ 23-37 ("Count Three"));

4) denial of medical care and imposition of other forms of cruel and unusual punishment in the jail in McDowell County, North Carolina, on unidentified times (id., ¶¶ 38-45 ("Claim Four"));

[6] Many district courts outside the Seventh Circuit, including a number in the Fourth Circuit, expressly have followed George on this and related points. See, e.g., *Woods v. County of Wilson, No. 5:10CT3118BO, 2011 U.S. Dist. LEXIS 110991, 2011 WL 4460619, at *4 (E.D.N.C. Sept. 26, 2011)* (unpublished); *Chandler v. James, 783 F. Supp. 2d 33, 39 (D.D.C. 2011)*; ***Proctor v. Applegate, 661 F. Supp. 2d 743, 779 (E.D. Mich. 2009)***; *Showalter v. Johnson, No. 7:08CV276, 2009 U.S. Dist. LEXIS 41155, 2009 WL 1321694, at *4 (W.D. Va. May 12, 2009)* (unpublished); *Robinson v. Johnson, No. 3:07CV449, 2009 U.S. Dist. LEXIS 25988, 2009 WL 874530, at *1 (E.D. Va. Mar. 26, 2009)* (unpublished); *McCoy v. Willis, No. 4:07CV3563-PMD-TER, 2008 U.S. Dist. LEXIS 69679, 2008 WL 4221745, at *5 (D.S.C. Sept. 15, 2008)* **[*24]** (unpublished).

5) violation of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), federal ***antitrust law***, and the constitutional right of access **[*25]** to courts by the company that runs the telephone system in the jail in Buncombe County, North Carolina, at unspecified times (id., ¶¶ 46-55 ("Claim Five"));

6) deprivation of due process and equal protection due to the unlawful accessing of North Carolina's and South Carolina's Sex Offender Registries at unidentified times and places (id., ¶¶ 56-62 ("Claim Six"));

7) cruel and unusual punishment in June 2008, in the form of denial of medicine, food, water, sleep, clothing, and recreation at the jail in Rockingham County, Virginia, as well as exposure to second-hand smoke and excessively-long confinement in restraints in transit to Hendersonville, North Carolina (id., ¶¶ 63-69 ("Claim Seven"));

8) violation of North Carolina stolen property laws and federal immigration laws related to the operation of a flea market at an unidentified place and time (id., ¶¶ 70-78 ("Claim Eight"));

9) breach of contract in connection with the sale of collectibles at an unspecified place and time (id., ¶¶ 79-82 ("Claim Nine"));

10) breach of contract as to electrical power service at an unidentified place and time (id., ¶¶ 83-85 ("Claim Ten"));

11) cruel and unusual punishment in the form of denial of medical **[*26]** care in the jail at Buncombe County, North Carolina, in November 2010 (id., ¶¶ 86-93 ("Claim Eleven"));

12) intentional and retaliatory institution of false charges in violation of due process in Transylvania County, North Carolina, on unspecified times (id., ¶¶ 94-100 ("Claim Twelve"));

13) common law fraud in connection with state civil litigation at unidentified places and times (id., ¶¶ 101-05 ("Claim Thirteen"));

14) usury in the provision of bail bonds at unspecified places and times (id., ¶¶ 106-10 ("Claim Fourteen"));

15) violation of North Carolina's UDTPA by the manufacturer of certain products utilized in jails and prisons at unidentified places and times (id., ¶¶ 111-20 ("Claim Fifteen"));

16) sale of a faulty automobile part and dealing in bad faith at unspecified places and times (id., ¶¶ 121-25 ("Claim Sixteen"));

17) fraud in the sale by auction of a coat at an unidentified place and time (id., ¶¶ 126-32 ("Claim Seventeen"));

18) fraud in connection with dealings related to storage units at unspecified places and times (id., ¶¶ 133-36 ("Claim Eighteen"));

19) breach of contract regarding monies owed at unidentified places and times (id., ¶¶ 137-41 ("Claim Nineteen"));

20) negligent **[*27]** misrepresentations by an expert witness at unspecified places and times (id., ¶¶ 142-47 ("Claim Twenty"));

21) defamation related to articles that appeared in the Charlotte Observer at unidentified times after Plaintiff's criminal trial in November 2009 (id., ¶¶ 148-52 ("Claim Twenty One"));

22) fraud in connection with the renting of an apartment at an unidentified place and time (id., ¶¶ 153-57 ("Claim Twenty Two"));

23) breach of contract, fraud, and related claims arising from litigation related to business dealings at unspecified places and times (id., ¶¶ 158-65 ("Claim Twenty Three"));

24) federal banking and privacy law violations regarding the removal of money from a checking account at unidentified places and times (id., ¶¶ 166-68 ("Claim Twenty Four"));

25) violation of North Carolina's UDTPA related to the provision of canteen services at the jail in McDowell County, North Carolina, at unspecified times (id., ¶¶ 169-77 ("Claim Twenty Five"));

26) breach of contract and professional malpractice in connection with a state collection action at unidentified places and times (id., ¶¶ 178-83 ("Claim Twenty Six"));

27) federal banking and privacy law violations arising from the release **[*28]** of financial records in the spring of 2008 at unspecified places (id., ¶¶ 184-87 ("Claim Twenty Seven"));

28) violation of state and federal banking laws related to the writing of certain checks at unidentified places and times (id., ¶¶ 188-95 ("Claim Twenty Eight"));

29) fraud in connection with a legal malpractice action originally filed in a state court in the Middle District of North Carolina in 2009 regarding a prior lawsuit in Granville County, North Carolina (id., ¶¶ 196-201 ("Claim Twenty Nine"));

30) unlawful debt collection under federal and state law at unspecified places and times (id., ¶¶ 202-07 ("Claim Thirty"));

31) unlawful arrest and detention at an unspecified place and time (id., ¶¶ 208-13 ("Claim Thirty One"));

32) criminal fraud and computer intrusion related to civil litigation at unidentified places and times (id., ¶¶ 214-25 ("Claim Thirty Two")); and

33) fraud and misrepresentation arising from a contract for internet research at unspecified places and times (id., ¶¶ 226-30 ("Claim Thirty Three")).

The Screening Order highlighted this misjoinder issue by noting that Plaintiff's "claims seem[ed] to lack any recognizable connection. He has raised claims related to, among **[*29]** other things, jail conditions, legal malpractice, bad business deals, disputes over insurance payments and car parts, landlord/tenant or real estate issues, banking problems, stolen property, and a disagreement over a deposit with an electric power company." (Docket Entry 2 at 3; see also id. at 6 ("Nor does it appear that many of the claims belong in the same lawsuit.").) Because Plaintiff's Complaint lacked sufficient factual content to state any claim, the Court did not need to address misjoinder further at that time; however, with the factual detail Plaintiff has added in his "Amended Complaint-Objection to Order of this Court," the unsustainability of his effort to join 33 distinct "Counts" and "Claims" against different (entirely non-overlapping) groupings of between one and eight of 54 or 56 putative Defendants has become so clear that the Court must now deal with the misjoinder issue. See *George, 507 F.3d at 607* ("The district court did not question [the plaintiff's] decision to join 24 defendants, and approximately 50 distinct claims, in a single suit. It should have done so.").

As with the complaint in George, Plaintiff's "Amended Complaint-Objection to Order of this Court" **[*30]** does "not make any effort to show that the [54 or 56] defendants he named had participated in the same transaction or series of transactions or that a question of fact is common to all defendants." Id. (internal quotation marks omitted). The Court therefore must not allow Plaintiff to proceed on the "Amended Complaint-Objection to Order of this Court." See id. ("A buckshot complaint that would be rejected if filed by a free person - say, a suit complaining that A defrauded the plaintiff, B defamed him, C punched him, D failed to pay a debt, and E infringed his copyright, all in different transactions - should be rejected if filed by a prisoner.").

Courts must enforce *Rule 20*'s joinder limitations in cases such as this one "not only to prevent the sort of morass that [results when a plaintiff puts dozens of claims against dozens of defendants into one complaint] but also to ensure that prisoners pay the required filing fees . . . ." Id. Plaintiff effectively has sought to commence 33 lawsuits for the price of one $350.00 filing fee. This Court, like others before, see, e.g., *Showalter v. Johnson, No. 7:08CV276, 2009 U.S. Dist. LEXIS 41155 at *10 (W.D. Va. May 12, 2009)* **[*31]** (unpublished), declines to permit such fee-avoidance.

Moreover, by improperly joining unrelated claims against multiple defendants, Plaintiff perhaps "was trying not only to save money but also to dodge th[e] [Prison Litigation Reform Act ("PLRA")]." *George, 507 F.3d at 607*. "[T]he 'three strikes' provision of the . . . [PLRA] generally prohibits a prisoner from proceeding *in forma pauperis* ('IFP') if he has previously had three or more actions dismissed as frivolous, malicious, or for failing to state a claim." *Tolbert v. Stevenson, 635 F.3d 646, 647 (4th Cir. 2011)* (citing *28 U.S.C. § 1915(g)*). By attempting to lump his 33 "Counts" or "Claims" together, Plaintiff may have "hoped that if even 1 of his [33] claims were deemed non-frivolous [or sufficient to state a claim], he would receive no 'strikes' at all, as opposed to the [32] that would result from making [32] frivolous [or legally insufficient] claims in a batch of [33] suits." *George, 507 F.3d at 607*. Indeed, Plaintiff has particular cause to attempt to avoid a decision that would constitute a "strike" under the PLRA because, as documented in the Background section (see supra, pp. 5-6 **[*32]** & nn.2, 3), he now has two such "strikes" (i.e., the dismissals in *Burgess, 2003 WL 22937930*, and *Burgess, 2011 U.S. Dist. LEXIS 38470, 2011 WL 1344167*) and thus a third "strike" would subject him to the PLRA's IFP ban. The Court (again, in line with the actions of other courts, see, e.g., *Showalter, 2009 U.S. Dist. LEXIS 41155, 2009 WL 1321694, at *4)* will not allow Plaintiff to insulate himself from the PLRA through misjoinder.

Having determined that the case cannot move forward via the "Amended Complaint-Objection to Order of this Court," the Court must select the proper curative step. In this regard, the Federal Rules of Civil Procedure provide that "[m]isjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." *Fed. R. Civ. P. 21*. "Where, as here, statute of limitations concerns arise, courts should sever rather than simply dismiss the misjoined claims [by dropping defendants]." *Robinson v. Johnson, No. 3:07CV449, 2009 U.S. Dist. LEXIS 25988, 2009 WL 874530, at *2 (E.D. Va. Mar. 26, 2009)* (unpublished).

To accomplish the required severance, "Plaintiff must file new complaints for his severed claims. Any forthcoming new complaints **[*33]** must comport with *Rules 8* and *20 of the Federal Rules of Civil Procedure* . . . [and] must stand or fall of their own accord." Id. To the right of the caption of each such new complaint, Plaintiff must place the following words: "NEW COMPLAINT FOR SEVERED COUNT/CLAIM _____ IN 1:11CV316," with the corresponding number in the blank. See id. Because of the volume of severed claims involved, the Court will give Plaintiff until December 30, 2011, to file any new, successor complaints. "The failure to submit a proper new complaint for any ['Count' or 'Claim' in the "Amended Complaint-Objection to Order of this Court" by December 30, 2011] will result in the dismissal of that ['Count' or 'Claim']." Id.

"Plaintiff will be responsible for the full filing fee for each new complaint he submits." Id.; accord *Showalter, 2009 U.S. Dist. LEXIS 41155, 2009 WL 1321694, at *6* ("Each new lawsuit will obligate [the plaintiff] to pay the $350.00 district court filing fee pursuant to *28 U.S.C. § 1915(g)*."). If Plaintiff takes the position that he lacks sufficient funds to pay the full $350.00 filing fee applicable to each new complaint for each severed "Count" or "Claim" in "Amended Complaint-Objection to Order of this Court" at **[*34]** the time of filing, he must file a proper application for IFP status with each new complaint as to which he does not pay the full filing fee. The Court will conduct appropriate screening under *28 U.S.C. § 1915(e)(2)* as to any such new, successor complaint for which Plaintiff seeks IFP status and/or under *28 U.S.C. § 1915A(b)* as to any such new, successor complaint in which Plaintiff seeks redress from a governmental official or employee.

Improper Venue

As detailed in the Background section, supra, p. 9, the Screening Order advised Plaintiff of the venue requirements and highlighted both the apparent lack of venue reflected by certain allegations in the Complaint and the absence of allegations necessary for a complete assessment of venue questions. Moreover, it directed Plaintiff to "be aware of the potential venue problems in drafting his amended complaint and [to] allege enough facts for the Court to make a venue determination if one becomes necessary or appropriate." (Docket Entry 2 at 8.) A review of the "Amended Complaint-Objection to Order of this Court" reveals that Plaintiff did not heed this instruction. To the contrary, as shown in the earlier summary of the "Amended Complaint-Objection **[*35]** to Order of this Court," supra, pp. 18-22, as to virtually all of the "Counts" and "Claims," venue either appears lacking (in that, based on the allegations, no

Defendant therein appears to reside in the Middle District of North Carolina, a substantial part of the events described therein failed to occur in the Middle District of North Carolina, and another district exists where venue would lie, see *28 U.S.C. § 1391(a)* and *(b)*) or Plaintiff has pled insufficient facts to permit any determination as to the propriety of venue.

If (consistent with the discussion in the preceding subsection, supra, pp. 25-26) Plaintiff files new complaints as to Counts One, Two, and Three and/or Claims Four, Five, Seven, Eleven, Twelve, Thirteen, Twenty, Twenty One, and Twenty Five of the "Amended Complaint-Objection to Order of this Court," the Court will have to consider transfer under *28 U.S.C. § 1406(a)*, in light of the lack of venue apparent on the face of Plaintiff's prior allegations as to each such "Count" or "Claim." See *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n, 830 F.2d 522, 526 (4th Cir. 1987)* ("[If] venue [i]s improper . . ., transfer of [Plaintiff's] action [i]s required under *28 U.S.C. § 1406(a)*."). **[*36]** "Although a motion by one of the parties is ordinarily required for transfer, the district court may consider the possibility of transfer sua sponte . . . [but generally must afford] an opportunity to be heard before a decision is rendered." *Feller v. Brock, 802 F.2d 722, 729 n.7 (4th Cir. 1986)*; accord *Caldwell v. Palmetto State Sav. Bank of S.C., 811 F.2d 916, 919 (5th Cir. 1987)* ("Under the transfer statute, a district court may transfer a case upon a motion or sua sponte."). Accordingly, the Court will direct Plaintiff to file contemporaneously with any such new complaint a memorandum of up to five pages showing cause why the Court should not transfer that complaint to another district under *Section 1406(a)*.

In addition, for reasons stated in a subsection to follow, see infra, pp. 31-32, the Court will order Plaintiff to include, in any new complaints as to other "Counts" and "Claims" in the "Amended Complaint-Objection to Order of this Court," additional allegations regarding the place(s) where the events at issue occurred. After reviewing those new complaints, the Court may require Plaintiff to show cause as to why it should not transfer those new complaints to another district **[*37]** under *Section 1406(a)*, as well.

Lack of Standing

"It is well settled that under Article III of the United States Constitution a plaintiff must establish that a case or controversy exists between himself and the defendant and cannot rest his claim to relief on the legal rights or interests of third parties." *Smith v. Frye, 488 F.3d 263, 272 (4th Cir. 2007)* (describing "dismissal for lack of standing" as dismissal "for lack of jurisdiction") (internal quotation marks omitted). To satisfy the Constitution's "standing limitation," a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir. 2005)* (internal brackets and quotation marks omitted)).

As to "Claim Twenty Nine" (Docket Entry 5, ¶¶ 196-201), "Claim Thirty" (id., ¶¶ 202-07), and "Claim Thirty One" (id., ¶¶ 208-13) of the "Amended Complaint-Objection to Order of this Court," Plaintiff purports to proceed based "on assignment from Joe L. Brady." As reflected in the prior summary, see supra, pp. 21-22, Claims Twenty Nine, Thirty, **[*38]** and Thirty One set forth allegations of torts against persons under federal and/or North Carolina law. Both federal and North Carolina law generally prohibit the assignment of such tort claims. See *Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037, 1048 (4th Cir. 1980)* (acknowledging "general rule of the non-assignability of personal injury claims" and describing its "main purposes . . . [as] prevent[ing] unscrupulous strangers to an occurrence from preying on the depraved circumstances of an injured person, and [] prohibit[ing] champerty"); see also *id. at 1052* (Widener, J., concurring and dissenting) (quoting *Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 213, 7 L. Ed. 108 (1828)*, for proposition "'that mere personal torts, which die with the party, and which do not survive to his personal representative, are not capable of passing by assignment,'" and observing that "research ha[d] uncovered no case modifying this general rule under federal law"); *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc., 175 N.C. App. 339, 343, 623 S.E.2d 334, 338 (2006)* ("It is well-established in this state that personal tort claims are not assignable because such assignments would be void against public **[*39]** policy because they promote champerty.") (citing, inter alia, *Charlotte–Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995))*.

The Court thus will order that, if (consistent with the severance requirement discussed in a preceding subsection, supra, pp. 25-26) Plaintiff files new complaints as to Claims Twenty Nine, Thirty, and Thirty One, he also file contemporaneously with such new complaints a memorandum of up to five pages showing cause why each such new complaint should not be dismissed for want of subject matter jurisdiction due to Plaintiff's lack of standing.

Lack of Diversity Jurisdiction

Once Plaintiff files any new complaints to accomplish the required severance, see supra, pp. 25-26, each such new complaint must stand on its own, including as to the existence of subject matter jurisdiction. See generally *Robinson, 2009 U.S. Dist. LEXIS 25988, 2009 WL 874530, at *2* ("Any forthcoming new complaints [carrying out a required severance] . . . must stand or fall of their own accord."). "Claim Nine" (Docket Entry 5, ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" **[*40]** (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id., ¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Five" (id., ¶¶ 169-77), "Claim Twenty Six" (id., ¶¶ 178-83), "Claim Twenty Nine" (id., ¶¶ 196-201), and "Claim Thirty Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court" assert only state law causes of action and fail to allege sufficient facts to support the Court's exercise of diversity jurisdiction under *28 U.S.C. § 1332(a)*.

For any new complaint as to said "Claims," the Court therefore will order Plaintiff to contemporaneously file a memorandum of up to five pages showing cause why the Court should not dismiss any such new complaint(s) for want of subject matter jurisdiction.

Lack of Allegations as to Place

"An allegation of . . . place is material when testing the sufficiency of a pleading." *Fed. R. Civ. P. 9(f)*. As documented in the prior summary of the "Counts" and "Claims" in the "Amended Complaint-Objection to Order of this Court," see supra, pp. 18-22, the allegations **[*41]** in Claims Six, Eight, Nine, Ten, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty Two, Twenty Three, Twenty Four, Twenty Five, Twenty Six, Twenty Seven, Twenty Eight, Thirty Two, and Thirty Three fail to provide sufficient information as to the place(s) where the events at issue occurred. Because of the materiality of allegations of "place" to the evaluation of the sufficiency of a complaint, the Court will order Plaintiff to allege where events relevant to the above-referenced claims took place in any new complaints he files as part of the severance required in this case, see supra, pp. 25-26.

Lack of Allegations as to Time

"An allegation of time . . . is material when testing the sufficiency of a pleading." *Fed. R. Civ. P. 9(f)*. As documented in the prior summary of the "Counts" and "Claims" in the "Amended Complaint-Objection to Order of this Court," see supra, pp. 18-22, the allegations in Count Three and Claims Four, Five, Six, Eight, Nine, Ten, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty One, Twenty Two, Twenty Three, Twenty Four, Twenty Six, Twenty Eight, Thirty Two, and Thirty Three fail to provide sufficient information **[*42]** as to the time(s) when the events at issue occurred. Because of the materiality of allegations of "time" to the evaluation of the sufficiency of a complaint, the Court will order Plaintiff to allege when events relevant to the above-referenced claims took place in any new complaints he files as part of the severance required in this case, see supra, pp. 25-26.

CONCLUSION

Plaintiff has misjoined claims against multiple defendants in contravention of *Federal Rule of Civil Procedure 20(a)(2)*, requiring severance pursuant to *Federal Rule of Civil Procedure 21*. Because certain of Plaintiff's claims contain allegations showing lack of venue, standing, and/or diversity jurisdiction, he must show cause why the Court should not transfer or dismiss any post-severance, successor complaints Plaintiff files as to such claims. In filing new complaints to carry out the required severance, Plaintiff also must include sufficient allegations as to the material matters of place and time. Finally, Plaintiff's objections to the Screening Order were untimely.

IT IS THEREFORE ORDERED as follows:

1) on or before December 30, 2011, for each of the 33 "Counts" or "Claims" in the "Amended Complaint-Objection to **[*43]** Order of this Court" (see Docket Entry 5, ¶¶ 6-235) that Plaintiff wishes to pursue, Plaintiff shall submit: A) a separate, independent, and legally sufficient new complaint that states to the right of the caption, "NEW COMPLAINT FOR SEVERED COUNT/CLAIM _____ IN 1:11CV316," with the corresponding number in the blank; and B) either a $350.00 filing fee or a proper application to proceed as a pauper;

2) if Plaintiff files a new complaint as to "Count One" (id., ¶¶ 6-16), "Count Two" (id., ¶¶ 17-22), "Count Three" (id., ¶¶ 23-37), "Claim Four" (id., ¶¶ 38-45), "Claim Five" (id., ¶¶ 46-55), "Claim Seven" (id., ¶¶ 63-69), "Claim Eleven" (id., ¶¶ 86-93), "Claim Twelve" (id., ¶¶ 94-100), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), or "Claim Twenty Five" (id., ¶¶ 169-77) of the "Amended Complaint-Objection to Order of this Court," he shall contemporaneously file a separate memorandum up to five pages in length with each such complaint showing cause in each such memorandum why each such new complaint should not be transferred to another district via *28 U.S.C. § 1406(a)*;

3) if Plaintiff files a new complaint as to "Claim Twenty **[*44]** Nine" (Docket Entry 5, ¶¶ 196-201), "Claim Thirty" (id., ¶¶ 202-07), or "Claim Thirty One" (id., ¶¶ 208-13) of the "Amended Complaint-Objection to Order of this Court," he shall contemporaneously file a separate memorandum up to five pages in length with each such complaint showing cause in each such memorandum why each such new complaint should not be dismissed for want of subject matter jurisdiction due to Plaintiff's lack of standing;

4) if Plaintiff files a new complaint as to "Claim Nine" (id., ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id., ¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Five" (id., ¶¶ 169-77), "Claim Twenty Six" (id., ¶¶ 178-83), "Claim Twenty Nine" (id., ¶¶ 196-201), or "Claim Thirty Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court," he shall contemporaneously file a separate memorandum **[*45]** up to five pages in length with each such complaint showing cause in each such memorandum why each such new complaint should not be dismissed for want of subject matter jurisdiction due to the fact that each such "Claim" asserts only state law causes of action and does not allege sufficient facts to support the Court's exercise of diversity jurisdiction under *28 U.S.C. § 1332(a)*;

5) if Plaintiff files a new complaint as to "Claim Six" (Docket Entry 5, ¶¶ 56-62), "Claim Eight" (id., ¶¶ 70-78), "Claim Nine" (id., ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id., ¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Four" (id., ¶¶ 166-68), "Claim Twenty Five" (id., ¶¶ 169-77), "Claim Twenty Six" (id., ¶¶ 178-83), "Claim Twenty Seven" (id., ¶¶ 184-87), "Claim Twenty Eight" (id., ¶¶ 188-95), "Claim Thirty Two" (id., ¶¶ 214-25), or "Claim Thirty Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court," Plaintiff shall include factual **[*46]** allegations as to the place(s) of occurrence of the events alleged as to each such "Claim";

6) if Plaintiff files a new complaint as to "Count Three" (id., ¶¶ 23-37), "Claim Four" (id., ¶¶ 38-45), "Claim Five" (id., ¶¶ 46-55), "Claim Six" (id., ¶¶ 56-62), "Claim Eight" (id., ¶¶ 70-78), "Claim Nine" (id., ¶¶ 79-82), "Claim Ten" (id., ¶¶ 83-85), "Claim Twelve" (id., ¶¶ 94-100), "Claim Thirteen" (id., ¶¶ 101-05), "Claim Fourteen" (id., ¶¶ 106-10), "Claim Fifteen" (id., ¶¶ 111-20), "Claim Sixteen" (id., ¶¶ 121-25), "Claim Seventeen" (id., ¶¶ 126-32), "Claim Eighteen" (id.,

¶¶ 133-36), "Claim Nineteen" (id., ¶¶ 137-41), "Claim Twenty" (id., ¶¶ 142-47), "Claim Twenty One" (id., ¶¶ 148-52), "Claim Twenty Two" (id., ¶¶ 153-57), "Claim Twenty Three" (id., ¶¶ 158-65), "Claim Twenty Four" (id., ¶¶ 166-68), "Claim Twenty Six" (id., ¶¶ 178-83), "Claim Twenty Eight" (id., ¶¶ 188-95), "Claim Thirty Two" (id., ¶¶ 214-25), or "Claim Thirty Three" (id., ¶¶ 226-30) of the "Amended Complaint-Objection to Order of this Court," Plaintiff shall include factual allegations as to the time(s) of occurrence of events alleged as to each such "Count" or "Claim"; and

7) the portion of the "Amended Complaint-Objection **[*47]** to Order of this Court" that falls under the heading "Objections to the Order of this Court" (id. at 46-47) will be disregarded as an untimely objection to a non-dispositive, pretrial ruling by a Magistrate Judge under *Federal Rule of Civil Procedure 72(a)*.

A FAILURE BY PLAINTIFF TO COMPLY WITH THIS ORDER IN A TIMELY MANNER WILL RESULT IN DISMISSAL WITHOUT PREJUDICE OF THIS ACTION WITHOUT FURTHER NOTICE TO PLAINTIFF. A FAILURE BY PLAINTIFF TO SUBMIT A PROPER NEW COMPLAINT FOR ANY "COUNT" OR "CLAIM" IN THE "AMENDED COMPLAINT-OBJECTION TO ORDER OF THIS COURT" BY DECEMBER 30, 2011, WILL RESULT IN THE DISMISSAL WITHOUT PREJUDICE OF THAT "COUNT" OR "CLAIM" WITHOUT FURTHER NOTICE TO PLAINTIFF.

/s/ L. Patrick Auld

L. Patrick Auld

United States Magistrate Judge

November 2, 2011

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[Sprint Nextel Corp. v. AT&T Inc.](#)

United States District Court for the District of Columbia

November 2, 2011, Decided; November 2, 2011, Filed

Civil Action No. 11-1600 (ESH); Civil Action No. 11-1690 (ESH)

Reporter
821 F. Supp. 2d 308 *; 2011 U.S. Dist. LEXIS 126573 **; 2011-2 Trade Cas. (CCH) P77,664

SPRINT NEXTEL CORP., Plaintiff, v. AT&T INC., et al., Defendants. CELLULAR SOUTH, INC., et al., Plaintiffs, v. AT&T INC., et al., Defendants.

Prior History: *United States v. AT&T Inc., 2011 U.S. Dist. LEXIS 125846 (D.D.C., Oct. 7, 2011)*

Core Terms

Cellular, carriers, wireless, antitrust, roaming, network, backhaul, allegations, mobile, acquisition, spectrum, anti trust law, customers, competitors, plaintiffs', merger, defendants', compete, input, proposed acquisition, markets, prices, wireless service, anticompetitive, injury-in-fact, purchaser, handsets, bands, concentration, manufacturers

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN1[] **Clayton Act, Claims**

Section 16 of the Clayton Act authorizes private parties to seek injunctive relief to protect against threatened loss or damage by a violation of the antitrust laws. *15 U.S.C.S. § 26*. While the statute's text is broad, providing for suits by any person, firm, corporation, or association, courts limit its reach to those plaintiffs that allege a threat of antitrust injury. Antitrust injury is injury of the type the antitrust laws were designed to prevent and that flows from that which makes the defendants' acts unlawful. Accordingly, a private antitrust plaintiff must allege more than threatened loss or damage that is merely causally linked to the defendant's anticompetitive behavior. The plaintiff must additionally allege that its threatened injury reflects the anticompetitive effect either of the antitrust violation or of anticompetitive acts made possible by the violation. Thus, even if a threatened injury is causally related to an antitrust violation, it will not qualify as antitrust injury unless it is attributable to an anticompetitive aspect of the practice under scrutiny.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN2[] Clayton Act, Claims

Determining whether a private party has standing to sue under § 16 of the Clayton Act requires a careful assessment of the connection between the threatened loss or damage, on the one hand, and the reason defendants' proposed conduct is allegedly illegal on the other. Conduct in violation of the antitrust laws may have three effects, often interwoven. In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can succeed only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN3[] Standing, Clayton Act

Methodologically, assessing antitrust injury at the pleadings stage of a suit under § 16 of the Clayton Act requires two distinct inquiries. First, does the plaintiff's complaint allege a threatened injury-in-fact? Second, does the threatened injury result from an anticompetitive aspect of the defendant's proposed conduct, i.e., that which would make the transaction illegal under the antitrust laws? The plaintiff has sufficiently pleaded a claim to antitrust injury only if its complaint satisfies both inquiries under the conventional *Fed. R. Civ. P. 8(a)* pleading standards that govern in all civil actions.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN4[] Clayton Act, Claims

The extent to which factors other than antitrust injury apply when plaintiffs sue for injunctive relief depends on the circumstances of the case, and the weight to be given the various factors will also necessarily vary depending on the context. Courts assessing the viability of a plaintiff's claim to antitrust injury on the pleadings under § 16 of the Clayton Act have considered whether the plaintiff's allegations are too speculative to be allowed to proceed. Indeed, § 16's requirement of threatened injury, *15 U.S.C.S. § 26*, dovetails with the U.S. Const. art. III requirement that in order to obtain forward-looking relief, the plaintiff must face a threat of injury that is both real and immediate, not conjectural or hypothetical. Thus, although § 16 of the Clayton Act protects against threatened loss or damage by a violation of the antitrust laws, *§ 26*, and although § 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency, the Clayton Act does not authorize suits by those whose allegations of threatened injury amount to little more than conjecture.

Antitrust & Trade Law > General Overview

HN5[] Antitrust & Trade Law

An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as horizontal.

Antitrust & Trade Law > Clayton Act > Scope

HN6[] **Antitrust & Trade Law, Clayton Act**

Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a buyer's monopoly. In their pure form, monopoly and monopsony refer to markets where there is but one seller or one buyer, respectively.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN7[] **Standing, Requirements**

To survive a motion to dismiss, the pleadings must suggest a plausible scenario that shows that the pleader is entitled to relief. Plaintiffs' antitrust complaints must therefore contain sufficient factual matter, accepted as true, to state a claim to antitrust standing that is plausible on its face. In particular, a naked assertion of antitrust injury is not enough; an antitrust claimant must put forth factual allegations plausibly suggesting (not merely consistent with) antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Standing, Requirements**

When allegedly anticompetitive behavior has the effect of either raising market price or limiting output and is therefore harmful to competition, it actually benefits competitors by making supra-competitive pricing more attractive. Put plainly, injury-in-fact is absent when a plaintiff complains only that its competitors' merger would be illegal because it would increase market concentration unduly.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Clayton Act, Claims**

That the Clayton Act enlists the assistance of competitors as private attorney generals to serve the high purpose of enforcing the antitrust laws does not obviate the requirement that competitors allege injury-in-fact. A private plaintiff must do more than to bring a carefully timed lawsuit as a potential backup to government action.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] **Standing, Requirements**

Where a defendant, by means of anticompetitive conduct, restricts or forecloses a competitor plaintiff's access to a necessary input, the resulting loss is injury of the type that the antitrust laws were designed to prevent. Indeed, the plaintiff has stated a theory of competitor harm that is cognizable under the antitrust laws when it has alleged that its rival's anticompetitive acts will result in its paying more for necessary inputs.

Antitrust & Trade Law > Clayton Act > Claims

HN11[] **Clayton Act, Claims**

Where monopsony power is the concern, what matters is market concentration on the buying side of the market, not the selling side.

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For AT&T, INC., AT&T MOBILITY LLC (1:11-cv-01690), Defendants: Mark C. Hansen, LEAD ATTORNEY, James M. Webster, KELLOGG HUBER HANSEN TODD & EVANS, PLLC, Washington, DC; Aaron Martin Panner, Michael K. Kellogg, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC, Washington, DC.

For T-MOBILE USA, INC., DEUTSCHE TELEKOM AG (1:11-cv-01690), Defendants: Mark C. Hansen, LEAD ATTORNEY, KELLOGG HUBER HANSEN TODD & EVANS, PLLC, Washington, DC; Mark W. Nelson, LEAD ATTORNEY, George S. Cary, CLEARY, GOTTLIEB, STEEN & HAMILTON, Washington, DC.

Judges: ELLEN SEGAL HUVELLE, United States District Judge.

Opinion by: ELLEN SEGAL HUVELLE

Opinion

[*312] MEMORANDUM OPINION

INTRODUCTION

These are antitrust **[**3]** cases between competing mobile wireless carriers. Before the Court are motions to dismiss lawsuits which Sprint and Cellular South brought to enjoin AT&T's proposed acquisition of T-Mobile. AT&T and T-Mobile move for dismissal pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, arguing that Sprint's and Cellular South's complaints fail to adequately allege that the merger would cause them "antitrust injury," and therefore that they lack the "antitrust standing" required to seek injunctive relief under *§ 16* of the Clayton Act, *15 U.S.C. § 26*. [1]

Plaintiff Sprint Nextel Corporation ("Sprint") is the third largest national provider of mobile wireless services, with 50 million wireless customers. (Sprint Compl. ¶ 96.) In 2010, Sprint "accounted for 15 percent of all mobile wireless services revenues." (*Id.*) Plaintiffs Cellular South, Inc., and its wholly owned subsidiary Corr Wireless Communications, L.L.C. (collectively, "Cellular South" unless otherwise stated), are regional carriers operating a wireless network that "serves more than 887,000 customers located in Mississippi, Tennessee, Alabama Florida, and other surrounding states." (Cellular South Compl. ¶¶ 1, 21.)

Defendant AT&T Mobility, L.L.C. ("AT&T"), the wholly owned subsidiary of defendant AT&T, Inc., is the second largest national carrier, [2] with 95 million customers. (Sprint Compl. ¶¶ 15, 94.) In 2010, AT&T "accounted for 32 percent of all mobile wireless services revenues." (*Id.* ¶ 94.) Defendant T-Mobile USA, Inc. ("T-Mobile"), the wholly owned subsidiary of defendant Deutsche Telekom AG, is **[**5]** the **[*313]** fourth largest national carrier, with 34 million customers. (Sprint Compl. ¶¶ 16, 97.) In 2010, T-Mobile "accounted for 12 percent of all mobile wireless services revenues." (*Id.* ¶ 97.)

On March 20, 2011, AT&T entered into a stock purchase agreement to acquire T-Mobile and to merge the two companies' mobile wireless services businesses. Five months later, the United States brought suit to enjoin the acquisition, alleging that its effect would "be substantially to lessen competition, or to tend to create a monopoly" in violation of *§ 7* of the Clayton Act. *15 U.S.C. § 18*. [3] Sprint and Cellular South filed the present suits in the subsequent weeks, [4] and defendants moved to dismiss both. [5]

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[1] Although properly treated as a threshold matter, antitrust standing is nonetheless an affirmative element of any antitrust suit brought by a private plaintiff and is assessed on a motion to dismiss according to the *Rule 12(b)(6)* standard, not that of *Rule 12(b)(1)* applicable to challenges to constitutional standing. *See* ***Palmyra Park Hosp. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1298 (11th Cir. 2010)*** (applying *Rule 12(b)(6)*); *NicSand, Inc. v. 3M Co., 507 F.3d 442, 447 (6th Cir. 2007)* (en banc) (same); *see also* ***Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1321 (9th Cir. 1996)*** (Trott, J., concurring) ("The plaintiff's ability to fulfill **[**4]** the requirements of antitrust standing is an essential threshold element of an antitrust case whereas constitutional standing is essential to the jurisdiction of the court.").

[2] Verizon "is the largest wireless carrier in the United States," with 104 million customers and 35 percent of mobile wireless services revenues. (Sprint Compl. ¶ 95.)

[3] *See* Complaint, *United States v. AT&T*, No. 11-cv-1560 (D.D.C. Aug. 31, 2011) [Dkt. No. 1].

[4] *See* Complaint, *Sprint v. AT&T*, No. 11-cv-1600 (D.D.C. Sept. 6, 2011) [Dkt. No. 1] ("Sprint Compl."); Complaint, *Cellular South v. AT&T*, No. 11-cv-1690 (D.D.C. Sept. 19, 2011) [Dkt. No. 1] ("Cellular South Compl.").

[5] *See* Motion to Dismiss, *Sprint v. AT&T*, No. 11-cv-1600 (D.D.C. Sept. 30, 2011) **[**6]** [Dkt. No. 16] ("Motion to Dismiss Sprint"); Motion to Dismiss, *Cellular South v. AT&T*, No. 11-cv-1690 (D.D.C. Sept. 30, 2011) [Dkt. No. 17] ("Motion to Dismiss Cellular South"). Sprint and Cellular South filed a joint opposition to AT&T's motions. *See* Joint Opposition, *Sprint v. AT&T* & *Cellular South v. AT&T*, No. 11-cv-1600 & No. 11-cv-1690 (D.D.C. Oct. 7, 2011) [Dkt. No. 26 & Dkt. No. 26] ("Joint Opp'n"). Defendants filed a combined reply brief. *See* Reply Memorandum, *Sprint v. AT&T* & *Cellular South v. AT&T*, No. 11-cv-1600 & No. 11-cv-1690 (D.D.C. Oct. 13, 2011) [Dkt. No. 27 & Dkt. No. 30] ("Reply").

The Court heard argument on defendants' motions on October 24, 2011. Having considered the parties' positions and the relevant legal principles, the Court will grant the motions except as to plaintiffs' claims regarding mobile wireless devices, and Cellular South's roaming claim insofar as it relates to Corr Wireless.

ANALYSIS

I. GOVERNING LEGAL PRINCIPLES

HN1[] *Section 16* of the Clayton Act authorizes private parties to seek injunctive relief to protect "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. While **[**7]** the statute's text is broad, providing for suits by "[a]ny person, firm, corporation, or association," *id.*, courts have limited its reach to those plaintiffs that allege a threat of "antitrust injury." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*.

Antitrust injury is injury "of the type the antitrust laws were designed to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Accordingly, a private antitrust plaintiff must allege more than threatened loss or damage that is merely "causally linked" to the defendant's anticompetitive behavior. *Id.* The plaintiff must additionally allege that its threatened injury "reflect[s] the anticompetitive effect either of the [antitrust] violation or of anticompetitive acts made possible by the violation." *Id.* Thus, even if a threatened injury is "causally related to an antitrust violation," it "will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

The antitrust injury requirement aligns antitrust suits **[**8]** brought by private parties "'with the purposes of the antitrust laws, **[*314]** and prevents abuses of those laws' by claimants seeking to halt the strategic behavior of rivals that increases, rather than reduces competition." *NicSand, 507 F.3d at 449-50* (quoting *HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991))*. "It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs . . . ." *Atl. Richfield Co., 495 U.S. at 342*.

When the Supreme Court first articulated the requirement in *Brunswick*, for example, it held that plaintiffs seeking treble damages for alleged antitrust violations under § 4 of the Clayton Act, *15 U.S.C. § 15*, had not established antitrust injury where they sought to recover for "profits they would have realized had competition been reduced" but for the defendant's pro- competitive activities. *429 U.S. at 488*. The Court did not dispute that plaintiffs had suffered injury-in-fact. Emphasizing that the antitrust laws "were **[**9]** enacted for 'the protection of competition not competitors,'" however, the Court held that it would be "inimical to the purposes of [those] laws to award damages" for injuries a competitor suffered from increased competition. *Id.* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*.

In *Cargill*, the Court applied the same principle in extending the antitrust injury requirement to suits for injunctive relief under *§ 16*. *See 479 U.S. at 109-13*. Monfort of Colorado, then the country's fifth-largest beef packer, sued to enjoin the acquisition of Spencer Beef, the number three beef packer, by Excel Corporation, the number two beef packer. *Id. at 106*. In its complaint, Monfort "alleged that the acquisition would 'violat[e] *[§] 7* of the Clayton Act because the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly.'" *Id. at 107* (first alteration in the original). Monfort further alleged that the acquisition would "result in a concentration of economic power in the relevant markets" that would allow the merged entity to bid up the cost of inputs and cause a drop in market prices, such that Monfort was threatened with a profit **[**10]** loss. *Id. at 107* (internal quotation marks omitted).

Finding Monfort's complaint "of little assistance" in "determining what Monfort alleged the source of its injury to be," *id. at 113*, the Court nonetheless was able to discern two distinct theories of injury that Monfort alleged: first, conventional price competition, and second, predatory pricing. [6] The Court concluded that neither theory supported Monfort's claim to antitrust injury. *Id. at 114-19*.

As to the first theory, the Court reasoned:

> *Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws **[**11]** protect competitors **[*315]** from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."

Id. at 116 (alteration in the original) (quoting *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir. 1984))*. As in *Brunswick*, where the Court did not question that plaintiff suffered lost profits, the *Cargill* Court accepted plaintiff's allegations of threatened injury-in-fact as sufficient. Nonetheless, the Court concluded that "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury." *Id. at 116-17*.

The Court then turned to Monfort's second claim of antitrust injury: the threat that Excel would engage in predatory pricing. *Id. at 117*. The Court stated that predatory pricing "is a practice that harms both competitors *and* competition" and recognized that, in theory at least, losses threatened by predatory pricing constitute **[**12]** an injury of the type the antitrust laws were designed to prevent. *Id. at 117-18* ("Predatory pricing is thus a practice 'inimical to the purposes of [the antitrust] laws,' *Brunswick*, [*429 U.S. at 488*], and one capable of inflicting antitrust injury.") (first alteration in the original). However, the Court concluded that Monfort had failed to properly press this claim before the district court, and that even if it had, it likely would not have succeeded given characteristics specific to the market it faced. *Id. at 118-19 & n.15*.

The Supreme Court's analysis in *Cargill* is instructive as to both the principles underlying the concept of antitrust injury and the method of inquiry it demands. ***HN2***[] Determining whether a private party has standing to sue under *§ 16* of the Clayton Act requires a careful assessment of the connection between the threatened loss or damage, on the one hand, and the reason defendants' proposed conduct is allegedly illegal on the other. As the Court clarified in *Atlantic Richfield*:

> Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in **[**13]** still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can [succeed] only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.

495 U.S. at 343-44.

HN3[] Methodologically, then, assessing antitrust injury at the pleadings stage of a *§ 16* suit requires two distinct inquiries. First, does plaintiff's complaint allege a threatened injury-in-fact? Second, does the threatened injury result from an anticompetitive aspect of defendant's proposed conduct, *i.e.*, that which would make the transaction illegal under the antitrust laws? A plaintiff has sufficiently pleaded a claim to antitrust injury only if its complaint satisfies both inquiries [7] under the conventional *Federal Rule of Civil Procedure 8(a)* pleading standards that

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[6] "Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill, 479 U.S. at 117*; *see id. at 117-19* nn.12,13,15.

govern **[*316]** "'in all civil actions.'" *Ashcroft v. Iqbal, 556 U.S. 662, 664, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009)* (quoting *Fed. R. Civ. P. 1*); *see* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-58, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. [8]

The Court's analysis, however, is not confined to the discrete question of whether Sprint and Cellular South have sufficiently alleged antitrust injuries. Antitrust injury is but one factor to be considered in assessing whether private plaintiffs have standing to sue under the antitrust laws. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the Supreme Court described other factors relevant to determining whether a plaintiff seeking treble damages pursuant to *§ 4* of the Clayton Act has antitrust standing: "the directness **[**15]** of the injury, whether the claim for damages is 'speculative,' the existence of more direct victims, the potential for duplicative recovery and the complexity of apportioning damages." *Andrx PharmS., 256 F.3d at 806* (citing *Associated Gen. Contractors, 459 U.S. at 542-45*); *accord* *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005)*.

To be sure, "many of these other factors are not relevant to the standing inquiry under *§ 16*," *Cargill, 479 U.S. at 110 n.5*, and therefore have no application here. The antitrust standing inquiry under *§ 16* is "less demanding" than that under *§ 4* because *§ 16* "provides for injunctive relief, not treble damages," and therefore "the risk of duplicative recovery or the danger of complex apportionment that pervades the analysis of standing under *[§] 4* is not relevant to the issue of standing under *[§] 16*." *Palmyra Park Hosp., 604 F.3d at 1299-1300* (internal quotation marks omitted); *accord* *Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 26, 264 U.S. App. D.C. 174 (D.C. Cir. 1987)*.

Ultimately, ***HN4***[] "[t]he extent to which [factors other than antitrust injury] apply when plaintiffs sue for injunctive relief depends on the circumstances of the case," and "the weight to be **[**16]** given the various factors will [also] necessarily vary" depending on the context. *Daniel, 428 F.3d at 443*. Of particular relevance here is the fact that courts assessing the viability of a § 16 plaintiff's claim to antitrust injury on the pleadings have considered whether the plaintiff's allegations are too speculative to be allowed to proceed. [9] Indeed, "Section 16's requirement of 'threatened injury,' *15 U.S.C. § 26*, dovetails with Article III's requirement that in order to obtain forward-looking relief, a plaintiff must face a threat of injury that is both 'real and immediate, not conjectural or hypothetical.'" *In re New Motor Vehicles* ***[*317]*** *Canadian Exp. Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008)* (some internal quotation marks omitted) (quoting *O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974))*. [10] Thus,

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[7] *Cf.* *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 806, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)* ("An antitrust plaintiff must establish . . . a threatened injury-in-fact caused by the defendant's **[**14]** alleged wrongdoing" and the injury "must be the kind of injury the antitrust laws were intended to prevent; it must 'flow[] from that which makes defendants' acts unlawful.'" (quoting *Brunswick, 429 U.S. at 489*)).

[8] *See, e.g.,* *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010)*, *cert. denied*, ***No. 10-1341, __ U.S. __, 132 S. Ct. 98, 181 L. Ed. 2d 26, 2011 U.S. LEXIS 6650***; ***__ U.S. __, 132 S. Ct. 98, 181 L. Ed. 2d 26, 2011 U.S. LEXIS 7004, 2011 WL 4530161 (Oct. 3, 2011)*** (applying the *Rule 8(a)* standard, as articulated in *Twombly* and *Iqbal*, to plaintiff's antitrust injury claims); *NicSand, 507 F.3d at 451* (same); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)* (same).

[9] *See, e.g.,* *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 321-22 (3d Cir. 2007)* (claims to antitrust injury that are "too speculative" because they allege only "secondary injury" from the proposed transaction are properly dismissed); *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 267-68 (3d Cir. 1998)* (plaintiff's allegations of an antitrust injury amounted only to a "speculative exercise," and plaintiff "cannot foist [its] version of what might have been on the court under the rubric of antitrust injury"); *cf.* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230-31, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (judgment as a matter of law is attained where plaintiff's "theory of competitive injury through oligopolistic price coordination depend[ed] upon a complex chain of cause and effect").

[10] *Cf.* *Associated Gen. Contractors, 459 U.S. at 535 n.31* (In § 4 suits, "the focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether **[**18]** the plaintiff

although § 16 of the Clayton Act protects "against *threatened* loss or damage by a violation of the antitrust laws," 15 U.S.C. § 26 (emphasis added), and although § 7 "was intended to arrest the anticompetitive effects of market power in their incipiency," FTC v. Procter & Gamble Co., 386 U.S. 568, 577, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967), the Act does not authorize suits by those whose allegations of threatened **[**17]** injury amount to little more than conjecture.

With these principles in mind, the Court turns to Sprint's and Cellular South's claims to antitrust standing and, in particular, antitrust injury. For purposes of this inquiry only, the Court assumes that AT&T's proposed acquisition of T-Mobile would violate § 7 of the Clayton Act, and focuses instead on whether plaintiffs have sufficiently alleged a threatened loss or damage stemming from an aspect or effect of the proposed acquisition that would make it illegal. [11]

II. PLAINTIFFS' CLAIMS

Sprint and Cellular South allege threatened injuries that stem from both horizontal and vertical aspects of AT&T's proposed acquisition of T-Mobile. That is to say: as participants in a number of different markets, wireless carriers are related both horizontally and vertically. In certain markets, the carriers compete with each other to sell outputs, and in other markets, they compete to purchase inputs. Such relationships are deemed horizontal in that they pit carriers against carriers, acting in parallel as either sellers or buyers. [12] (Where the carriers compete as sellers, the proposed acquisition raises monopoly concerns. Where they compete as buyers of inputs, the anticompetitive form is monopsony. [13]) In yet other markets, **[*318]** the wireless carriers buy and sell services to and from each other, and are therefore vertically related. [14] In this complex and constantly evolving industry, **[**20]** markets are interconnected and the carriers play multiple roles simultaneously. The Court will address plaintiffs' claims regarding the horizontal effects of the proposed acquisition before turning to their vertical claims, although it recognizes that this distinction is not always clear-cut.

Assuming the truth of the facts that the plaintiffs allege, the Court describes each relevant market and assesses the plaintiffs' claims of antitrust injury in it. ***HN7***[] "To survive a motion to dismiss, the pleadings must suggest a plausible scenario that shows that the pleader is entitled to relief." Jones v. Horne, 634 F.3d 588, 595, 394 U.S.

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is a proper party to bring a private antitrust action."); Ross v. Bank of Am., 524 F.3d 217, 224-25 (2d Cir. 2008) ("Antitrust standing demands a much more detailed and focused inquiry into a plaintiff's antitrust claims than constitutional standing.").

[11] Because the antitrust injury inquiry is concerned not with *whether* the defendant's conduct constitutes an antitrust violation, but rather questions *why* it would, courts assume a violation *arguendo. See* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 925 n.7 (3d Cir. 1999); Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc., 919 F.2d 1517, 1520 n.2 (11th Cir. 1990); Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1239 (3d Cir. 1987); **[**19]** *see also* IIA Phillip E. Areeda et al., ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 335f, at 75 (3d ed. 2007) ("To test standing in a private suit, . . . assume the existence of a violation and then ask whether the [antitrust standing] elements are shown.").

[12] *See* Brown Shoe, 370 U.S. at 334 (***HN5***[] "An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.'").

[13] ***HN6***[] "Monopsony power is market power on the buy side of the market. . . . As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007) (citation omitted) (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297 (1991)). *See generally* Roger D. Blair & Jeffrey L. Harrison, *Monopsony in Law and Economics* (2010). In their pure form, monopoly and monopsony refer to markets where there is but one seller or one buyer, respectively. Unless otherwise noted, the terms are used here to encompass **[**21]** markets where one firm, although competing with others, possesses market power.

[14] *See* Brown Shoe, 370 U.S. at 323 ("Economic arrangements between companies standing in a supplier-customer relationship are characterized as 'vertical.'").

App. D.C. 261 (D.C. Cir. 2011) (alterations and internal quotation marks omitted). Plaintiffs' complaints must therefore "contain sufficient factual matter, accepted as true, to state a claim" to antitrust standing "that is plausible on its face." Iqbal, 129 S.Ct. at 1949 (internal quotation marks omitted). In particular, "[a] 'naked assertion' of antitrust injury, the Supreme Court has made clear, is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." NicSand, 507 F.3d at 451 (quoting Twombly, 550 U.S. at 557).

A. Horizontal Effects

AT&T, T-Mobile, Sprint, **[**22]** and Cellular South are primarily competing wireless carriers: they compete horizontally to sell wireless services and a broad array of wireless devices, including basic mobile phones, smartphones (*e.g.*, Android phones, BlackBerry phones, the Apple iPhone), tablets (*e.g.*, the Samsung Galaxy Tab, the BlackBerry PlayBook, the Apple iPad), and other products that access their voice and data networks. [15] In addition to competing horizontally in the output market, the carriers compete horizontally in the input market, as purchasers of wireless devices: they attempt to secure the most desirable devices for their respective networks so they can sell them to customers. The carriers also compete horizontally as purchasers in the market for wireless spectrum, as they acquire new frequency bands and as they work to develop and buy network equipment, chipsets, and device antennae that operate on them.

1. The Market for Wireless Services

Sprint and Cellular South compete with AT&T, T-Mobile, and other wireless carriers— most prominently, Verizon— to sell wireless services. In the market that is of primary concern here, that for postpaid **[**23]** wireless services, [16] the "goods" in question consist of retail consumer plans and corporate and government plans that customers purchase so that they can use their wireless devices for voice calls, text **[*319]** messaging, and data delivery (*e.g.*, email and the internet). The relevant market prices are the monthly fees that consumers pay for postpaid wireless services and the bulk fee corporate and government entities negotiate for the same. (*See* Sprint Compl. ¶¶ 64-66, 72-74.)

Sprint and Cellular South allege that AT&T's acquisition of T-Mobile would affect an illegal concentration of market power and lead to higher retail wireless rates. Sprint opens its complaint by declaring that, "[i]n one fell swoop," the proposed transaction "would eliminate one of four national competitors" in the mobile wireless market "and marginalize **[**24]** a second (Sprint), pushing the market back toward a 1980s-style cell phone duopoly that would force consumers to endure higher prices and be denied the fruits of vigorous innovation." (*Id.* ¶ 1; *see also id.* ¶ 2 ("On its face, the horizontal combination of AT&T and T-Mobile is a classic violation of antitrust merger law, resulting in market concentration far in excess of the thresholds established by" law.); Cellular South Compl. ¶¶ 10-14.)

Standing alone, however, such allegations do not help to resolve the question of whether these competitor plaintiffs have pleaded antitrust injury. At issue here are Sprint's and Cellular South's allegations regarding the injuries that *they* will suffer if the merger is consummated. Alleging harm to consumers, while relevant to showing an antitrust violation, is not sufficient to demonstrate antitrust injury; harm to *consumers* by way of increased prices is the type of injury the antitrust laws were designed to prevent, but it is not an injury-in-fact that *competitors* suffer. [17] ***HN8***[]

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[15] The parties refer to these devices collectively as "handsets."

[16] "Typically, postpaid services require two-year contracts and are available only to customers who satisfy a credit check. Prepaid services, on the other hand, do not include two-year contracts" and instead "allow the subscriber to pay up front for a month of service, or are pay-as-you-go plans where a subscriber purchases . . . minutes in advance." (Sprint Compl. ¶ 65.)

[17] ***HN9***[] That the Clayton Act enlists the assistance of competitors as "private attorney generals" to "'serve . . . the high purpose of enforcing the antitrust laws,'" Cargill, 479 U.S. at 129 & n.6 (Stevens, J., dissenting) (quoting Zenith Radio Corp. v.

When allegedly anticompetitive behavior "[has] the effect of either raising market price or limiting output" and is therefore "harmful to competition," it "actually *benefit[s]* **[**25]** competitors by making supracompetitive pricing more attractive." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Put plainly, "injury-in-fact . . . is absent when a plaintiff complains [only] that its competitors' merger [would be] illegal because it [would] increase[] market concentration unduly." IIA Areeda et al., *supra*, ¶ 335f, at 73; *see id.* ¶ 348b.

That remains the case even if, as Sprint and Cellular South allege, the proposed acquisition will incentivize Verizon, "AT&T's most significant competitor post-merger, . . . to coordinate with AT&T rather than compete." (Sprint Compl. ¶ 3; *see id.* ¶¶ 195-98; Cellular South Compl. ¶¶ 73-76.) In *Matsushita Electrical Industrial Co.*, the Supreme Court addressed allegations by American television manufacturers that their Japanese rivals "had illegally conspired to drive American firms from the . . . market." *475 U.S. at 577-78*. The Court began its analysis "by emphasizing what [plaintiffs'] claim is *not*:"

> **[*320]** Nor can [plaintiffs] recover damages for any conspiracy by [defendants] to charge higher than competitive prices in the American market. Such conduct would indeed violate the [antitrust laws], but it could not injure [plaintiffs]: as [defendants'] competitors, [plaintiffs] stand to gain from any conspiracy to raise the market price in [televisions].

Id. at 582-83 (citations omitted). The Court's logic is directly **[**27]** applicable here. Whether the result of an increase in market concentration by itself, or "the oligopolistic price coordination" that "excessive concentration . . . portends," *Brooke Group Ltd., 509 U.S. at 229-30*, an increase in market prices alone does not harm competitors. To the contrary, "You *want* your competitors to charge high prices." *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 778 (7th Cir. 1999)* (Posner, J.). The possibility that a post-merger AT&T could raise market prices does not, without more, threaten injury-in-fact to Sprint and Cellular South. It therefore does not confer antitrust standing on them. [18]

2. The Market for Wireless Devices

Plaintiffs claim that wireless devices "are becoming the primary driver in selection of wireless service." (Cellular South Compl. ¶ 54.) "Device preference increasingly drives customer choice of wireless carriers." (*Id.*; *see* Sprint Compl. ¶ 79.) As such, wireless carriers compete with each other to secure the most desirable devices for their own networks, sometimes leveraging exclusivity deals with device manufacturers to aid their efforts. [19] Sprint and Cellular South allege that, together with Verizon, a post-merger AT&T would "foreclose their . . . access to the most innovative handsets and raise their costs," such that their "offers to [their] customers would be less attractive and [their] business would be injured." [20] (*Id.* ¶ 159-60; *see id.* ¶¶ 4, 7, 79, 84-87, 157, 159-69, 208; Cellular South

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Hazeltine Research, Inc., 395 U.S. 100, 130-31, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)), does not obviate the requirement that competitors allege injury-in-fact, *id. at 113* (citing *Brunswick, 429 U.S. at 489*). The conclusion that the Eleventh Circuit reached in a different context applies here with equal force: "[A private] plaintiff must do more than to bring a carefully timed lawsuit as a potential back-up to government action." *Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480, 1493 (11th Cir. 1989)* (denying attorney's fees to a competitor plaintiff where the plaintiff, because its **[**26]** § 16 suit stalled while the FTC pursued similar objections in a parallel court proceeding, had not demonstrated its own role in provoking the defendant to pro-competitive behavior).

[18] Sprint and Cellular South correctly note that defendants have not contested whether their complaints state a claim "that the acquisition violates [§] 7 by increasing AT&T's market power in the relevant wireless markets" and that it would "further enhance[] AT&T's power to raise prices post-merger." (Joint Opp'n at 16.) But regardless of whether those "allegations state a plausible *prima facie* [§] 7 claim for harm to competition" (*id.* at 16-17), they do not state a plausible claim to antitrust injury because they do not allege that Sprint and Cellular **[**28]** South would suffer injury-in-fact.

[19] Because the complaints **[**29]** do not allege that wireless carriers ever buy devices from each other, and instead describe the carriers as competing with each other to buy them from manufacturers, the alleged effects of the acquisition on the market for devices are horizontal even though the devices themselves are akin to inputs.

Compl. ¶¶ 12, 26, 50-63.) The increased market concentration brought about by the proposed acquisition would, according to Sprint, "enable both AT&T and Verizon to coerce exclusionary handset deals . . . without AT&T having gained that advantage through competition on the merits." (Sprint Compl. ¶ 160.)

HN10[] Where a defendant, by means of anticompetitive conduct, restricts or forecloses a competitor plaintiff's access to a necessary input, courts have found that the resulting loss is injury of the type that the antitrust laws were designed to prevent. *See Eastman Kodak Co. v. Image Technical* ***[*321]*** *Servs., Inc., 504 U.S. 451, 478, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., No. 97 CIV. 5499, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295, at *22 (S.D.N.Y. March 9, 2000)*; *Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F.Supp. 860, 878 (W.D.N.Y. 1994)*; **[**30]** *Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1276 (E.D.Pa. 1987)*. [21] Indeed, defendants concede that a plaintiff has stated a "theory of competitor harm" that is cognizable under the antitrust laws" when it has alleged that its rival's anticompetitive acts will result in its paying more for necessary inputs. (Reply at 2.) [22]

In *Eastman Kodak*, firms that serviced Kodak photocopiers (independent service organizations or "ISOs") alleged that Kodak acted anticompetitively when it "adopted policies to limit the availability of parts to [those firms] and to make it more difficult for [them] to compete with Kodak in servicing Kodak equipment." *504 U.S. at 455*. Kodak machines required Kodak parts, and Kodak parts were only available from Kodak directly or by way of original-equipment manufacturers ("OEMs") that contracted with Kodak. *Id. at 456-57*. When Kodak limited direct sales of parts to "buyers of Kodak equipment who use[d] Kodak service or [who] repair[ed] their own machines," and additionally struck agreements with the OEMs preventing them from selling parts to anyone but Kodak, the ISOs "were unable to obtain parts from reliable sources . . . and many were forced out of business, while others lost substantial revenue." *Id. at 458*. The ISOs sued, alleging "that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak **[**32]** machines, in violation of § 2 of that Act." *Id. at 459* (citing *15 U.S.C. §§ 1*, *2*). [23]

Neither the Supreme Court nor the lower courts questioned whether the ISOs had established antitrust injury, [24] notwithstanding that they were Kodak's competitors in the market for servicing Kodak photocopiers. Indeed, the Supreme Court was unequivocal in declaring that Kodak's "alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent." *Id. at 478*. This was

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[20] The "most innovative handsets" are smartphones, "which integrate computer operating systems with phone capabilities and high resolution cameras." (Sprint Compl. ¶ 80; *see* Cellular South Compl. ¶ 52.) In addition to being desirable to consumers, smartphones are attractive to carriers because with their purchase, subscribers typically sign-up for expensive data plans.

[21] *See also* Edward A. Snyder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, *90 Mich. L. Rev. 551, 561-63 (1991)* (surveying literature exploring the "raising rivals' costs" theory of antitrust injury and describing why "the premise underlying" the theory "is straightforward"); *id. at 585* ("Allegations of anticompetitive exclusion, if properly framed, will satisfy the antitrust injury requirement."); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, *96 Yale L.J. 209 (1986)*.

[22] (*See also* Motion to Dismiss Sprint at 6 ("competitors have established standing where they have plausibly alleged that they would be excluded from a market or suffer harm as a result of vertical effects of a merger—usually, foreclosure of supply of a needed input" (citing, *inter alia,* ***[**31]*** *Six West* and *Bon-Ton Stores*)).)

[23] The ISOs sought both damages and injunctive relief. *Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1201 (9th Cir. 1997)*.

[24] *See Image Technical Servs., Inc. v. Eastman Kodak Co., No. C-87-1686-WWS, 1988 U.S. Dist. LEXIS 17218, 1988 WL 156332 (N.D. Cal. April 18, 1988)*, *rev'd*, *903 F.2d 612 (9th Cir. 1990)*. In fact, Kodak did "not dispute [the ISOs'] standing to bring [their *§] 2* claim." *Image Technical Servs., Inc., 903 F.2d at 619 n.6*.

so even though there existed some alternative sources of Kodak parts, *id. at 458 & n.2*, and even though Kodak did not have market **[*322]** power in the interbrand market for its equipment. *Id. at 465*.

What distinguishes the present case from *Eastman* ***[**33]*** *Kodak*, however, is the alleged source of the defendants' power to impair plaintiffs' ability to compete in the input market. In *Eastman Kodak*, the defendant was both the plaintiffs' competitor and their supplier. Here, the wireless carriers—plaintiffs, defendants, Verizon, and all the rest, national and regional alike—compete against each other as fellow purchasers of wireless devices, which they procure from manufacturers in order to sell to consumers. [25] It would not be the alleged antitrust violation—AT&T's acquisition of T-Mobile—but rather the "anticompetitive acts made possible by the violation" that plaintiffs claim would injure them. *Brunswick Corp., 429 U.S. at 489*. Theirs is a threatened "injury of the type the antitrust laws were intended to prevent," *id.*, but because their theory depends on the merged entity's monopsony power, and not its simple ability to refuse to sell to them, alleging a plausible threat of loss or damage is a more complex task for Sprint and Cellular South than it was for the *Eastman Kodak* plaintiffs.

Yet, other plaintiffs have succeeded on similar theories in the past. In *Six West*, an independent theater operator challenged the merger of its two major competitors, theater chains that were owned by vertically integrated movie distributors. *2000 U.S. Dist. LEXIS 2604, 2000 WL 264295, at *1-2, 21*. The plaintiff alleged that, because the transaction would "effectuate[] intimate affiliations between exhibitors . . . and distributors," it would "'impede plaintiff's ability to obtain quality motion pictures.'" *Id. at *21* (quoting plaintiff's amended complaint). The Court concluded that plaintiff had alleged an antitrust injury because the merger would "effectively[] depriv[e] [p]laintiff of its ability to compete for first-run films." *Id. at *22*.

In *Bon-Ton Stores*, the Bon-Ton department store chain sought **[**35]** to enjoin the acquisition of McCurdy's, one of its local competitors, by May, one of its large national competitors. *881 F.Supp. at 862-63*. With the acquisition, May would have acquired all of the available retail space for a department store in all of the main malls in Rochester, New York. *Id. at 865*. Bon-Ton argued that the merger would hinder its ability to enter the Rochester market because store space in malls was critical to the department store business. *Id. at 876-77*. The Court issued a preliminary injunction and denied defendants' motions to dismiss, concluding that Bon-Ton's threat of "effective exclusion from the Rochester market" constituted antitrust injury. *Id. at 878* ("Courts have held in many cases that a business which has been prevented from entering (and thus competing in) a market have standing to sue under the antitrust laws." (collecting cases)).

Finally, in *Tasty Baking*, the manufacturer of Tastykake snack cakes sued to unravel the merger of the manufacturers of the Hostess and Drake snack cake brands. *653 F. Supp. at 1254*. The plaintiff alleged that the transaction would "impair [its] ability to enter new markets and develop business, by facilitating [defendants'] **[**36]** negotiations with retailers for better **[*323]** store shelf space and promotional time slots in markets where [plaintiff] does compete and by" enabling the merged entity to engage in predatory pricing. *Id. at 1255*. The Court concluded that the plaintiff had "alleged antitrust injury," and rejected defendants' argument that plaintiff's harm stemmed from defendants' "increased operating efficiencies" as stating "a factual dispute" but not "demonstrat[ing] any inadequacy" in the pleading. *Id.* Turning to the evidence adduced at the hearing on the preliminary injunction, the Court paid particular attention to the plaintiff's allegations of "threatened predatory non-pricing actions." *Id. at 1276*. The Court found support in the record for plaintiff's claims that defendants could "successfully pressure retailers" to stop carrying its products, to place them in less desirable locations in stores, and to allot them less promotional time. *Id. at 1273*. The Court concluded that because plaintiff's "entry into, expansion within, and preservation of share in relevant markets could be frustrated by defendants'" anticompetitive strategies, *id.*, plaintiff had standing to sue. *Id. at 1274*.

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[25] The national carriers sometimes work directly with manufacturers to develop new devices for their networks. (*See* Sprint Compl. ¶ 82.) Regional carriers **[**34]** such as Cellular South have had far less success in this regard, allegedly because of their small subscriber base. (*See* Cellular South Compl. ¶¶ 53, 58; *see also* Sprint Compl. ¶ 84 ("Because" device manufacturers "commonly require volume commitments from carriers," those "with small subscriber bases are at a significant disadvantage in attracting OEMs to develop new devices or technology for their networks.").)

Mobile wireless devices, **[**37]** and smartphones in particular, are Sprint's and Cellular South's first-run movies, mall locations suitable for department stores, and shelf space and promotional time, for they are necessary inputs for plaintiffs' businesses. (Cellular South Compl. ¶ 54; Sprint Compl. ¶ 79.) Like the plaintiffs in *Six West*, *Bon-Ton Stores*, and *Tasty Baking*, Sprint and Cellular South have alleged that the transaction in question threatens their continued access to these inputs. [26] As a general matter, plaintiffs' threatened injuries are those of the type the antitrust laws were designed to prevent, and courts have approved claims similar to those specifically raised here.

Nonetheless, the Court must still determine the sufficiency of plaintiffs' pleadings, and in particular the plausibility of their threat to injury-in-fact arising from the monopsony power AT&T would gain in the market for mobile wireless devices with the acquisition of T-Mobile. **[*324]** Defendants argue that, because plaintiffs' complaints do not describe the state of competition among device manufacturers, their claims must fail. The Court disagrees. ***HN11***[] Where monopsony power is the concern, what matters is market concentration on the buying side of the market, not the selling side. *Weyerhaeuser Co., 549 U.S. at 320* ("Monopsony power is market power on the buy side of the market."); *see also* *Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001)* (Sotomayor, J.) (Because "the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[,] . . . [a] greater availability **[**40]** of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question." (citation and internal quotation marks omitted)). [27] That there may be and, indeed, by all accounts is, healthy competition among firms that *sell* mobile wireless devices is irrelevant to understanding whether, by acquiring T-Mobile, AT&T could so increase its *buying* power as to dictate terms to device manufacturers and otherwise impair plaintiffs' access to these necessary inputs. [28] Judged against these standards, the Court concludes that plaintiffs' complaints contain sufficient facts, which must at this stage be accepted as true, to state a plausible claim to threatened loss or damage in the market for mobile wireless devices.

Sprint's and Cellular South's complaints provide factual support for the allegation that AT&T already possesses significant market power as a purchaser of mobile wireless devices, and that the acquisition of T-Mobile threatens them with harm. Sprint alleges that the proposed transaction would add T-Mobile's 34 million customers to AT&T's

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[26] Contrary to defendants' assertions (*see* Reply at 12 n.9), plaintiffs' allegations in *Six West, Bon-Ton Stores*, and *Tasty Baking* resemble those made here by Sprint and Cellular South: both go to reduced access or increased costs even while employing "foreclosure" language at times. *Compare* *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 265296, at *22* ("Plaintiff alleges that the merger causes antitrust injury by *restraining* [its] access to quality motion pictures" and "*limit[ing]* [its] ability to obtain select movies." (emphasis added)) *and* *Bon-Ton Stores, 881 F. Supp. at 876-77* **[**38]** (Bon-Ton's chairman "testified that it is *more economical* to open a store in a mall as opposed to a standalone location or strip center," and the Court concluded that, while the merger would not make entry by a competitor "impossible," it was nonetheless "obvious that a significant and substantial barrier to entry would exist if May obtained all the present space in the four major regional shopping malls." (emphasis added)) *and* *Tasty Baking Co., 653 F. Supp. at 1255* (Plaintiff "claim[s] that defendants' monopolization illegally will *impair* [plaintiff's] ability to enter new markets and develop business . . . ." (emphasis added)) *with* (Sprint Compl. ¶ 160 ("With *reduced* access to the latest handsets post-acquisition, Sprint's offers to its customers would be less attractive and its business would be injured." (emphasis added)) *and id.* ¶ 163 (alleging that the proposed acquisition "would result in Sprint, as well as smaller carriers, facing . . . increased costs" and "substantial delays" for "the latest phones and consumer devices") *and* Cellular South Compl. ¶ 26 ("Regional carriers will not be able to obtain the latest wireless devices *in a timely fashion and at reasonable cost.*" (emphasis **[**39]** added)) and *id.* ¶ 58 ("The proposed merger would *reduce access* to the latest devices . . . . (emphasis added))). Regardless, as an economic concept market foreclosure is measured in terms of costs: when costs are prohibitive, firms exit, or choose not to enter, markets.

[27] Indeed, the prototypical monopsonist is the factory in the company town. Because the factory is the sole employer—the sole purchaser of labor—it can dictate wages, benefits, and working conditions regardless of how large the town's population. *See, e.g.*, M. Todd Henderson, *The Nanny Corporation*, *76 U. Chi. L. Rev. 1517, 1553 (2009)* ("Company towns were isolated geographically, attracted specialized labor, and were therefore often monopsony buyers of labor **[**41]** over large geographic and skill areas.").

[28] *See* Blair & Harrison, *Monopsony in Law and Economics, supra*, at 93 ("A monopsony issue in the area of horizontal mergers is raised when one buyer acquires a rival buyer and thereby increases the possibility that there will be an undesirable concentration of power on the buying side of the market." (emphasis deleted)).

95 million customers, leaving the merged entity with 129 million customers (a 37 percent increase) (Sprint Compl. ¶¶ 94, 97) and controlling "in excess of 40 percent of the national markets." (*Id.* ¶ 2; *see id.* ¶ 138; Cellular South Compl. ¶ 9 (alleging United States customer numbers for the national and regional carriers in the second quarter of 2011).).

Crucially, Sprint then alleges two links between a carrier's power as a seller in the output market and a carrier's power as a buyer in the input **[**42]** market. The first regards volume commitments:

> Given the expense of developing new handsets, [manufacturers] commonly require volume commitments from carriers in order to spread R&D and production costs over a large volume of unit sales. Because of these volume commitments, carriers with smaller subscriber bases are at a significant disadvantage in attracting [manufacturers] to develop new devices or technology for their networks. For example, while regional carriers now offer some smartphones, [manufacturers] developing handsets with the latest technology tend to design them for the large national carriers because they have the ability to sell the **[*325]** most phones, thus spreading R&D costs over a larger number of units.

(Sprint Compl. ¶ 84.)

Sprint's second alleged connection between concentration in the selling and buying markets relates to "exclusivity arrangements or 'time-to-market' advantages" through which larger carriers secure exclusive access to certain devices—typically "cutting-edge smartphones"—for a specific period of time. (*Id.* ¶ 85; *see* Cellular South Compl. ¶¶ 58-59.) Sprint alleges that the Federal Communications Commission ("FCC") has found that while larger carriers can **[**43]** negotiate handset exclusivity agreements, smaller carriers such as Sprint cannot. (Sprint Compl. ¶ 85.) Sprint cites Apple's iPhone as an example. AT&T was the exclusive provider of the "iconic" iPhone from 2007 until early 2011, when Apple "gave Verizon a time-to-market advantage . . . most likely because Verizon had the largest subscriber base in the United States." (*Id.* ¶ 86.) Accordingly, Sprint "had to compete without access to the iPhone for nearly five years." (*Id.*) [29] That AT&T and Verizon thus wielded their purchasing power in the past substantiates Sprint's claim to threatened injury-in-fact from the merger:

> As a result of the proposed transaction's illegal increase in market concentration, the size and scale differential between AT&T and Verizon on the one hand, and Sprint and the fringe carriers on the other hand, would increase dramatically. This would enable both AT&T and Verizon to coerce exclusionary handset deals . . . without AT&T having gained that advantage through competition on the merits. With reduced access to the latest handsets post-acquisition, Sprint's offers to its customers would be less attractive and its business would be injured.

(*Id.* ¶ 160; *see id.* ¶ **[**44]** 162 (alleging that, in addition to endowing AT&T with the ability to secure more exclusive handset arrangements, the merger would allow AT&T to extract longer exclusivity periods).) [30]

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[29] The Court can take judicial notice of the fact that Sprint gained the ability to sell the iPhone with the release of the iPhone 4S on October 14, 2011, and that Cellular South will also reportedly sell the iPhone. *See* Darren Murph, *Sprint iPhone Officially Announced: iPhone 4 and 4S Both On the Way*, engadget.com, October 4, 2011, *available at* http://www.engadget.com/2011/10/04/sprint-iphone-officially-announced-on-sale-october-14/; Roger Cheng, *Apple iPhone 4S: Soon at C Spire, But Not T-Mobile*, CNET.com, October 19, 2011, *available at* http://news.cnet.com/8301-1035_3-20122553-94/apple-iphone-4s-soon-at-c-spire-but-not-t-mobile/. Nonetheless, Sprint's allegation that even it, the nation's third-largest wireless carrier, lacked access to the iPhone for almost five years adds plausibility to its alleged threat of harm from the proposed acquisition.

[30] The Court does not imply that handset exclusivity arrangements are themselves improper under the antitrust laws. To the contrary, courts have concluded that **[**45]** restraints of this type are not anticompetitive. *See, e.g.,* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 245 (2d Cir. 1997). Rather, the Court merely credits Sprint's allegation that it will suffer harm from future exclusivity arrangements if AT&T acquires additional buying power in the market for devices.

Cellular South's claims to antitrust injury from the proposed transaction's effect on the market for wireless devices are, if anything, even more plausible. Cellular South adds narrative to the numbers and market logic alleged by Sprint:

> Cellular South and other carriers have often been refused access to current devices and given access only when the device is no longer the most current model. Cellular South and other carriers **[*326]** receive older phones at higher prices. The proposed merger will continue and exacerbate that conduct.

(Cellular South Compl. ¶ 53; *see id.* ¶¶ 60, 63, 87.)

Cellular South also focuses on the proposed acquisition's elimination of "T-Mobile as an independent source of demand for wireless devices," thus squarely stating a monopsony concern. (Cellular South Compl. **[**46]** ¶ 12; *see id.* ¶ 26 ("AT&T's acquisition of T-Mobile would further consolidate an already concentrated wireless industry and remove one independent customer (T-Mobile) with millions of device customers from the already short list of those wireless carriers ordering devices from device manufacturers.").)

But Cellular South worries about more than the mere fact of the post-merger AT&T's enhanced buying power in the market for devices. It alleges that the proposed transaction would exacerbate its network interoperability woes. As will be discussed in more detail below, not all carriers' networks are compatible with each other: phones designed for one network cannot be used on many others. (*See* Section II(B)(1), *infra.*) Cellular South claims that AT&T and Verizon have exercised their purchasing power in the markets for devices and network equipment to propagate "their own separate 'ecosystems' of compatible infrastructure . . . that cannot be utilized by other competitors," and that the proposed acquisition would increase the big carriers' "incentive and power to exclude competitors from those ecosystems." (Cellular South Compl. ¶ 50.) Accordingly, "Without T-Mobile's independent demand **[**47]** for devices, device manufacturers will be even less willing to design or build devices for any carrier, like Cellular South, which is operating outside of the ecosystem of one or the other of [Verizon and AT&T]." (*Id.* ¶ 52.) In other words, Cellular South alleges that the proposed acquisition threatens its access not only to handsets that are particularly desirable, but also, more fundamentally, to whole "ecosystems" of devices and network infrastructure—and customers. Based on these allegations, the Court concludes that Cellular South's complaint also satisfies *Twombly* as regards its claim of threatened injury-in-fact from an anticompetitive aspect of the proposed merger—AT&T's acquisition of monopsony power in the market for mobile wireless devices.

By contrast, certain of the plaintiffs' seemingly device-related claims do not plausibly allege threatened injury-in-fact. Sprint states that the post-merger AT&T would, with Verizon, compose a "Twin Bell duopoly" gatekeeper, controlling "access to the wireless bridge between upstream developers and the consumers they seek to connect with via wireless communications." (Sprint Compl. ¶ 9; *see id.* ¶¶ 187-88.) This may be a plausible allegation, **[**48]** but it does not describe a threatened loss or damage to *Sprint*, as opposed to one faced by the upstream producers: merely claiming that "independent wireless carriers . . . would not have the features and content required to compete," (*id.* ¶ 188), does not suffice in the absence of facts about the market relationship between the carriers and those producers.

Sprint's claim to threatened injury arising from the potential loss of T-Mobile as a partner in ventures "to create substantial scale for the creation of new handsets and to compete with [AT&T and Verizon] for such handsets" also fails. (*Id.* ¶ 161.) Sprint frames this allegation in terms of "innovation in handsets," (*id.* ¶ 169; *see, e.g., id.* ¶¶ 4, 91; Joint Opp'n at 29), but in order to state a claim to antitrust injury it must do more—again, it must allege its own injury-in-fact stemming from defendants' allegedly anticompetitive behavior. **[*327]** Along these lines, Sprint describes its past collaboration with T-Mobile in the Open Handset Alliance ("OHA"), where the two carriers worked with "mobile device and component manufacturers, software developers, semiconductor manufacturers," and others to "develop[] the Android mobile phone device **[**49]** platform." (Sprint Compl. ¶¶ 88-90.) Sprint argues that the proposed acquisition would "stifle collaborative efforts like the OHA in the future." (Joint Opp'n at 29; *see* Sprint Compl. ¶ 169 ("Absent the proposed acquisition by AT&T, T-Mobile would continue to have the incentive and ability to partner with Sprint and other carriers.").) And yet Sprint's chosen example, the OHA, included a number of firms engaged in various aspects of the wireless market. (*Id.* ¶ 89.) Even accepting that the merger would eliminate T-Mobile as a potential participant in such ventures, there are no facts alleged that plausibly suggest their demise.

Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995), is of no help to Sprint here. There, in determining that the plaintiff newspaper, the *Daily Record*, had antitrust standing to challenge the acquisition of one of its local competitors (the *Times*) by another of its local competitors (the *Morning News*), the Court found it significant that the challenged acquisition would spell the likely end "of a news and advertising sharing agreement" that was then in effect between the *Daily Record* and the *Times. Cmty.* Publishers, Inc., 892 F. Supp. at 1166. **[**50]** Because of the dynamics of the local newspaper market and the fact that the agreement was only between the *Daily Record* and the *Times*, the Court assumed that the "anticompetitive incentive to terminate" the agreement would inevitably lead to the agreement's end. *Id. at 1167*. Here, by contrast, Sprint acknowledges that the OHA consists of many players, from many different industries. (Sprint Compl. ¶ 89.) Even if T-Mobile was a "critical, pioneering member[]" of the OHA, (*id.*), Sprint's complaint fails to allege facts in support of the claim that the proposed acquisition would cause the OHA to fall apart or leave Sprint without alternative partners in its quest to develop new wireless devices.

As discussed, however, the plaintiffs' complaints do state plausible claims that the proposed acquisition threatens them with loss and damage in the market for handsets generally. Because their threatened injuries "flow[] from that which makes defendants' acts unlawful" in that they would result from the post-merger AT&T's increased monopsony power in a market for inputs that are necessary to their ability to compete, Sprint and Cellular South have adequately alleged a threatened antitrust injury **[**51]** with regard to the proposed acquisition's effects on their access to mobile wireless devices. *Brunswick Corp., 429 U.S. at 489*.

3. The Market for Wireless Spectrum and Network Development

To assess Sprint's claims of potential injury in the market for wireless spectrum, it is first necessary to provide a brief explanation of contemporary mobile wireless technology and the government's role in regulating certain aspects of it.

Mobile wireless devices "convert voice, text, and data into radio signals, which are then transmitted to a cell site," consisting of an antenna or an array of antennas and "typically located on a tower or building." [31] (Sprint Compl. ¶ 24.) The FCC, "which is authorized under federal law to **[*328]** allocate the use of radio spectrum, established cellular telecommunications service" in 1981. (*Id.* ¶ 25.) The FCC "license[s] bands of spectrum in increments measured in hertz . . . to wireless providers." (*Id.* ¶ 34.) "The value of particular spectrum bands depends on many factors." (*Id.*)

One factor affecting a band's value is the "propagation **[**52]** characteristics of the spectrum." (*Id.*) For example, "Lower frequency signals travel greater distances and penetrate buildings and other obstructions more effectively." (Cellular South Compl. ¶ 48; *see* Sprint Compl. ¶ 35.) "The FCC has licensed radio spectrum for commercial mobile wireless use primarily in bands between 700 MHz and 2500 MHz." (*Id.* ¶ 35.) Because the 700 MHz band (so-called "beachfront spectrum") is the "lowest frequency spectrum that the FCC has licensed for commercial mobile wireless communications," and therefore has "excellent propagation characteristics" such that "it can be built out with fewer cell sites and therefore less expensively than high frequency spectrum," (*id.* ¶ 37), licenses for it are highly desirable from the perspective of wireless carriers. (Cellular South Compl. ¶ 48). [32]

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[31] For an explanation of how signals from the wireless networks connect to the traditional wireline network, see Section II(B)(2), *infra.*

[32] Sprint alleges that "AT&T and Verizon together control 92 percent of the paired 700 MHz spectrum suitable for commercial mobile broad band use in the top 54 most populous U.S. markets, and 100 percent of the paired 700 MHz spectrum suitable for commercial mobile broadband in the top 10 markets." (Sprint Compl. ¶ 38.) Cellular South alleges that, when the FCC "auctioned much **[**53]** of the 700 MHz spectrum" in early 2008, "AT&T and Verizon were able to purchase most" of it, "winning 85% (by value) of the paired spectrum." (Cellular South Compl. ¶ 47.) Sprint and Cellular South do not describe their own holdings of beachfront spectrum, nor do they allege how much T-Mobile has (and therefore how much of it AT&T would stand to gain if the proposed merger were to be consummated).

Another factor affecting a spectrum band's value is "the extent to which an ecosystem of compatible infrastructure, equipment, and handsets exists for the bands" (Sprint Compl. ¶ 34) because, for example, the antenna on a mobile device and that at a cell site must be tuned to the same band in order for them to connect. [33] (*Id.* ¶ 57.) "Wireless carriers design and build their network infrastructure for specific spectrum bands." (*Id.* ¶ 40.) Bands that are "in use already have ecosystems of compatible infrastructure, equipment, and handsets," but developing a network on bands that have only recently been allocated by the FCC, such as the desirable beachfront spectrum on the 700 MHz band, requires "considerable investment." (*Id.*)

To the extent that Cellular South's claims regarding wireless spectrum relate to cutting-edge wireless devices, these allegations have been addressed above. (*See* Section II(A)(2), *supra.*) Sprint, on the other hand, focuses on the fact that the merger "would add T-Mobile's spectrum to AT&T's already substantial spectrum holdings." (*Id.* ¶ 170.) Sprint also claims that, "[a]bsent the acquisition of T-Mobile, all of the national wireless carriers, with the possible exception of Verizon, likely would seek spectrum in 'new' bands for which the research and development costs for new equipment have not yet been incurred." (*Id.* ¶ 171.) Thus, "[b]y acquiring developed spectrum through the T-Mobile acquisition, AT&T would effectively and improperly shift the costs of spectrum development to Sprint and other carriers" and "further weaken their ability to compete on the merits by increasing **[*329]** their costs and delaying their access to new equipment." (*Id.*)

What differentiates **[**55]** this claim from plaintiffs' devices claims is that here, Sprint has not alleged that the proposed transaction would be a merger-to-monopsony. Sprint does not claim that the acquisition would enable AT&T to muscle other carriers out of FCC auctions for wireless spectrum, but rather, that the transaction would add to AT&T's inventory of spectrum and reduce its network development costs. To the extent Sprint challenges the mere fact that, if AT&T acquires T-Mobile, it will also acquire some additional amount of spectrum, Sprint does not allege injury-in-fact. Without additional guidance as to this claim, the Court is left to assume that AT&T's acquisition of T-Mobile's spectrum would threaten Sprint with injury-in-fact only if the acquisition would curtail Sprint's access to a supply of spectrum that it demonstrably needed. The parties differ significantly as to the sufficiency of AT&T's spectrum holdings, [34] but Sprint neither alleges facts about T-Mobile's holdings nor describes its own holdings. Without more, Sprint has not alleged facts sufficient to state a claim to antitrust injury arising from AT&T's acquisition of T-Mobile's unknown stock of spectrum.

Sprint also claims antitrust injury on the theory that "[b]y acquiring developed spectrum through the T-Mobile acquisition, AT&T would effectively and improperly shift the costs of spectrum development to Sprint and other carriers[,] . . . further weak[ening] their ability to compete on the merits by increasing their costs and delaying their access to new equipment." (*Id.*; *see id.* ¶ 174.) In that it describes the carriers as collaborating successfully on market development, [35] this assertion stands in sharp contrast to a complaint that is otherwise thick with allegations of cut-throat rivalry and predatory behavior in the market for mobile wireless services. Furthermore, even if the carriers' uncoordinated **[**57]** actions in developing new spectrum bands have yielded positive externalities in the past, what would be anticompetitive about the proposed acquisition if it eliminated those externalities and the carriers had to pay their own costs or, as it seems that Sprint is alleging, if the acquisition caused the costs to be split three ways rather than four? This assertion lacks sufficient factual support.

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[33] Another requirement for connection is that a mobile device and **[**54]** a mobile network use the same transmission technology. (*See* Sprint Compl. ¶ 57; Cellular South Compl. ¶ 38.) Transmission technologies are addressed in the Court's discussion of the market for roaming. (*See* Section II(B)(1), *infra.*)

[34] (*Compare* Sprint Compl. ¶ **[**56]** 36 ("AT&T holds a nationwide average of 40 MHz below 1 GHz— almost three times Sprint's holdings below 1 GHz, and slightly less than Verizon's average of 54 MHz below 1 GHz.") *with* Motion to Dismiss Sprint at 7 ("AT&T's acquisition of T-Mobile is driven by AT&T's need to alleviate a severe shortage of spectrum and network capacity constraints. . . . Sprint faces no spectrum constraints today, and it benefits so long as AT&T faces high costs and constraints on its ability to innovate.").)

[35] (*See* Sprint Compl. ¶ 41 ("When multiple carriers build their networks and develop handsets at the same time in a newly allocated spectrum band, they all benefit from the shared costs of development.").)

For these reasons, defendants' Motion to Dismiss Sprint is granted as to Sprint's claims regarding spectrum and network development costs.

B. Vertical Effects

AT&T, T-Mobile, Sprint, and Cellular South also buy and sell services and products among themselves, such that Sprint and Cellular South challenge two vertical effects of the proposed acquisition—effects that alter the dynamics of their relationship with AT&T as purchasers of services that AT&T sells or that are allegedly related to services that AT&T sells.

Plaintiffs' first allegation of a vertical effect regards the market for roaming. **[**58]** "Roaming agreements between carriers **[*330]** can be used to add coverage for subscribers beyond the carrier's network, or supplement its capacity." (Sprint Compl. ¶ 33.) [36] Regional carriers such as Cellular South are particularly dependent on roaming agreements: because they do not have nationwide networks, they rely on their contracts with the national carriers to provide their subscribers with coast-to-coast access to wireless networks. (Cellular South Compl. ¶ 27.) Both Sprint and Cellular South allege that the proposed acquisition threatens them harm because it will result in their paying higher prices for roaming. (*See* Sprint Compl. ¶ 183; Cellular South Compl. ¶ 27.)

Sprint alone raises a second claim regarding the proposed acquisition's vertical effects, this with regard to the market for "backhaul." Backhaul is also a necessary input **[**59]** in the market for mobile wireless services in that it connects cell sites to the traditional wireline networks where calls are routed. In addition to acting as wireless carriers themselves, AT&T and Verizon also supply the lion's share of backhaul to other wireless carriers, including Sprint and, at the present, T-Mobile. (Sprint Compl. ¶ 149.) Sprint alleges that by eliminating T-Mobile as an independent purchaser of backhaul, the proposed acquisition will enable AT&T and Verizon to charge Sprint and other carriers higher prices for the service. (*Id.* ¶¶ 7, 182.)

What plaintiffs' claims regarding roaming and backhaul share in common is the general allegation that AT&T's purchase of T-Mobile will result in plaintiffs paying more to procure necessary inputs. Accordingly, as it did with regard to plaintiffs' allegations about the proposed acquisition's effect on the market for wireless devices, the Court concludes that plaintiffs' alleged injuries are of the type that the antitrust laws were designed to prevent. *See* (Section II(A)(2), *supra*); *Eastman Kodak Co., 504 U.S. at 478*; *Tasty Baking Co., 653 F. Supp. at 1273-76*. The inquiry focuses instead on the other component of antitrust injury: **[**60]** have plaintiffs alleged, with the requisite specificity, a threatened injury-in-fact?

At the outset, it is important to note one critical difference between plaintiffs' devices allegations addressed above, on the one hand, and their roaming and backhaul allegations on the other. In the market for devices, plaintiffs allege that AT&T's acquisition of T-Mobile would be a merger-to-monopsony. Their allegations of loss or damage stem from the post-merger AT&T's purchasing power in the market for devices?an input market for all carriers. Because plaintiffs have alleged facts about the proposed transaction's effects on the output market (the market for mobile wireless services), and because they posited links between AT&T's increased selling power in the output market and its increased purchasing power in the input market, they have stated a plausible claim to antitrust injury in the market for wireless devices.

In the markets for roaming and backhaul, however, plaintiffs do not raise monopsony claims. Rather, plaintiffs allege that they, along with T-Mobile, purchase roaming and backhaul from AT&T and Verizon in various configurations. Plaintiffs' roaming and backhaul claims relate not to **[**61]** the merged entity's purchasing power, but rather to its selling power, for they allege the proposed acquisition will increase concentration among sellers of roaming and backhaul (and that they will **[*331]** be affected *as purchasers* in those markets). The economic

[36] For example, if a subscriber of Carrier A is in a location that is not served by Carrier A but that is served by Carrier B and Carrier C, the subscriber will still be able to use her phone if and only if Carrier A has a roaming agreement with Carrier B or Carrier C, or both. In this example, Carriers B and C are in a position to sell roaming to Carrier A.

analysis does not differ and the antitrust laws are concerned with both monopsony and monopoly power. [37] But whereas factual allegations about the output market (for mobile wireless services), combined with descriptions of the links between the merged entity's power as a seller in the output market and its power as a buyer in the input market (for mobile wireless devices), sufficed to support plaintiffs' claims regarding devices, those allegations are less directly relevant to plaintiffs' claims regarding roaming and backhaul. In order to successfully allege that the proposed transaction threatens them with injuries-in-fact in the markets for roaming and backhaul, plaintiffs must describe those markets with greater specificity than they have done if *Twombly* is to be satisfied.

1. The Market for Roaming

Roaming allows one carrier's subscribers to access another carrier's network when they are outside of their own network's range, as long as the two carriers' networks are compatible and as long as the carriers have a roaming agreement. (Sprint Compl. ¶¶ 55, 57; Cellular South Compl. ¶ 27.)

While a number of factors determine whether two networks are compatible, the parties emphasize transmission technology. [38] (*See* Sprint Compl. ¶¶ 43-47; Cellular South Compl. ¶¶ 38, 40, 44.) A transmission technology is, as the name implies, a particular means of transmitting information—perhaps akin to a language. Two different transmission technologies predominate in the contemporary domestic market for mobile wireless services. Of the national carriers, AT&T and T-Mobile use the "Global System for Mobile Communications" ("GSM"), and Verizon and Sprint use "Code Division Multiple Access" ("CDMA"). (Sprint Compl. ¶ 44; Cellular **[**63]** South Compl. ¶ 38.) Ninety-seven percent of Cellular South's customers use CDMA, whereas three percent—the customers of Corr Wireless, which Cellular South recently acquired—use GSM. (Cellular South Compl. ¶¶ 20-21, 67.) Because they do not share a language, an AT&T subscriber's phone is technologically incapable of connecting to the Verizon network but can connect to the T-Mobile and Corr Wireless networks, and a Sprint subscriber's phone cannot connect to AT&T's or T-Mobile's networks but can connect to Verizon's network, and so on.

Carriers have used various transmission technologies over time, but this basic divide between GSM and CDMA has persisted to the current, "third generation" networks ("3G"). [39] (*Id.* ¶ 38; Sprint Compl. ¶ 45.) Cellular South alleges that, with the move to "fourth generation" technology ("4G"), "all of the wireless industry is moving toward . . . 4G-LTE[,] . . . the 'gold standard' of wireless service." [40] (Cellular **[*332]** South Compl. ¶ 40.) For the present, **[**64]** however, device and network incompatibility is a powerful dynamic in the market for mobile wireless services. This is especially true for regional carriers, such as Cellular South, which depend on their ability to buy roaming from the national carriers in order to provide their customers with nationwide access. (*Id.* ¶ 27, 65.)

Thus, carriers sign roaming agreements to supplement their networks' capacities and so their customers do not lose service when traveling outside their service areas. (Sprint Compl. ¶¶ 33, 55.) "Verizon and AT&T have large wireless network footprints in the United States," and "therefore have a higher percentage of on-network calls than other carriers" so "their subscribers have less need for roaming. AT&T and Verizon realize revenue from carriers who contract for roaming services over their networks." (*Id.* ¶ 56.) Implicit in the fact that Verizon **[**65]** and AT&T

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[37] *See* *Weyerhaeuser Co., 549 U.S. at 322* ("'[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint[.]' . . . The kinship **[**62]** between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopolization." (first alteration in the original) (quoting *Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984))*).

[38] In addition to using the same transmission technology, a phone must be tuned to the same spectrum band as a competing carriers' network in order to function. (*See* Sprint Compl. ¶ 57; Section II(A)(3), *supra.*)

[39] For example, "AT&T and T-Mobile use GSM-based High Speed Pack Access ('HSPA') technology" for their 3G mobile broadband service, and "Verizon and Sprint use[] CDMA-based Evolution Data Optimized ('EV-DO')." (Sprint Compl. ¶ 45.)

[40] For its current 4G network, however, Sprint "uses WiMax technology." (Sprint Compl. ¶ 46.)

have "*less* need" is the fact that they both buy and sell roaming, but Sprint's complaint says nothing more about their purchasing activities. [41] Nor does Sprint provide any description of its own roaming contracts.

Rather, Sprint merely alleges that "[t]he merger would raise [its] input costs for roaming." (*Id.* ¶ 183.) Because Sprint is a CDMA carrier and AT&T and T-Mobile are GSM carriers, however, Sprint cannot purchase roaming from defendants. In order to justify its allegation of threatened harm, Sprint posits the following sequence: After the merger, AT&T will increase its retail wireless rates.

> Increasing its retail wireless rates would give AT&T an incentive to increase its roaming prices, and increasing its roaming prices to its rivals would support higher retail prices. With AT&T setting higher prices, Verizon would have an incentive to increase its retail **[**66]** prices and also to raise its roaming fees to CDMA carriers, including Sprint.

(Sprint Compl. ¶ 185.) Even accepting for the moment that the acquisition will prompt AT&T to raise its retail rates, there remain three assumptions that underlie this scenario for which Sprint alleges *no* factual basis: First, that AT&T's increased retail wireless rates would give it "an incentive to increase" the rates it charges its competitors for roaming; second, that Verizon would match AT&T's increase in retail rates rather than keep its prices low to attract new customers; and third, similar to the first, that Verizon's increased retail wireless rates would prompt it to raise its roaming fees to Sprint.

When counsel for Sprint was asked at oral argument to explain where the complaint alleged facts to support these assumptions, counsel did not cite facts and instead referenced a "basic economic principle" and an ***Antitrust Law*** *Journal* article upon which Sprint relied for its discussion of customer foreclosure. (10/24 Tr. 76 ("[T]his is a basic economic principle. It's cited in the leading economics article, . . . Riordan and Salop. . . . We cited it."); *see* Joint Opp'n at 39-40 (discussing the market for **[**67]** backhaul, where Sprint is a customer of AT&T's (citing Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Merger: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 557 (1995) (addressing customer foreclosure))).) But the referenced "principle" is nowhere to be found in the materials cited, since they relate to customer foreclosure and Sprint is not a customer of either AT&T or T-Mobile in **[*333]** the market for roaming. Without more, Sprint's allegation amounts to mere speculation, not a plausible scenario wherein Sprint would suffer injury-in-fact from the merger. *See* *Twombly, 550 U.S. at 570*; *Broadcom Corp., 501 F.3d at 321-22*. Defendants' Motion to Dismiss Sprint is therefore granted as to Sprint's roaming claim.

Cellular South, on the other hand, presents more concrete claims to antitrust injury in the market for roaming when it alleges that, "[b]y reducing the number of potential roaming partners, the merger threatens" it with "pay[ing] higher roaming prices." (Cellular South Compl. ¶ 27.) The crucial difference is that Cellular South's Corr Wireless subsidiary, which uses the GSM transmission technology, has been a roaming customer of T-Mobile and is currently a roaming customer **[**68]** of AT&T. (*Id.* ¶ 67.) As such, given that roaming is a necessary input for Cellular South, the fact that "the removal of T-Mobile from the marketplace would leave only AT&T as a potential GSM roaming partner," (*id.* ¶ 68), might be enough to demonstrate Cellular South's antitrust standing.

Defendants protest that only "a small fraction of Cellular South's customer base relies on roaming technology compatible with AT&T's and T-Mobile's networks." (Motion to Dismiss Cellular South at 8.) This is certainly true, and defendants are correct that "Cellular South's assertion that AT&T and T-Mobile's merger will nevertheless somehow result in Cellular South paying higher roaming rates for its CDMA technology to Verizon has no greater factual support than the parallel allegation in Sprint's complaint." (*Id.* at 9 (emphasis deleted).) Cellular South has not alleged facts that would plausibly suggest that any cost increase by the post-merger AT&T for GSM roaming would hop the technological divide to CDMA roaming. Accordingly, defendants' Motion to Dismiss Cellular South is granted as to Cellular South's CDMA roaming claims.

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[41] In court, counsel for AT&T represented that "even AT&T needs roaming. In fact, we are [a] net buyer of roaming from Cellular South." (10/24/11 Tr. 50-51.) The Court does not consider this representation for its factual value, but rather highlights it as an example of the kind of information that the complaints omit.

Defendants' Motion is denied, however, as to Cellular South's GSM roaming **[**69]** claims. Defendants have cited no case establishing a *de minimis* exception to antitrust injury. Even if Corr Wireless represents only a small part of Cellular South's business, Cellular South's allegations suggest that its threatened loss from the merger is plausible.

First, Cellular South alleges that regional carriers' ability to procure roaming at reasonable rates is crucial to their business model: "Reasonable and affordable roaming access has always been, and continues to be, a prerequisite for any wireless operator that does not own a nationwide network. . . . No wireless carrier can survive without access to a nationwide network for voice and data transmissions when the carrier's customers are outside the carrier's service area." (Cellular South Compl. ¶¶ 64-65.) Second, Cellular South alleges that Corr Wireless had significant difficulties securing roaming agreements in the past. (*Id.* ¶ 67 ("AT&T unreasonably and wrongfully refused a 3G roaming agreement with Corr Wireless until very recently, and even then, offered only unreasonable terms that amount to a constructive refusal to permit 3G roaming.").) Third, Cellular South claims that Corr Wireless's experience was not unique, **[**70]** and that AT&T has a history of engaging in "exclusionary practices." (*Id.* ¶ 71.) For example, "Cellular South alleges, on information and believe, that AT&T has engaged in a pattern and practice of denying roaming agreements to smaller carriers, as part of its efforts to monopolize local markets and to injure competition." (*Id.*) Looking to the future, Cellular South worries in particular about whether it will be able to negotiate 4G-LTE roaming agreements with the national carriers. (*Id.* ¶¶ 66, 69-71.). **[*334]** Taken together, these allegations of threatened price increases and possible foreclosure suffice to show Cellular South's antitrust standing to the extent that it relies on T-Mobile and AT&T for a critical input.

Defendants' appeal to the fact of FCC regulation of roaming does not, at this stage, defeat Cellular South's showing. Defendants argue that FCC regulations require "all mobile wireless carriers to provide roaming for common carrier services to other carriers on a just, reasonable, and non-discriminatory basis." (Motion to Dismiss Cellular South at 9. [42]) Yet in its complaint, Cellular South has alleged facts suggesting that AT&T presently does not negotiate roaming agreements **[**71]** in good faith (*see* Cellular South Compl. ¶ 71)—facts which the Court must accept as true for purposes of deciding defendants' motion, *Twombly, 550 U.S. at 556*, and facts which therefore must be heard to question the adequacy of the FCC's rules. [43]

2. The Market for Backhaul

Backhaul comprises the physical infrastructure—dedicated copper, microwave, or fiber optic circuits—that connects cell sites to the wireline network to which wireless calls are routed. [44] (Sprint Compl. ¶ 58.) "Wireless carriers,

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[42] Defendants cite *47 C.F.R. § 20.12*; Report and Order and Further *Notice of Proposed Rulemaking, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, 22 FCC Rcd 15817 (2007)*, *modified on recon.*, Order on Reconsideration and Second Further *Notice of Proposed Rulemaking, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, 25 FCC Rcd 4181 (2010)*; *Second Report and Order, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, 26 FCC Rcd 5411, 5423*, at ¶ 23 (2011), *appeals pending, Cellco P'ship v. FCC*, Nos. 11-1135 & 11-1136 (D.C. Cir. filed May 13, 2011).

[43] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, is not to the contrary. In *Trinko*, the Supreme Court noted that, "in certain circumstances, 'regulation significantly diminishes the **[**72]** likelihood of major antitrust harm.'" *540 U.S. at 412* (quoting *Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990))*. But when considering a motion to dismiss, "likelihood" is not the issue: this Court is concerned with plausibility. "Asking for plausible grounds to infer" a threatened injury-in-fact "does not impose a probability requirement at the pleading stage." *Twombly, 550 U.S. at 556*. Furthermore, *Trinko* did not address antitrust standing, *see* *540 U.S. at 416 n.5*, and instead considered whether the plaintiff had stated an antitrust claim on the merits. *See* *id. at 417-18* (Stevens, J., dissenting) ("I would not decide the merits of the [antitrust] claim unless and until such a claim is advanced by" a plaintiff with antitrust standing.).

[44] Backhaul is one form of "special **[**73]** access," and is regulated by the FCC's "special access rules." (Sprint Compl. ¶ 58; *see id.* ¶¶ 58-62 (criticizing the effectiveness of the FCC's regulatory regime).) At least according to counsel for Sprint, the FCC uses the terms "backhaul" and "special access" interchangeably. (10/24/11 Tr. 65.) This Court will do the same: especially

including Sprint, depend on backhaul to connect their cell sites to their networks and to the public switched telephone network." (*Id.* ¶ 125.)

Imagine a call placed from a cellphone to a landline phone. Voice data travels wirelessly from the device to a cell site (on a given band of spectrum and via a particular transmission technology, as discussed). **[*335]** The data then travels via backhaul from the cell site to the wireline network (where the call is routed [45]). Once connected to the wireline network, the data finally makes its way to the recipient's phone, and the call is completed.

The contemporary market for backhaul reflects the recent history of the telecommunications industry. "For decades" prior to its breakup in 1984, "the Bell System controlled wireline monopolies across the country." (*Id.* ¶ 5.) Since then, Sprint alleges that "the 'Ma Bell' descendants, AT&T and Verizon, have largely reassembled the Bell monopolies under their joint control." (*Id.*) Therefore, AT&T and Verizon own wires—both the wireline networks, which they control as "[t]he two remaining [incumbent local exchange carriers ("ILECs")] of the old Bell System," and the backhaul that connects cell sites to those networks. (*Id.* ¶ 59.) Indeed, Sprint claims that AT&T and Verizon "are the predominant providers of [backhaul]," although, crucially, they compete with "some independent telecommunications firms" that also provide backhaul. (*Id.*) Specifically, Sprint alleges that "[o]ver 90 percent of all special access services in the United States, including backhaul, are provided by the ILECs, primarily AT&T and Verizon." (*Id.* ¶ 149.)

Because it reflects the initial inheritances from the Bell System and the subsequent mergers among **[**75]** the Baby Bells, the market for backhaul is geographically bifurcated. AT&T and Verizon have distinct traditional service territories, such that they rarely compete with each other as backhaul providers. (*Id.* ¶¶ 134, 177; *see also* 10/24/11 Tr. 66 (Counsel for Sprint representing that "AT&T has [a historical legacy incumbent monopoly] in [its] half of the country.").) AT&T's ILEC territory comprises twenty-two states. (Sprint Compl. ¶ 181.) Sprint alleges that "AT&T has market or monopoly power for backhaul in a number of relevant geographic markets . . . in its traditional service territor[y]." (*Id.* ¶ 151.)

Like Sprint's claims to antitrust injury in the markets for mobile wireless devices and roaming, Sprint's claim to antitrust injury in the market for backhaul alleges that the proposed acquisition would increase Sprint's costs for a necessary input. (*Id.* ¶ 175.) Sprint purchases backhaul from AT&T. (*Id.* ¶ 176 ("Sprint pays about $1 billion per year for . . . backhaul, mostly to AT&T and Verizon.").) Where these claims differ, however, is with regard to T-Mobile's current role in the market. T-Mobile, while not a potential roaming partner for Sprint due to the incompatibility of their **[**76]** networks, both buys and sells roaming. With regard to backhaul, by contrast, T-Mobile is only a fellow purchaser.

Sprint cannot allege, therefore, that the proposed transaction would be a merger-to-monopoly. By acquiring T-Mobile, AT&T will not gain any backhaul infrastructure, and the merger would not lead immediately to increased concentration among backhaul *suppliers.* Sprint gets there in a roundabout way, though, by alleging first that the acquisition will decrease the number of backhaul *purchasers.* Sprint quotes an industry association filing before the FCC stating that "'AT&T has indicated that it will move T-Mobile's backhaul traffic on to its own transport network wherever possible.'" (*Id.* ¶ 181.) The same filing states that T-Mobile currently sources backhaul "'for approximately 20 percent of its cell sites'" from independent providers, *i.e.*, not AT&T and not Verizon. (*Id.* ¶ 181; *see id.* ¶ 178-79 (describing T-Mobile "as a purchaser of backhaul with a strong interest in obtaining services **[*336]** from alternative backhaul providers" and as a source of "business opportunities for competitive providers").) When the merger eliminates that demand, Sprint's theory goes, independent providers **[**77]** will exit the market and the incentives for entry by new providers will be diminished. (*Id.* ¶¶ 152, 178-79.) At the end of this chain of events, the

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because the FCC's regulations do not factor into the Court's analysis, any distinction between backhaul and special access is not particularly relevant here. However, the fact that Sprint makes distinct assertions about backhaul and special access, (*see, e.g.*, Sprint Compl. ¶¶ 149, 179-80), without defining the difference between them is illustrative of the complaint's vagueness with regard to this market.

[45] Calls between **[**74]** cellphones are also typically routed through the wireline network.

market for backhaul is more concentrated and Sprint will suffer harm when AT&T and Verizon, no longer checked by rival suppliers, are able to raise their rates. (*Id.* ¶ 175.)

It bears repeating that, as has been established and as defendants concede (*see* Reply at 2), such an injury would be of the type that the antitrust laws are designed to prevent. [46] (*See* Section II(A)(2), *supra.*) Having satisfied the second component of antitrust injury, if Sprint stated a claim to threatened injury-in-fact in the backhaul market that was plausible on its face, Sprint would succeed.

As it stands, Sprint's claims fail. Sprint alleges no facts to support its theory that the elimination of T-Mobile as a purchaser of backhaul will increase concentration among backhaul sellers by putting the independent providers out of business. Sprint might have described the independent providers (by more than just name (*see* Sprint Compl. ¶ 149)) and the local markets where T-Mobile's presence as an independent purchaser ensures their survival. Crucially, Sprint might have provided even rough estimates of the percentage of the independent purchasers' business that T-Mobile represents. [47] Sprint's complaint, however, says nothing about the sell side of the market apart from its statements regarding AT&T's and Verizon's present market power and its claims about barriers to entry and expansion. (*See id.* ¶¶ 149-51, 177-79.) The Court therefore has no means by which to assess the plausibility of the scenario Sprint suggests. That the scenario is extreme—positing that the decrease in demand after T-Mobile's elimination as a purchaser will be so significant as to be lethal to the independent providers, leading to a price *increase*, whereas **[**79]** demand decreases usually coincide with price *decreases*—only makes the Court's task more difficult. At the pleadings stage, Sprint need not supply "detailed factual allegations," and yet it must state facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. Because its complaint leaves so much to conjecture, Sprint fails to adequately allege a threatened injury-in-fact in the backhaul market. Defendants' Motion to Dismiss Sprint is granted as to Sprint's backhaul claim.

CONCLUSION

Time and again, the Supreme Court has emphasized that "'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Id. at 558* (quoting *Associated Gen. Contractors, 459 U.S. at 528 n.17*). It is no accident **[*337]** that antitrust cases provoke these recitations.

While perhaps "elusive," [48] the antitrust injury requirement not only aligns private antitrust enforcement to the aims of the antitrust **[**80]** laws; it also performs the more conventional function of only allowing plaintiffs to proceed on claims made facially plausible by the allegation of sufficient facts. *Id. at 570*; *see* *NicSand, 507 F.3d at 451*. It is unsurprising, therefore, that established precedent forecloses competitors' claims that challenge a proposed transaction's effect on competition without sufficiently alleging the threat of an injury-in-fact that they face and that is "'of the type the antitrust laws were designed to prevent.'" *Cargill, 479 U.S. at 113* (quoting *Brunswick Corp., 429 U.S. at 489*). Such claims belong to the government. But where private plaintiffs have successfully pleaded antitrust injury, the fact that they are defendants' competitors is no bar. *Cf.* *id. at 120-22* (rejecting the government's

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[46] The parties' disputes as to the application of cases finding antitrust standing when a competitor raises its rivals' costs by means of an anticompetitive act are therefore beside the point. (*See* Joint Opp'n at 39-44 (citing, *inter alia, Ford Motor Co. v. United States, 405 U.S. 562, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)*; *AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568 (7th Cir. 1999)*; *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone Inc., 140 F.3d 1228 (9th Cir. 1998))*; Reply at 16-17 (disputing **[**78]** plaintiffs' characterization of *Ford Motor Co.*).)

[47] That T-Mobile relies on independent providers for 20 percent of its backhaul needs, (Sprint Compl. ¶ 181), is irrelevant to how much the independent providers rely on T-Mobile as a customer.

[48] *Blue Shield of Va. v. McCready, 457 U.S. 465, 477, 478, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; *see* Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697 (2003).

proposed per se rule denying competitors standing to challenge acquisitions on the basis of predatory pricing theories). [49]

Defendants' Motion to Dismiss Sprint and Motion to Dismiss Cellular South are both denied insofar as they challenge plaintiffs' claims to antitrust injury with regard to the proposed acquisition's effects on the market for mobile wireless devices. (*See* Section II(A)(2), *supra.*) Defendants' Motion to Dismiss Cellular South is denied insofar as it attacks Cellular South's antitrust standing to pursue claims regarding the role of Corr Wireless as a purchaser of GSM roaming. (*See* Section II(B)(1), *supra.*) Defendants' motions are granted as to plaintiffs' remaining claims.

/s/ ELLEN SEGAL HUVELLE

United States District Judge

Date: November 2, 2011

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[49] "'[T]he scheme of the [Clayton Act] is sharply to distinguish between Government suits, either **[**81]** criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.'" *United States v. Borden Co., 347 U.S. 514, 518-19, 74 S. Ct. 703, 98 L. Ed. 903 (1954)* (first alteration in the original) (quoting *United States v. Bendix Home Appliances, 10 F.R.D. 73, 77 (S.D.N.Y. 1949)* (Rifkind, J.)).

E-Pass Techs. v. Moses & Singer, LLP

United States District Court for the Northern District of California

November 4, 2011, Decided; November 4, 2011, Filed

No. C-09-5967 EMC

Reporter
2011 U.S. Dist. LEXIS 128018 *; 2011 WL 5357912

E-PASS TECHNOLOGIES, Plaintiff, v. MOSES & SINGER, LLP, et al., Defendants.

Subsequent History: Partial summary judgment granted by *E-Pass Techs. v. Moses & Singer, LLP, 2012 U.S. Dist. LEXIS 52485 (N.D. Cal., Apr. 13, 2012)*

Prior History: *E-Pass Techs., Inc. v. Moses & Singer, LLP, 2011 U.S. Dist. LEXIS 96231 (N.D. Cal., Aug. 26, 2011)*

Core Terms

state court, judicial estoppel, allegations, patent, asserting, Defendants', federal court, lawsuit, patent law, courts, River, federal jurisdiction, substantial issue, motion to strike, state action, infringement, subject matter jurisdiction, federal patent law, exclusive federal jurisdiction, federal action, federal claim, disavowed, estoppel, grounds, motion to dismiss, antitrust claim, district court, oral argument, inter alia, court's decision

Counsel: **[*1]** For E-Pass Technologies, Inc., Plaintiff: Adela Carrasco, James R. Rosen, Ryan Donald Saba, Rosen Saba, LLP, Beverly Hills, CA.

For Palm, Inc., Creditor: Edward Henryk Sikorski, DLA Piper LLP (US), San Diego, CA; Vincent S. Lam, DLA Piper US LLP, East Palo Alto, CA.

For ACCESS Systems Americas, Inc., Creditor: Andrew T. Oliver, LEAD ATTORNEY, Kilpatrick Townsend & Stockton LLP, Menlo Park, CA.

For VISA U.S.A. Inc., Visa International Service Association, Creditors: Madison C. Jellins, LEAD ATTORNEY, HelixIP LLP, Redwood City, CA.

For Moses & Singer, LLP, ESQ. Stephen N. Weiss, Defendants: Richard D. Hoffman, LEAD ATTORNEY, Eun Jung Kim, Robert Miller Fineman, Duane Morris LLP, San Francisco, CA.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

ORDER DENYING DEFENDANTS' MOTION TO STRIKE AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

(Docket Nos. 116, 117)

Plaintiff E-Pass Technologies, Inc. filed suit against its former attorneys, Defendants Moses & Singer, LLP, and Stephen N. Weiss, Esq., asserting claims for negligent misrepresentation, breach of fiduciary duty, and professional negligence. In its First Amended Complaint ("FAC"), Plaintiff also includes allegations touching **[*2]** directly on federal patent law, alleging that defendants misunderstood Plaintiff's '311 Patent and failed "to properly construe the validity, construction or effect of Federal patent law to the '311 Patent." FAC ¶ 9. An action is currently pending in state court between the same parties, with Plaintiff asserting only state law bases for its claims against Defendants.

Pending before the Court are Defendants' Motion to Strike portions of Plaintiff's FAC on the grounds of judicial estoppel and Full Faith and Credit, Docket No. 116, and their Motion to Dismiss Plaintiff's FAC on the grounds of lack of subject matter jurisdiction and the *Colorado River* doctrine, Docket No. 117. The Court held a hearing on this matter on October 24, 2011. After considering the parties' submissions and oral argument, and for the reasons set forth below, the Court hereby **DENIES** Defendants' motions to dismiss and strike Plaintiff's FAC.

I. FACTUAL & PROCEDURAL BACKGROUND

A. State Court Lawsuit

E-Pass initiated the state court litigation in January 2009. Docket No. 20 (Ord Decl., Ex. A) (docket sheet for state court litigation). In the state court action, the operative complaint is the second amended complaint, **[*3]** which Plaintiff filed August 3, 2009, alleging causes of action for negligent misrepresentation, breach of fiduciary duty and negligence based on defendants' representation of E-Pass in the federal patent litigation. E-Pass alleges in the state action that "Defendants pursued, and continued to pursue, a litigation that, in the exercise of reasonable care, they should not have advised E-Pass to pursue." Mot. for Leave to Amend at 3. More specifically, E-Pass alleges the following.

In February 2000, E-Pass obtained ownership of the '311 patent. At about the same time, E-Pass hired Moses & Singer, a law firm, to represent it in, *e.g.*, seeking license and business opportunities with respect to the '311 patent. Mr. Weiss is a partner in the Moses law firm and was the primary attorney working on E-Pass's matters.

Defendants advised E-Pass to forego licensing and business opportunities with respect to the patent and instead recommended focusing on suing entities that Defendants believed were infringing on the patent. Defendants failed to disclose that, by engaging in this strategy, E-Pass would become saddled with a reputation in the patent community as a "patent troll."

Following Defendants' **[*4]** advice, E-Pass agreed to file a patent infringement lawsuit against 3Com in February 2000. Prior to filing the lawsuit, Defendants failed to conduct a proper investigation to determine whether the lawsuit had a legal and/or factual basis. In August 2002, the federal trial court in the 3Com case granted 3Com's motion for summary judgment. Subsequently, that decision was reversed by the Federal Circuit, and the case was remanded. This gave E-Pass the opportunity to conduct further investigation and discovery to support its case.

Instead of focusing on the 3Com case, however, Defendants recommended filing more patent infringement lawsuits, and, accordingly, an action was initiated against Visa in October 203 and another against PalmOne in February 2004. A lawsuit was also filed against Microsoft.

In March 2005, 3Com, Visa, and PalmOne filed motions for summary judgment. Defendants failed to obtain (whether through discovery or other informal avenues) any new evidence to oppose the motions. In March 2006, the federal trial court granted summary judgment to 3Com, Visa, and PalmOne. The court held, *inter alia*, that "E-Pass failed to adduce any evidence to support a finding that any defendant **[*5]** or its customers practiced all of the steps of the claimed '311 Patent method." Subsequently, the trial court granted 3Com, Visa, and PalmOne's motion for attorneys' fees, explaining, *inter alia*, that E-Pass had conducted a '"minimalist pre-filing investigation,"' that E-

Pass had failed to provide any evidence in support of its case, and that E-Pass had thereby engaged in vexatious or unjustified litigation. After the trial court's summary judgment decision was affirmed by the Federal Circuit in January 2007, the trial court awarded fees and costs to 3Com, Visa, and Palm in an amount exceeding $2.3 million. The fee decision was also affirmed by the Federal Circuit.

Thus, after seven years of litigation, E-Pass had paid Defendants millions of dollars in fees and costs, failed to obtain any benefit as a result of Defendants' work, had been saddled with the reputation of being a patent troll (and therefore had no ability to market the '311 patent), and forced to pay the fees and costs of 3Com, Visa, and PalmOne. E-Pass also failed to prevail in its lawsuit against Microsoft.

Thereafter, E-Pass brought the state suit against its former lawyers. In October 2009, the state trial court rejected **[*6]** Plaintiff's claim that there are no issues of patent law in the state action and granted Defendants' demurrer based on lack of subject matter jurisdiction. The state trial court concluded there was no subject matter jurisdiction because the claims required resolution of substantial questions of patent law, and as such raised questions within the exclusive jurisdiction of the federal court.

On appeal to the California Court of Appeal, Plaintiff argued that the trial court erred in concluding that its claims raised substantial issues of patent law, and represented that E-Pass will not challenge the claim construction theory in the state action. Mot. for Leave to Amend at 6. Specifically,

> At oral argument, counsel for E-Pass expressly disavowed any challenge to the claim construction proffered and argued by defendant attorneys in the federal litigation. Counsel confirmed that E-Pass does not allege any negligence with respect to the manner in which defendant attorneys defined the scope of the patent. Rather, E-Pass alleges that the defendant attorneys knew or should have known that they did not have sufficient evidence to support the claims being asserted.

E-Pass Technologies, Inc. v. Moses & Singer, LLP, 189 Cal. App. 4th 1140, 1148, 117 Cal. Rptr. 3d 516 (2010). **[*7]** On the basis of Plaintiff's representations, the Court of Appeal reversed the trial court's decision on November 5, 2010, and held that claims did not raise substantial issues of patent law and thus the state court had jurisdiction to hear Plaintiff's claims. *Id. at 1142*. The Court of Appeal noted that it "base[d] [its] decision upholding state court jurisdiction on the limited scope of E-Pass's allegations, as acknowledged in its briefs and at oral argument. On remand E-Pass will be bound by the narrow construction proffered in this court." *Id. at 1148 n.4*.

B. Federal Court Lawsuit

In December 2009, after the Superior Court's ruling but before the Court of Appeal decision, E-Pass initiated this federal lawsuit. E-Pass pled the same claims in the federal lawsuit as in the state lawsuit based on the same underlying facts. Based on these allegations, E-Pass asserts claims for (1) negligent misrepresentation, (2) breach of fiduciary duty, and (3) professional negligence (*i.e.*, legal malpractice). With respect the first claim, E-Pass alleges, *inter alia*, that Defendants negligently misrepresented that "they could prove infringement of the '311 Patent, and that there was sufficient evidence **[*8]** to support E-Pass'[s] claims asserted in the Underlying Actions [against 3Com, Visa, PalmOne, and Microsoft]." Compl. ¶ 42; FAC ¶ 44. With respect to the second claim, E-Pass alleges, *inter alia*, that Defendants breached their fiduciary duty to E-Pass by "misle[ading] [it] into believing it had viable, valuable patent claims by misrepresenting to or concealing from E-Pass the true facts showing the opposite, and by assuring E-Pass positive outcomes in the Underlying Actions." Compl. ¶ 50(f); FAC ¶ 53(g). E-Pass seems to include, *inter alia*, the above allegations as part of its third claim for professional negligence (*i.e.*, legal malpractice). The original complaint in this Court alleges jurisdiction based only on *28 U.S.C. § 1338*. Compl. ¶ 7.

At a June 22, 2011 Case Management Conference ("CMC") following the California Court of Appeal's decision, Defendants argued that this Court may not have subject matter jurisdiction over this action in light of the California Court of Appeal opinion in the corollary state action. *See E-Pass v. Moses & Singer, 189 Cal. App. 4th 1140, 117 Cal. Rptr. 3d 516 (2010)*. In response, Plaintiff asserted diversity as an alternative ground for jurisdiction. The Court gave Plaintiff **[*9]** an opportunity to file an FAC within twenty days. Docket No. 98. After the hearing, Plaintiff asserts that it discovered "minor modifications" it needed to make in order to properly allege original jurisdiction under *§ 1338*. Mot. for Leave to Amend at 2. Specifically, Plaintiff asserts that, during discovery in the federal action, it discovered the basis for a federal theory of liability regarding the patent misconstruction. Mot. for Leave to Amend at 5-6. Plaintiff has also admitted that it views the state court decision upholding jurisdiction as unduly restrictive, and thus would now prefer to litigate in federal court. *See* Joint CMC, Docket No. 96, at 2-3.

Accordingly, Plaintiff's FAC now alleges harm arising, *inter alia*, from Defendants' "misunderstanding of the '311 Patent and Defendants' failure to properly construe the validity, construction, or effect of Federal patent law to the '311 Patent. *See* FAC ¶ 9. The federal action includes all theories of liability against Moses & Singer in the state action, plus these additional allegations that are not included in (indeed expressly excluded from) the state action. Mot. for Leave to Amend at 4. The FAC alleges federal jurisdiction **[*10]** based on both patent law and diversity. FAC ¶¶ 8-9. Plaintiff avers that it will dismiss the state action against Moses & Singer and Weiss once this Court rules that it has jurisdiction under either of its alternative theories. Mot. for Leave to Amend at 5. Plaintiff will then maintain the state action only against the Squire, Sanders & Dempsey defendants, who cannot be joined in the federal suit due to statute of limitations problems. Mot. for Leave to Amend at 6.

II. DISCUSSION

Defendants assert a number of theories for dismissing, staying, or striking Plaintiff's FAC. They argue that the Court should strike Plaintiff's new allegations in the FAC (those asserting Defendants misunderstood and misconstrued the patent) based on judicial estoppel and the Full Faith and Credit Act. *See* Docket No. 116. In addition, they argue that the Court should dismiss the FAC for lack of subject matter jurisdiction and dismiss or stay the action under the *Colorado River* doctrine. *See* Docket No. 117.

A. Legal Standard

Under *Rule 12(f)*, a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. "Immaterial matter is **[*11]** that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* (internal quotation marks omitted), overruled on other grounds, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Id.* (citation and internal quotation marks omitted). When ruling on a motion to strike, a court views the pleading under attack in the light most favorable to the nonmoving party. See *RDF Media Ltd. v. Fox Broad Co., 372 F. Supp. 2d 556, 561 (C.D. Cal. 2005)*. Courts generally disfavor motions to strike because striking is such a drastic remedy. *See* *Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000)* (stating that "striking a party's pleadings is an extreme measure, and, as a result, we have previously held that 'motions to strike under *Fed. R. Civ. P. 12(f)* are viewed with disfavor and are infrequently granted'").

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests the sufficiency of a complaint, facilitating dismissal **[*12]** to the extent the pleading fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. The pleading is construed in the light most favorable to the non-moving party and all material allegations in it are taken to be true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir.1986)*. However, even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (internal brackets and quotation marks omitted)).

Hence, the Court need not assume unstated facts, nor will it draw unwarranted inferences. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* ("Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); *Cousins v. Lockyer, 568 F.3d 1063, 1067 (9th Cir. 2009)*; *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)* ("Nor is the court required **[*13]** to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

B. Judicial Estoppel

Defendants contend that Plaintiff expressly represented to the state court that it was not pursuing any federally-based claims against Defendants. As the Court of Appeal noted, "At oral argument, counsel for E-Pass expressly disavowed any challenge to the claim construction proffered and argued by defendant attorneys in the federal litigation. Counsel confirmed that E-Pass does not allege any negligence with respect to the manner in which defendant attorneys defined the scope of the patent." *E-Pass Technologies, Inc. v. Moses & Singer, LLP, 189 Cal. App. 4th 1140, 1148, 117 Cal. Rptr. 3d 516 (2010)*. On the basis of these statements, the state Court of Appeal allowed Plaintiff to proceed in state court finding there was no exclusive federal jurisdiction over the claims as asserted and limited the lawsuit to what the state court concluded were narrow claims that raised no substantial issue of patent law. *Id. at 1148 n.4* ("We base our decision upholding state court jurisdiction on the limited scope of E-Pass's allegations, as acknowledged in its briefs and at oral argument. **[*14]** On remand E-Pass will be bound by the narrow construction proffered in this court.").

In the aftermath of the state court's decision, Plaintiff represented at this Court's CMC on June 15, 2011 that it would remain in federal court because it viewed the state court decision as too restrictive. Hoffman Decl. ¶ 3. Plaintiff's FAC thus raises as substantive patent law allegations for the first time, claims that Defendants "misunderst[ood] [] the '311 Patent and [] fail[ed] to properly construe the validity, construction or effect of Federal patent law to the '311 Patent." FAC ¶¶ 9, 65(c).

Defendants argue that Plaintiff should be judicially estopped from making such assertions because it "had unequivocally and expressly stated to two state courts that its claims do not encompass substantial issues of federal patent law meriting federal question jurisdiction." Mot. to Strike at 4. Plaintiff argues in response that its current position is not "clearly inconsistent" with its position in state court. Plaintiff contends that it never argued in state court that Defendants understood the '311 patent or properly construed it; rather, it merely excluded those allegations from its state court claims. **[*15]** Opp. to Mot. to Strike at 5. Because Plaintiff has always included federal patent jurisdiction as its basis for jurisdiction in the federal action, Plaintiff argues that there can be no question that its state court statements were not inconsistent with its actions in this Court and do not bind it here. Opp. to Mot. to Strike at 2-3.

"Federal law governs the application of judicial estoppel in federal courts." *Johnson v. Oregon, 141 F.3d 1361, 1364 (9th Cir. 1998)*. A district court has discretion in deciding whether judicial estoppel is applicable. *See* *New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* ("[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion") (quotations omitted); *Estate of Shapiro v. United States, 634 F.3d 1055, 1057 (9th Cir. 2011)* (noting that a district court's application of judicial estoppel is reviewed for abuse of discretion). Its general purpose is to protect the integrity of the judicial process and to "prevent[] a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich, 530 U.S. 211, 228 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)*. Thus, the doctrine typically applies **[*16]** when a "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *New Hampshire, 532 U.S. at 750* (holding that judicial estoppel barred New Hampshire from asserting a position about a river boundary contrary to a position it had taken in an earlier litigation that had culminated in a consent decree). *See also* *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772, 780 (9th Cir. 2009)* ("Accordingly, because Spectrum obtained a favorable decision in the district court as a result of its assertions that the alleged infringement first arose in 1999, we find that Spectrum is estopped from claiming before this court that the 2001 label formed the basis of Sunset's claim.").

Courts have used three criteria to determine when judicial estoppel is appropriate: (1) when a party's later position is clearly inconsistent with its original position; (2) when the party has successfully persuaded the court of the earlier position; and (3) when allowing the inconsistent position would allow the party to derive **[*17]** an unfair advantage or impose an unfair detriment on the opposing party. *See* *United States v. Ibrahim, 522 F.3d 1003, 1009 (9th Cir. 2008)*; *see also* *New Hampshire, 532 U.S. at 750-51 (2001)*; *Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1249, 176 L. Ed. 2d 18 (2010)*. These factors, however, are not "inflexible prerequisites" or "an exhaustive formula."

New Hampshire v. Maine, 532 U.S. 742, 751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). "Additional considerations may inform the doctrine's application in specific factual contexts." *Id.*

1. Jurisdiction and Estoppel

In the instant case, the Court notes as a preliminary matter that it is unclear whether judicial estoppel should be applied to inconsistent statements that bear on a court's jurisdiction. Wright and Miller have noted that "[b]road interests of public policy may limit the reach of judicial estoppel." 18B C. Wright, A. Miller, & E. Cooper, Fed. Prac. & Proc. Juris. § 4477 (2d ed. 2011). These public policy interests include jurisdictional concerns. *Id.* In *Int'l Union of Operating Engineers v. County of Plumas, 559 F.3d 1041 (9th Cir. 2009)*, for example, the Ninth Circuit allowed a party who had originally removed to federal court on the basis of federal subject matter jurisdiction **[*18]** to challenge that jurisdiction on appeal. The Court reasoned that even though the party had taken inconsistent positions, its concerns regarding jurisdiction trumped any equitable concerns. *Id. at 1044*. The Court concluded that the party "may be guilty of chutzpah, but we must consider the merits of its argument anyway." *Id.*

While it seems obvious that estoppel cannot create federal jurisdiction that otherwise does not exist, similar logic applies in the inverse situation, when a party that had earlier claimed no need for federal jurisdiction is now asserting a basis for such jurisdiction. "The interests of the courts in protecting themselves and opposing parties against inconsistency may yield to such interests as the desire to protect against deciding a case when federal subject-matter jurisdiction does not exist, [or] *to exercise federal subject-matter jurisdiction when it does exist*." Fed. Prac. & Proc. Juris. § 4477 (emphasis added). Courts have recognized the federal courts' general duty to exercise jurisdiction where it is present. *See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1967)* (noting the "virtually unflagging obligation of the federal **[*19]** courts to exercise the jurisdiction given them"); *see also Gray v. City of Valley Park, Mo., 567 F.3d 976, 981-982 (8th Cir. 2009)* ("Even if the parties wasted judicial resources up to this point and misled the courts on this issue in the process, we may not forge ahead on blind principle without jurisdiction to do so."); *Whiting v. Krassner, 391 F.3d 540, 543-544 (3d Cir. 2004)* ("[C]ourts have generally refused to resort to principles of judicial estoppel to prevent a party from 'switching sides' on the issue of jurisdiction."), *certiorari denied*, *545 U.S. 1131, 125 S. Ct. 2938, 162 L. Ed. 2d 871*; *Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC, 232 F.3d 79, 82 (2d Cir. 2000)* ("'[P]rinciples of estoppel do not apply' to questions of subject matter jurisdiction.") (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982))*; *In re Southwestern Bell Tel. Co., 535 F.2d 859, 861 (5th Cir. 1976)* ("Whatever the scope of the [judicial estoppel] doctrine may be, so far as we have been able to discover it has never been employed to prevent a party from taking advantage of a federal forum when he otherwise meets the statutory requirements of federal jurisdiction. . . . Judicial estoppel **[*20]** principles cannot conclusively establish jurisdictional facts."), *affirmed as modified by 542 F.2d 297* (en banc), *reversed on other grounds*, *430 U.S. 723, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977)*; *But see Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 14 (1st Cir. 1999)* (indicating that judicial estoppel may be invoked to prevent claims of lack of jurisdiction); *Gamblin v. Miss. Farm Bureau Mut. Ins. Co., No. 3:07CV698 HTW-LRA, 2010 U.S. Dist. LEXIS 42572 (S.D. Miss. Apr. 30, 2010)* (applying judicial estoppel to bar plaintiffs sought from bringing suit in federal court under *§§ 1981* and *1982* after their state court action was dismissed because previously, plaintiffs had successfully achieved remand of their state action by expressly disavowing any claims under federal law). This duty to exercise jurisdiction applies with particular force where, as here, federal jurisdiction is exclusive.

Similar to the case at bar, in *Bonzel v. Pfizer, Inc., 439 F.3d 1358, 1363 (Fed. Cir. 2006)*, the plaintiff had previously successfully argued for remand of a breach of contract claim on the basis that there was no substantial issue of patent law. *Id. at 1361* ("Dr. Bonzel moved to remand that federal action to the Minnesota state court, **[*21]** stating that he was not charging infringement or seeking a declaration of patent rights, but was solely seeking enforcement of a contract and remedy for its breach."). Then, when that state court action was dismissed on *forum non conveniens* grounds, Dr. Bonzel brought a subsequent suit in federal court claiming federal patent jurisdiction under *§ 1338* and asserting new support for such jurisdiction. *Id. at 1361-62*. The Federal Circuit declined to apply judicial estoppel to Dr. Bonzel's assertion of *§ 1338* jurisdiction, noting that it was questionable whether estoppel could even apply to jurisdictional questions. While the court went on to conclude that there were no substantial issues of patent law present in that case, it nonetheless did not apply estoppel to bar Dr. Bonzel from raising new justifications for patent jurisdiction notwithstanding his earlier inconsistent statements. *Id. at 1363*.

Similar to Dr. Bonzel, Plaintiff in this case first asserted that federal jurisdiction was not proper as its claims raised no substantial issue of patent law, convinced a court to adopt that reasoning, and later reversed itself to assert new, contradictory grounds for federal patent jurisdiction. **[*22]** Thus, *Bonzel* and the other cases described above cast doubt on whether the Court should exercise its discretion to preclude Plaintiff from asserting new justifications for federal jurisdiction, especially where exclusive federal jurisdiction is at issue.

2. Judicial Estoppel Factors

Even assuming that principles of judicial estoppel apply to the instant case, the Court finds that judicial estoppel does not bar Plaintiff's conduct in particular because the state court did not rely on Plaintiff's assertions in a way that would later "create the perception that either the first or the second court was misled." *New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)*. Rather, the state court simply applied the facts and allegations before it to determine whether it had jurisdiction to hear Plaintiff's claims.

In the instant case, while the state court relied on Plaintiff's assertions that it was not contesting Defendants' understanding or construction of the patent in state court, *E-Pass, 189 Cal. App. 4th at 1148 n.4*, it could not have relied on any assertion (implied or express) that Plaintiff would not make such claim in federal court. As Defendants conceded at oral argument hearing, the California **[*23]** Court of Appeal made no reference to and apparently was not aware of the federal complaint. Indeed, had Plaintiff been more transparent and alerted the state court that it might allege broader claims in the federal action, its candor would not have changed the state court's analysis because the state court was deciding its jurisdiction based on the state court pleadings. In short, the state court did not rely on any statement contradicting Plaintiff's position in this Court. *See* *Sivak v. Hardison, 658 F.3d 898, 2011 U.S. App. LEXIS 18568, 2011 WL 3907111, at *25 n.2 (9th Cir. 2011)* ("Absent the district court's reliance on Sivak's concession, Sivak is not bound by his prior assertions.") (citations omitted).

Furthermore, for the same reason, Plaintiff's arguments to this Court do not imply that the state court erred in its decision, a requirement for judicial estoppel. *See* *Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1249, 176 L. Ed. 2d 18 (2010)* (declining to apply judicial estoppel in part because the somewhat inconsistent positions would not result in inconsistent court decisions); *Cf.* *Gamblin, 2010 U.S. Dist. LEXIS 42572 at *18* (applying judicial estoppel where plaintiffs included statement in their complaint **[*24]** that "these plaintiffs expressly waive and hereby disavow any claim for any relief whatsoever under any federal laws or any federal question concerning the allegations in this Complaint, whether said allegations are pled or not"); *Matek v. Murat, 638 F. Supp. 775, 782-83 (C.D. Cal. 1986)* (holding judicial estoppel would apply where "plaintiffs ha[d] on several occasions made it abundantly clear that they are not urging any claim under RICO" in that court); *Wade v. Woodings-Verona Tool Works, Inc., 469 F. Supp. 465, 467 (W.D. Pa. 1979)* (holding judicial estoppel would apply to a plaintiff's statement in motion for summary judgment of defendant's counterclaim for patent invalidity that there was no case or controversy regarding the patent's validity because it was not claiming, and never would claim, patent infringement).

This case is thus distinct from others in which courts have applied judicial estoppel. For example, in *Patriot Cinemas, Inc. v. General Cinemas Corp.*, the parties had been engaged in protracted jurisdictional battles over whether plaintiff's state antitrust claim was merely a disguised federal claim. [1] *834 F.2d 208, 214 (1st Cir. 1987)*, *cited with approval by* *Helfand, 105 F.3d at 535*. **[*25]** After the federal district court had denied remand and dismissed the action, determining that the state court antitrust claim was no more than a disguised federal claim, [2]

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[1] Antitrust claims, like patent claims, are subject to exclusive federal jurisdiction. *See* *Marrese v. Am. Academy of Orthopaedic Surgeons, 470 U.S. 373, 375, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985)*.

[2] The court dismissed the federal action for lack of subject matter jurisdiction rather than simply denying remand under the then-applicable doctrine of derivative jurisdiction. *Patriot Cinemas, 834 F.2d at 209*. "According to that doctrine, 'a federal district court does not have removal jurisdiction over a claim that the state court lacked subject matter jurisdiction to decide in the first place.'"

Plaintiff appealed the federal decision and also filed a complaint in state court. The state court complaint omitted the antitrust claim entirely. Defendant then requested that the state court stay the action until the First Circuit considered whether Plaintiff's antitrust claim was necessarily a federal claim. In response, Plaintiff "represented [to the state court] that it would not pursue a separate claim based on state ***antitrust law*** regardless of the outcome of its pending federal appeal." *Id. at 211*. Ostensibly relying on that statement, the state court denied the motion for a stay. Plaintiff then attempted to retreat from this position in the federal appeal, noting that it may want to pursue the antitrust claim *in state court* after all, should the court reverse the district court's decision. The First Circuit precluded Plaintiff from doing so, holding "that the doctrine of judicial estoppel bars Patriot from changing the position it previously took in the superior court that it does not intend to proceed on **[*26]** the state antitrust claim 'at all.'" *Id. at 214*.

Similarly, in *Gamblin*, on which Defendants heavily rely, the court barred the plaintiffs from asserting the very claims they had previously disavowed in the same court. *2010 U.S. Dist. LEXIS 42572 at *4*. These plaintiffs had previously achieved federal court remand of their action by expressly disavowing any claims under federal law; they later sought to bring suit in federal court under *§§ 1981* **[*27]** and *1982* (after their state court action was dismissed). Because the federal court had relied on plaintiff's disavowal of federal claims in remanding the action to state court in the first place, the court concluded that they were judicially estopped from bringing those claims in a new federal action. *Id. at *18-20*.

In contrast to the case at bar, *Patriot Cinemas* and *Gamblin* involved situations in which the plaintiff attempted to retreat from an earlier position that it would not bring particular claim(s) in a certain court. In short, the first court relied on the earlier representation from which the plaintiff later retreated. As noted above, such reliance, an essential element of judicial estoppel (*see* *Patriot Cinemas, 834 F.2d at 213-14*; *Gamblin, 2010 U.S. Dist. LEXIS 42572 at *17-18)*, is lacking here.

Moreover, while the Court is sympathetic to Defendants' allegations of forum shopping, Defendants fail to explain in any detail how Plaintiff "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire, 532 U.S. at 743*. Although they have expended time and resources litigating these issues in two fora, the litigation in both **[*28]** courts is still in the early stages. There is no substantial issue of prejudice to Defendants' ability to respond to Plaintiff's broader allegations in this Court. In addition, the "advantage" Plaintiff has acquired in being in federal court is no greater than what it would have achieved had it capitulated to Defendants' position from the outset that this case belonged in federal court. Indeed, Defendants now find themselves in the forum they initially requested. Thus, unlike some cases cited by Defendants, here the inconsistency itself has not unfairly benefitted Plaintiff. *Cf*. *United Nat'l Ins. Co., 555 F.3d at 779-80* (applying judicial estoppel where insured had won previous case by asserting the infringement occurred in 1999 and sought to argue in new action that infringement did not occur until 2001).

Thus, the Court concludes that Plaintiff is not judicially estopped from asserting allegations based on federal patent law contained in the FAC in this action. The Court thus DENIES Defendants' motion to strike on the basis of judicial estoppel.

C. Full Faith & Credit

Defendants next argue that the Court should strike Plaintiff's new allegations in the FAC regarding Defendants' alleged **[*29]** misunderstanding or misconstruction of the patent based on the Full Faith and Credit Act, due to the state court's decision that Plaintiff's claims against Defendants do not raise any substantial issue of federal patent law. Mot. to Strike at 5; FAC ¶¶ 9, 47, 53(a), 65. The Full Faith and Credit Act, *28 U.S.C. § 1738*, "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 373, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996)*.

Id. at 210 (quoting *Pueblo International, Inc. v. Reichard De Cardona, 725 F.2d 823, 828 (1st Cir. 1984))*. Thus, under the facts of the case, there was no federal antitrust action remaining.

The state court decision has no preclusive effect over Plaintiff's FAC. The Supreme Court has held that there is no *per se* rule barring federal claims based on the same set of facts as previous state law claims where the federal claims could not have been brought in state court. *Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985)*. As the Ninth Circuit has concluded, "Under California preclusion law, in order for *res judicata* to apply to claims not raised in previous proceedings, the court rendering the prior judgment must have had jurisdiction to hear such claims." *Eichman v. Fotomat Corp., 759 F.2d 1434, 1437 (9th Cir. 1985)*. Thus, a prior state **[*30]** court suit cannot preclude a subsequent action based on exclusive federal jurisdiction. *Id. at 1436* ("Because California preclusion law includes the requirement of prior jurisdictional competency, . . . we find that Eichman is not precluded from bringing a federal action when the state court had no jurisdiction to hear Eichman's federal claims.") (internal citation omitted).

Furthermore, the state court did not adjudicate the substantive question whether Defendants committed negligence or malpractice in failing to construe the '311 patent properly. The state court merely held it had jurisdiction over the Plaintiff's claim as alleged in that court. That question is separate and distinct from the question whether this Court has federal jurisdiction based on the FAC herein.

Accordingly, the Court DENIES Defendants' motion to strike on the basis of Full Faith and Credit.

D. Subject Matter Jurisdiction

Defendants next argue that the Court should dismiss this action for lack of subject matter jurisdiction. However, in the instant case, Defendants have no valid argument for lack of jurisdiction, as they concede the existence of diversity jurisdiction. *See* Mot. to Dismiss Reply at 2 ("Defendants **[*31]** do not contest the existence of diversity jurisdiction among the parties in this matter."). In addition, because the Court has determined that neither judicial estoppel nor Full Faith and Credit prevents Plaintiff from asserting new allegations under federal patent law, the Court also has federal question jurisdiction due to Plaintiff's allegations in the FAC that Defendants misunderstood and misconstrued the '311 patent in the underlying federal actions. *See* *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1268 (Fed. Cir. 2007)*. Moreover, Defendants do not contest that Plaintiff's new allegations (if permitted) would invoke exclusive federal jurisdiction. Thus, there is no basis for the Court to dismiss the action for lack of jurisdiction.

E. *Colorado River*

Finally, Defendants argue that the Court should dismiss or stay this action under the *Colorado River* doctrine. "The *Colorado River* doctrine allows a district court to stay or dismiss a federal suit 'due to the presence of a concurrent state proceeding for reasons of wise judicial administration.'" *Minucci v. Agrama, 868 F.2d 1113, 1115 (9th Cir. 1989)*.

> *Colorado River* and subsequent cases lay out **[*32]** the following factors, that, although not exclusive, are relevant to whether it is appropriate to stay proceedings:
> (1) whether the state court first assumed jurisdiction over property;
> (2) inconvenience of the federal forum;
> (3) the desirability of avoiding piecemeal litigation;
> (4) the order in which jurisdiction was obtained by the concurrent forums;
> (5) whether federal law or state law provides the rule of decision on the merits;
> (6) whether the state court proceedings are inadequate to protect the federal litigant's rights;
> (7) whether exercising jurisdiction would promote forum shopping.
> The factors relevant to a given case are subjected to a flexible balancing test, in which one factor may be accorded substantially more weight than another depending on the circumstances of the case, and "with the balance heavily weighted in favor of the exercise of jurisdiction."

Holder v. Holder, 305 F.3d 854, 870-71 (9th Cir. 2002).

However, the doctrine applies only "to claims under the concurrent jurisdiction of the federal and state courts. '[A] district court has no discretion to stay proceedings as to claims within exclusive federal jurisdiction under the wise judicial administration exception.'" **[*33]** *Minucci, 868 F.2d at 1115* (holding that, because plaintiff's "copyright claim is within the exclusive jurisdiction of the federal courts, the *Colorado River* doctrine is inapplicable"); *see also* *Intel Corp. v. Advanced Micro Devices, 12 F.3d 908, 913 n.7 (9th Cir. 1993)* (noting that, while "[t]he Supreme Court has yet to address the question of the applicability of the *Colorado River* doctrine to cases involving claims subject to exclusive federal jurisdiction . . . , . . . the circuit courts, and the Ninth Circuit in particular, have uniformly held that a district court may not grant a stay in this context"). In the instant case, because the Court has permitted Plaintiffs to maintain their new allegations asserting patent jurisdiction under *28 U.S.C. § 1338(a)*, it has exclusive federal jurisdiction over the case at bar. Hence, the *Colorado River* doctrine would appear inapplicable.

In any event, E-Pass agrees if federal jurisdiction obtains over the FAC and the claims are otherwise not barred, it will dismiss the state claims against the Defendants herein. This would obviate any stay. Accordingly, the Court DENIES Defendants' motion to dismiss or stay the action based on that doctrine.

III. [*34] CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' motion to dismiss and motion to strike Plaintiffs FAC.

This order disposes of Docket Nos. 116 and 117.

IT IS SO ORDERED.

Dated: November 4, 2011

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

End of Document

Lopeti v. Alliance Bancorp

United States District Court for the District of Hawaii

November 4, 2011, Decided; November 4, 2011, Filed

Civ. No. 11-00200 ACK-RLP

Reporter

2011 U.S. Dist. LEXIS 165859 *; 2011 WL 13233545

PAULA FINAU LOPETI, an individual, and MALIA ANA LOPETI, an individual, Plaintiffs, v. ALLIANCE BANCORP, a California corporation; ACCEPTANCE CAPITAL MORTGAGE CORPORATION, a Washington corporation; CENTRAL MORTGAGE COMPANY, an ARKANSAS banking corporation; HSBC BANK USA, National Association; MERSCORP, INC., a Delaware corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., a New York corporation and DOES 1-100, inclusive, Defendants.

Subsequent History: Motion granted by *Lopeti v. Alliance Bancorp, 2012 U.S. Dist. LEXIS 203562 (D. Haw., Mar. 21, 2012)*

Core Terms

mortgage, Plaintiffs', lender, motion to dismiss, securitization, borrowers, allegations, Crossclaim, documents, violations, Counts, foreclosure, successors, assigns, foreclosure sale, modification, foreclose, asserts, disclosures, nominee, courts, notice, antitrust, mortgagee, judicial notice, damages, parties, motion to strike, fiduciary duty, trust deed

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For Malia Ana Lopeti, an individual, Plaintiff, Counter Defendant: Paul J. Sulla, Jr., LEAD ATTORNEY, Hilo, HI USA.

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For Mortgage Electronic Registration System, Inc., a New York Corporation, Defendant, Cross Defendant: Gary Y. Okuda, LEAD ATTORNEY, Leu & Okuda, The Merchant House, Honolulu, HI USA.

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Judges: Alan C. Kay, Senior United States District Judge.

Opinion by: Alan C. Kay

Opinion

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE, GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT, AND GRANTING CROSS-DEFENDANTS' MOTION TO DISMISS CROSSCLAIM

PROCEDURAL BACKGROUND

On March 28, 2011, Malia Ana Lopeti and Paula Finau Lopeti ("Plaintiffs") filed a complaint ("Complaint") against defendants Alliance Bancorp[1] ("Alliance"), Acceptance Capital Mortgage Company ("ACMC"), Central Mortgage Company ("Central"), HSBC Bank USA, National Association ("HSBC"), Merscorp, Inc. ("Merscorp"), and Mortgage Electronic Registration System, Inc. ("MERS") (collectively "Defendants"). Doc. No. 1. The Complaint asserts federal and state law claims arising from a November 2006 mortgage **[*3]** transaction involving real property in Hilo, Hawaii.

On June 13, 2011, ACMC filed an answer to the Complaint. Doc. No. 9. ACMC's Answer was accompanied by a counterclaim against Plaintiffs ("ACMC's Counterclaim") and a crossclaim against all Defendants for reimbursement, contribution, equitable subrogation, and/or indemnity ("ACMC's Crossclaim").

On June 24, 2011, Defendants Central, MERS, and HSBC filed a motion to dismiss the Complaint ("Motion to Dismiss Complaint"). Doc. No. 20. The motion was accompanied by a memorandum in support ("Defs.' MTD Compl. Mem."). On August 9, 2011, and October 5, 2011, Defendants Merscorp and ACMC, respectively, filed motions to join the Motion to Dismiss Complaint. Doc. Nos. 32, 39.

On July 5, 2011, Plaintiffs filed an answer to ACMC's Counterclaim. Doc. No. 26.

On August 9, 2011, Cross-Defendants Central, HSBC, Merscorp, and MERS, filed a motion to dismiss ACMC's Crossclaim ("Motion to Dismiss Crossclaim"). Doc. No. 30. The motion was accompanied by a memorandum in support of the motion ("Defs.' MTD Crossclaim Mem."). On October 5, 2011, ACMC filed a memorandum in opposition to the Motion to Dismiss Crossclaim ("ACMC's Opp'n"). Doc. No. 40. On October **[*4]** 13, 2011, Central, HSBC, Merscorp, and MERS filed a reply memorandum in support of their Motion to Dismiss Crossclaim. Doc. No. 49.

On October 6, 2011, Plaintiffs filed a motion to strike the Motion to Dismiss Complaint as against all Defendants ("Pls.' Motion to Strike"), or in the alternative, a memorandum in opposition to Defendants' Motion to Dismiss Complaint ("Pls.' Opp'n"). Doc. No. 43. On October 13, 2011, Central, HSBC, and MERS filed a reply to Plaintiffs' Motion to Strike and Plaintiffs' Opposition ("Defs.' Reply"). Doc. No. 50.

The Court held a hearing on Defendants' Motion to Dismiss Complaint, Plaintiffs' Motion to Strike, and Defendant's Motion to Dismiss Crossclaim on October 27, 2011.

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[1] Alliance, which is apparently a defunct entity, has not appeared in this action. At the hearing, Plaintiffs asserted that they are still pursuing their claims as against Alliance. Thus, Plaintiffs' claims as against Alliance are not dismissed.

FACTUAL BACKGROUND[2]

This action relates to an adjustable rate note ("the Note") that Plaintiffs executed on November 20, 2006, in the amount of $269,100.00 in favor of Defendant Alliance.[3] Defs.' MTD Compl. Ex. 1-1.[4] To secure payment on the Note, Plaintiffs on the same day executed a mortgage in favor of Alliance ("the Mortgage") encumbering Plaintiffs' real property located at 149 Wilder Rd., Hilo, Hawaii, 96720 ("the Property"). Id. Ex. 1-2.[5] The Mortgage was recorded on January 4, 2007, in **[*5]** the Bureau of Conveyances of the State of Hawaii ("the Bureau") as Document No. 2007-001680. Id.

According to Plaintiffs, Alliance, as the lender, and ACMC, as the mortgage broker, convinced Plaintiffs to refinance by presenting them with a "teaser rate," but failed to explain to Plaintiffs that the initial rate and payment would soon adjust, increasing their monthly obligation. Compl. ¶¶ 4, 21. Plaintiffs further claim that Alliance and ACMC relied on Plaintiffs' stated income, assets, and liabilities, and that Alliance and ACMC could not "make a reasonable determination of whether Plaintiffs could qualify for the home loan without further verification and scrutiny." Id. ¶ 24. Plaintiffs assert that the terms of the Note were such that they could never realistically repay the loan and Alliance and ACMC should have declined to give them the loan. Id. ¶¶ 24, 27.

The Mortgage provides that MERS is the mortgagee under the Note, acting solely as nominee for the lender (Alliance) and the lender's successors and assigns. Defs.' MTD Compl. Ex. 1-2. MERS subsequently assigned the Mortgage to Central by virtue of an Assignment of Mortgage ("the Assignment") dated June 9, 2009, and recorded in **[*6]** the Bureau on June 17, 2009, as document number 2009-093030. Id. Ex. 1-3. Plaintiffs contest the validity of this assignment. Compl. ¶ 89. Plaintiffs also assert that the Mortgage and Note were securitized, and that the securitization renders the Note unenforceable. Id. ¶¶ 94, 98.

According to Plaintiffs, in June 2008, Central informed Plaintiffs that Central did not have a renewal of Plaintiffs' hazard insurance covering the Property and thus had included the property under its group insurance policy. Id. ¶ 35. Plaintiffs claim that they later learned it was hurricane insurance that was required by Central and purchased it locally at a price much less than the group coverage provided by Central. Id. ¶ 40. Plaintiffs assert that "[h]opelessly behind with the mortgage payment primarily as a result of [the] forced insurance charge and the increasing monthly amount under the mortgage, the Plaintiffs sought assistance to modify their loan under a loan modification program offered by CENTRAL in April 2009." Id. ¶ 41. Plaintiffs assert that they were financially unable to accept a loan modification offered by Central. Id. ¶¶ 42-43.

On November 19, 2009, Central conducted a nonjudicial foreclosure **[*7]** and purchased the Property. Id. ¶ 45. Plaintiffs contend that "CENTRAL and HSBC do not own or hold the Note and have not claimed or demonstrated that the Defendants represent the actual owner of the Note," and thus Central and HSBC had no authority to conduct the foreclosure. Id. ¶¶ 100, 105-07.

Plaintiffs filed the instant Complaint on March 23, 2011, seeking, inter alia, a declaration that Central cannot legally enforce the terms of the Note and Mortgage, a declaration that the foreclosure sale is invalid, and damages. Id. Prayer for Relief.

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[2] The facts as recited in this Order are for the purpose of disposing of the instant motions, and are not to be construed as findings of fact that the parties may rely on in future proceedings in this case.

[3] The Moving Defendants attached an Affidavit of Sale as exhibit 1 to the Motion to Dismiss Complaint. The Affidavit of Sale had several documents, including the Note, attached to it and labeled as Exhibits 1-9. For citation purposes, the Court will refer to the Affidavit of Sale as Exhibit 1, and the subsequent attachments as Exhibits 1-1, 1-2, 1-3, and so forth.

[4] Attached to the Note was a Prepayment Addendum to Note. Defs.' MTD Compl. Ex. 1-1.

[5] Attached to the Mortgage was an Adjustable Rate Rider. Defs.' MTD Compl. Ex. 1-2.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") permits dismissal of a complaint that fails "to state a claim upon which relief can be granted." Under Rule 12(b)(6), review is generally limited to the contents of the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996). Courts may also "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). Documents whose contents are alleged in a complaint and whose authenticity is not questioned by any party may also be considered in ruling on a Rule 12(b)(6) motion to dismiss. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

On a Rule 12(b)(6) motion to **[*8]** dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996). However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. See Sprewell, 266 F.3d at 988; Nat'l Assoc. for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000); In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996). Moreover, the court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. Sprewell, 266 F.3d at 988.

In summary, to survive a Rule 12(b)(6) motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations and quotations omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal citations and quotations omitted). Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim that is "plausible **[*9]** on its face." Id. at 570. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. (quoting Fed. R. Civ. P. 8(a)(2)).

"Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment." Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009) (internal quotation marks omitted). "But courts have discretion to deny leave to amend a complaint for futility, and futility includes the inevitability of a claim's defeat on summary judgment." Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir.1987) (citations and internal quotation marks omitted).

DISCUSSION

Plaintiffs' Complaint asserts the following claims: Counts I, II, and V — violations of the Hawaii Revised Statutes ("H.R.S.") Chapter 667; Count III — violation of the Clayton Antitrust Act, 15 U.S.C. § 12, et seq.; Count IV — violation of the Hawaii antitrust/antimonopoy acts, H.R.S. §§ 480-13 and 480-9; Count VI — breach of contract; Count VII — violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et seq.; Counts VIII and **[*10]** IX — unfair and deceptive acts or practices ("UDAP") in violation of H.R.S. § 480-2; Counts X and XI — breach of fiduciary duty; Counts XII and XIII — common law fraud; Count XIV — respondeat superior liability; Count XV — negligent misrepresentation; Count XVI — civil conspiracy; Count XVII — wrongful disclosure; Count XVIII — improper restrictions as a result of securitization; Count XIX — wrongful conversion of the Note; Count XX — the

Mortgage and Note are unenforceable because of securitization; Count XXI — restrictions imposed upon the modification of the Mortgage are a clog upon the equity of redemption; Count XXII — quiet title; and Count XXIII — constructive trust or mortgage trust. Central, HSBC, and MERS filed a Motion to Dismiss Complaint, and ACMC and Merscorp have joined in the motion. The Court will address the counts in turn. Before doing so, the Court will address Plaintiffs' Motion to Strike Defendants' Motion to Dismiss Complaint and whether the Court can take judicial notice of documents submitted by the parties. After addressing the merits of the Motion to Dismiss Complaint, the Court will address Defendants Central, HSBC, Merscorp, and MERS's Motion to Dismiss ACMC's Crossclaim. **[*11]**

I. Plaintiffs' Motion to Strike

Plaintiffs assert that Defendants' Motion to Dismiss Complaint is untimely because the Defendants failed to file an answer or responsive pleading within the applicable time period provided by *Federal Rule of Civil Procedure 12*.[6] At the hearing, Plaintiffs' attorney asserted that *Federal Rule of Civil Procedure 12(f)* provides authority for striking the Motion to Dismiss Complaint.

"[T]he Ninth Circuit 'allows a motion under *Rule 12(b)* any time before the responsive pleading is filed,' even if filed outside the time limits of *Rule 12(a)(1)*." *Ass'n of Irritated Residents v. Fred Schakel Dairy, Civ. No. F0540707AWISMS, 2005 U.S. Dist. LEXIS 36769, 2005 WL 3299508, at *3 (E.D. Cal. Dec. 2, 2005)* (quoting *Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1474 (9th Cir. 1988))*. Because the Moving Defendants, with the exception of ACMC who timely filed an answer, have failed to file a responsive pleading in this case, the Motion to Dismiss Complaint is not untimely.

Even if untimely, however, the rules do not require striking the motion. *Rule 12(f)* provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Under *Rule 12(f)*, a party may only move to strike material contained in a "pleading." A motion to dismiss is not a "pleading," which is defined by *Federal Rule of Civil Procedure 7(a)* as a complaint, an answer to a complaint, an answer to a counterclaim, an answer to a **[*12]** crossclaim, a third-party complaint, an answer to a third-party complaint, or a court-ordered reply to an answer. Consequently, a motion to dismiss may not be the subject of a *Rule 12(f)* motion. See *MJ Harbor Hotel, LLC v. McCormick & Schmick Rest. Corp., 599 F. Supp. 2d 612, 623 (D. Md. 2009)*; *Heise v. Olympus Optical Co., Ltd., 111 F.R.D. 1, 4 (N.D. Ind. 1986)*.

Moreover, Plaintiffs have not sought entry of default judgment against any Defendant.

For these reasons, the Court DENIES Plaintiffs' Motion to Strike.

II. Judicial Notice

Pursuant to *Federal Rule of Evidence 201*, a court may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. Defendants request that the Court take judicial notice of the Affidavit of Sale, which was recorded in the Bureau on November 30, 2009, as document number 2009-182298. Defs.' MTD Compl. Ex. 1. The Affiant, an

[6] *Federal Rule of Civil Procedure 12(a)(1)(A)* provides that a defendant must serve an answer within twenty-one days after being served the summons and complaint, or if the defendant waives service, within sixty days after a request for a waiver was sent. The docket shows that MERS and Merscorp were served on April 18, 2011, and thus an answer was due by May 9, 2011. Doc. No. 7. Central was served on April 21, 2011, and thus an answer due by May 12, 2011. Doc. No. 6. HSBC filed a Waiver of Service of Summons on June 29, 2011, and stated therein that the waiver request was sent on April 22, 2011, rendering an answer due by June 21, 2011. Doc. No. 22. The Moving Defendants filed the Motion to Dismiss Complaint on June 24, 2011. Merscorp filed its Motion for Joinder on August 9, 2011. Doc. No. 32. ACMC was served on May 24, 2011, and timely filed its answer, counterclaim, and crossclaim on June 13, 2011. Doc. Nos. 9, 13.

attorney who represented Central in the nonjudicial foreclosure sale, attached and filed copies of relevant documents to the Affidavit. Id. The Affiant asserted that each copy was true and correct. Id. These documents include the Note, the Mortgage, the Assignment of the Mortgage to Central, and an affidavit of publication of notice in the Honolulu Star Bulletin ("Affidavit of Publication"). Defs.' MTD Compl. Exs. 1-1, 1-2, 1-3, and 1-9.

At the **[*13]** hearing, Plaintiffs conceded that the Court can consider the affidavit of sale, including the documents attached thereto, in deciding the Motion to Dismiss Complaint. Plaintiffs, however, continue to contest the authenticity of the Affidavit of Sale, asserting that it has no legal effect due to the absence of a notary stamp and because it is not based on the Affiant's personal knowledge.[7] Pls.' Opp'n at 17-18.

The Court rejects Plaintiffs' assertion that it cannot consider the Affidavit of Sale because it lacks a notary stamp. "An affidavit is a sworn document," and "[a] document's qualification as an affidavit is not determined by the presence or absence of 'the stamp or seal of a notary.'" *De Mars v. O'Flynn, 287 F. Supp. 2d 230, 242 (W.D.N.Y. 2003)* (quoting 11 Moore's Federal Practice § 56.14[1][b] (Matthew Bender 3d ed.)); see *Pedersen v. Greenpoint Mortg. Funding, Inc., Civ. No. S-11-0642 KJM EF, 2011 U.S. Dist. LEXIS 96397, 2011 WL 3818560, at *16 n.8 (E.D. Cal. Aug. 29, 2011)* ("[N]otarization is an acknowledgment of the signer's identity and is not essential to a document's validity."). The Affiant asserted the Affidavit was made under sworn oath, and it is signed by the Affiant and a witness. The Court finds no basis to question the authenticity of the Affidavit, which is contained in the public records. **[*14]** [8]

The contents of the Note, Mortgage, Mortgage Assignment, Affidavit of Sale, and Affidavit of Publication can be readily determined through public records, the accuracy of which cannot reasonably be questioned. The Court therefore takes judicial notice of these documents. See *Benak v. Alliance Capital Mgmt. L.P., 435 F.3d 396, 401 n.15 (3d Cir. 2006)* (concluding it was proper to take judicial notice of newspaper articles "to indicate what was in the public realm at the time" for purposes of establishing inquiry notice); Caraang v. PNC Mortg., 795 F. Supp. 2d 1098, 2011 WL 2470637, at *12 (D. Haw. 2011) (taking judicial notice of, inter alia, a mortgage, a note, and an "Affidavit of Foreclosure Under Power of Sale"); *Doran v. Wells Fargo Bank, Civ. No. 11-00132 LEK-BMK, 2011 U.S. Dist. LEXIS 58436, 2011 WL 2160643, at *7 (D. Haw. May 31, 2011)* (taking judicial notice of a first mortgage, second mortgage, and foreclosure affidavit).

III. Motion to Dismiss Complaint

A. Count I — Lack of Legal Right to Foreclose (Central and HSBC)

In Count I, Plaintiffs assert that Defendants Central and HSBC violated Hawaii Revised Statute ("H.R.S.") *§ 667-5* because they had no right to foreclose on the Property due to the defective assignment of the Mortgage, the securitization of the loan, and because "Central and HSBC are not the real party in interest." Compl. ¶¶ 102-07.

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[7] Plaintiffs refused the Court's invitation to consider the Motion to Dismiss as a motion for summary judgment, which would have allowed the Court to consider the documents attached to Plaintiffs' Opposition. See *Fed. R. Civ. P. 12(d)*("If, on a motion under *Rule 12(b)(6)* or *12(c)*, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under *Rule 56*."). The Court will not take judicial notice of the documents attached to Plaintiffs' Opposition because the documents are either unreliable or not necessary in deciding the instant motion.

[8] The Court also concludes that Plaintiffs' assertion that the Affidavit is not based on the Affiant's personal knowledge because the Affiant attests "to actions that occurred almost exclusively outside of Honolulu, where the Affiant resides," and that "the affiant does not claim to have personally witnessed or took part in any of the actions she described," are without merit. Pls.' Opp'n at 14-15. The Affiant states that at all relevant times she was authorized to act on behalf of Central in the matters set forth in the Affidavit, and that the Affidavit was based on her personal knowledge and belief. Defs.' MTD Compl. Ex. 1. She further certified that either her or her representative handled the notifications attached to the Affidavit and conducted the public auction sale. Id. The Affiant's personal knowledge is therefore apparent from the face of the Affidavit.

H.R.S. § 667-5 provides requirements that a mortgagee, the mortgagee's successor in interest, **[*15]** or an entity acting on its behalf, must meet to conduct a nonjudicial foreclosure. "[A]n agreement created at a foreclosure sale conducted pursuant to *HRS section 667-5* is void and unenforceable where the foreclosure sale is invalid under the statute." *Lee v. HSBC Bank USA, 121 Haw. 287, 218 P.3d 775, 780 (Haw. 2009)*.

The Assignment of Mortgage, recorded in the Bureau, establishes that MERS, as nominee for Alliance, transferred to Central "all its right, title and interest in" the Mortgage. See id. In their opposition, Plaintiffs assert that Alliance's bankruptcy resulted in an invalid assignment. Contrary to Plaintiffs' assertion, MERS may assign a mortgage after the lender for which MERS was named as nominee has dissolved because MERS, as mortgagee, holds legal title to the interests in the mortgage. See Defs.' MTD Compl. Ex. 1-2 ("MERS is the mortgagee under this Security Instrument"; "MERS holds only legal title to the interests granted by Borrower in this Security Instrument"); see also, *Cooper v. Bank of N.Y. Mellon, Civ. No. 11-00241 LEK-RLP, 2011 U.S. Dist. LEXIS 94410, 2011 WL 3705058, at *13 (D. Haw. Aug. 23, 2011)* (concluding that a lender's bankruptcy did not preclude MERS from validly assigning the lender's mortgage to another entity); *Long v. One West Bank, FSB, No. 11 C 703, 2011 U.S. Dist. LEXIS 94675, 2011 WL 3796887, at *3 (N.D. Ill. Aug. 24, 2011)* (concluding that because the security deed stated that MERS is the grantee under the security instrument, **[*16]** MERS's assignment of a security deed after the lender for which it was acting as nominee had declared bankruptcy was valid); *Kiah v. Aurora Loan Servs., LLC, Civ. No. 10-40161-FDS, 2010 U.S. Dist. LEXIS 121252, 2011 WL 841282, at * 4 (D. Mass. Mar. 4, 2011)* (determining that because "MERS had the power to act as the agent of any valid note holder under the terms of the mortgage documents," the fact that MERS was acting as nominee for a dissolved entity did not prevent it from validly assigning the mortgage).

In their opposition, Plaintiffs' assert that the assignment is suspicious and improper because it is signed by Dorcas Tiller, in her capacity as Assistant Secretary of MERS, but that Tiller is actually an employee of Central. Pls.' Opp'n at 12-13. In support of their argument, Plaintiffs attach a print out dated September 27, 2011, from "LinkedIn," a social-networking website, which shows "Dorcas Tiller" is a "Cash Manager at Central Mortgage Company." Pls.' Opp'n Ex. C. The Court finds this is an unreliable source and not a proper subject of judicial notice, and in any event, the printout reveals nothing about the validity of an execution and assignment by MERS in June 2009. Moreover, in rejecting claims challenging foreclosure procedures for home loans maintained **[*17]** within the MERS system, the Ninth Circuit has explained that:

> MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans.

*Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 2011 WL 3911031, at *2 (9th Cir. Sept. 7, 2011)* (internal citations omitted). There is thus no basis for Plaintiffs' allegation that Tiller was not authorized to act on behalf of MERS.

Plaintiffs' arguments with respect to securitization are also without merit. Securitization of a loan through the MERS system does not affect the right of the lender, or the lender's successor in interest, to initiate foreclosure after borrowers default on their loans. *656 F.3d 1034, Id. at *7*.

At the hearing, Plaintiffs asserted that Central conducted the foreclosure without authority because it is not a holder of the Note. Plaintiffs further asserted that a letter was sent from Central to Plaintiffs stating that HSBC is the holder of the Note. Plaintiffs, however, did not refer to this letter in their Complaint and have not submitted it to the Court. The parties have not otherwise submitted any documentation related to who **[*18]** owns the Note. The Complaint also fails to assert what actions, if any, HSBC performed in the foreclosure sale. Plaintiffs' argument apparently is that a split between the Mortgage and Note occurred because Central does not own the Note, and such split renders Central without authority to foreclose on the Mortgage. The Court declines to consider this argument without coherent or detailed factual assertions in the Complaint or argument from the parties. The Court will allow Plaintiffs to amend Count I and makes the following observations.

In *Cervantes, 656 F.3d 1036, 2011 WL 3911031, at *7*, the Ninth Circuit explained that a split between a note and deed "only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds, are not agents of the lenders." In Cervantes, the Ninth Circuit cited *Landmark National Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (Kan. 2009)*, a case in which the Kansas Supreme Court explains the theory behind this conclusion as follows:

> [I]n the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable. The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note **[*19]** to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust.

Id. at 166-67.

The Mortgage explicitly states that MERS is acting as nominee for "Lender and Lender's successors and assigns." Defs.' MTD Compl. Ex. 1-2. "A nominee means one designated to act for another as his representative in a rather limited sense and is used sometimes to signify an agent or trustee. It is a common occurrence in public land records and has long been sanctioned as a legitimate practice." *James v. ReconTrust Co., No. CV-11-CV-324-ST, 2011 U.S. Dist. LEXIS 101139, 2011 WL 3841558, at *7 (D. Or. Aug. 26, 2011)*. In *In re Tucker, 441 B.R. 638 (Bkrtcy. W.D. Mo. 2010)*, the court concluded that the language in the Deed of Trust at issue was "more than sufficient" to render MERS an agent of the Lender and its successors." *Id. at 645*. The court relied on language from the deed, similar to the language in the Plaintiffs' Mortgage, that granted MERS broad rights **[*20]** as nominee for Lender and Lender's successors and assigns to "'to exercise any or all' of the interests granted by the Borrower under the Deed of Trust, 'including but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender.'" Id. If Central, as assignee of "all [MERS's] right, title and interest in" the Mortgage became an agent for Alliance's successors and assigns, Central might be entitled to foreclose by virtue of its status as mortgagee and an agent for the lender or the lender's successor or assign. See Defs.' MTD Compl Ex. 1-3; see *In re Tucker, 441 B.R. at 646* (determining that naming MERS as nominee in a deed of trust was sufficient to create an agency relationship between MERS and the Lender's successors because the successors manifested assent that the agent will act on its behalf through their membership agreements with MERS).

The Mortgage also expressly gives MERS and its successors and assigns the authority to foreclose on the Property:

> TRANSFER OF RIGHTS IN THE PROPERTY
>
> This Security Instrument secures to Lender: (I) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrowers covenants and **[*21]** agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the [Property]. . . . Borrower understands . . . if necessary to comply with law or customs, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.

Id. Ex. 1-2 (emphasis added). Thus, if it was "necessary to comply with law or customs," Central might be entitled to foreclose on the Property regardless of the status of the holder of the Note.

Finally, under *H.R.S. § 667-5*, a mortgagee or entity acting on the mortgagee's behalf may conduct a nonjudicial foreclosure pursuant to a power of sale contained in a mortgage. The statute provides no requirements related to the Note.

Count I is DISMISSED WITH LEAVE TO AMEND.

B. Count II — Failure to Provide Public Announcement of Continued Date [*22] (Central and HSBC)

At the hearing, Plaintiffs' counsel stated that it is no longer pursuing a claim based on an alleged failure to provide notice of postponement of a continued date.

Count II is therefore DISMISSED WITHOUT PREJUDICE.

C. Count III — Violation of the Clayton Antitrust Act (All Defendants)

Plaintiffs allege that all Defendants violated the Clayton Anti-Trust Act, *15 U.S.C. § 12, et seq.*, by engaging in predatory or anti-competitive conduct by selling "over-leveraged, highly inflated loans to the Plaintiffs," selling "fraudulent securities to investors," and "participat[ing] in a ratings scheme to fraudulently rate these securities as safer than they truly were." Compl. ¶ 117. According to Plaintiffs, this scheme caused the collapse of the real estate market, which in turn created an economic collapse, "which resulted in Plaintiffs being unable to pay their mortgage payments." Id. ¶ 119.

Count III of the Complaint is identical to Count I of the plaintiff's complaint in *Radford v. U.S. Bank Nat'l Ass'n, Civ. No. 10-00766 LEK-KSC, 2011 U.S. Dist. LEXIS 101774, 2011 WL 4054863 (D. Haw. Sept. 9, 2011)*, and Count I of the plaintiff's complaint in *Radford v. Wells Fargo Bank, Civ. No. 10-00767 SOM-KSC, 2011 U.S. Dist. LEXIS 51935, 2011 WL 1833020 (D. Haw. May 13, 2011)*. In these cases, Judge Kobayashi and Chief Judge Mollway, respectively, dismissed the Counts, explaining: **[*23]**

> The Complaint includes no factual allegation suggesting that Defendants entered into an agreement to affect competition or committed acts violating federal antitrust laws. [Plaintiff] also fails to identify any particular provision of the Clayton Act that Defendants have allegedly violated. Overall, he fails to put forth any specific factual or legal allegations or to link those allegations to particular statutory violations. Instead, [Plaintiff] alleges that Defendants 'worked to create the collapse of the mortgage market, which in turn created an economic collapse unprecedented since the Great Depression.' Compl. ¶ 76. Such sweeping statements fail to apprise Defendants of their alleged wrongdoings. The court additionally notes that, as [Plaintiff] has failed to allege an adequate 'antitrust injury,' he could lack 'antitrust standing' to bring this claim.

*U.S. Bank, 2011 U.S. Dist. LEXIS 101774, 2011 WL 4054863, at *12* (quoting *Wells Fargo, 2011 U.S. Dist. LEXIS 51935, 2011 WL 1833020, at *3)*.

Plaintiffs have failed to give any reason that would distinguish their claims from the identical claims in U.S. Bank and Wells Fargo, and therefore the Court adopts the foregoing analysis as the Court's analysis with respect to Count III.

Count III is DISMISSED WITHOUT PREJUDICE.

D. Count IV — Violation of Hawaii Antitrust/Antimonopoly [*24] Laws (All Defendants)

Plaintiffs assert that all Defendants violated Hawaii Antitrust/Antimonopoly laws by monopolizing or attempting to monopolize the mortgage lending and servicing market. Compl. ¶¶ 123-24. Again, the Plaintiffs' allegations are identical to those made in Count II of U.S. Bank and Count II of Wells Fargo. In granting the defendants motions to dismiss in those cases, Judge Kobayashi and Chief Judge Mollway, respectively, found:

> In Count II, [Plaintiff] asserts violations of state antitrust laws. [Plaintiff] states generally that '[m]ortgage lending and servicing in Hawaii is an activity in or affecting interstate commerce[.]' Compl. ¶ 79. He then alleges that Defendants violated 'the Hawaii Anti-Trust Act, *Hawaii Revised Statutes § 480-13*, and the Hawaii Monopolization Act, *Hawaii Revised Statutes § 480-9*.' Compl. ¶ 80. Again, [Plaintiff] fails to make factual

> allegations suggesting that Defendants made an agreement to diminish competition. Broad assertions of state ***antitrust law*** violations do not give Defendants an opportunity to properly defend themselves. Count II is dismissed with leave to amend as to all Defendants.

*U.S. Bank, 2011 U.S. Dist. LEXIS 101774, 2011 WL 4054863, at *13* (quoting *Wells Fargo, 2011 U.S. Dist. LEXIS 51935, 2011 WL 1833020, at *3* (third and fourth alterations in original)).

Plaintiffs have failed to give any reason that would distinguish **[*25]** their claims from the identical claims in U.S. Bank and Wells Fargo. This Court adopts the reasoning of these cases as its analysis with respect to Count IV.

Count IV is DISMISSED WITHOUT PREJUDICE.

E. Count V — Violation of *H.R.S. §§ 667-5 - 667-10* (Central and HSBC)

In Count V, Plaintiffs seek a declaration that the foreclosure sale of their home is void due to Defendants Central and HSBC failing to follow the procedural and notice requirements for a nonjudicial foreclosure sale set forth in *H.R.S. § 667-5 to -10*. Compl. ¶¶ 125-28. Specifically, Plaintiffs allege that Defendants Central and HSBC failed to: (1) publicly announce the continued auction date; (2) publish the correct location of the auction; (3) appear at the auction site to conduct the sale; and (4) "deposit[] at most ten (10%) of the bid amount in advance of the auction as required under *HRS § 667-5.7*." Id. ¶ 126.

At the hearing, Plaintiffs' counsel stated that they are no longer asserting that Central and HSBC failed to publicly announce a continued auction date or deposit at must ten percent of the bid amount in advance of the auction.

To the extent Plaintiffs are still asserting that Central and HSBC failed to publish the correct location and failed to appear at the auction **[*26]** site, their claims fail. The Affidavit of Publication establishes that a notice of sale for the Property was published in the Honolulu Star-Bulletin three times, listing the sale date as November 19, 2009, and the location of the sale as the State Office Building in Hilo, Hawaii. Plaintiffs do not dispute that the nonjudicial foreclosure sale took place on November 19, 2009, and have not asserted that the sale did not occur at the State Office Building in Hilo, Hawaii. Compl. ¶ 45. Under Chapter 667, there is no requirement that the mortgagee itself appear at the auction site to conduct the sale. Plaintiffs have not asserted who conducted the sale and whether or not that party was authorized to act on behalf of Central. Plaintiffs' conclusory allegations, without any factual detail, are insufficient to survive a motion to dismiss.

Count V is hereby DISMISSED WITHOUT PREJUDICE.

F. Count VI — Breach of Contract (Central and HSBC)

Count VI, Plaintiffs breach of contract claim, is premised on their alleged status as third-party beneficiaries of a contract entered into between Central and the government as part of the Home Affordable Modification Program ("HAMP"). Compl. ¶¶ 130-35. The HAMP **[*27]** grew out of the *Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, et seq.* ("EESA"), which authorizes the Department of Treasury ("DOT") to purchase certain troubled assets. See *Phipps v. Wells Fargo Bank, N.A., Civ. No. 10-2025 LJO-SKO, 2011 U.S. Dist. LEXIS 10550, 2011 WL 302803, at *1 (E.D. Cal. Jan. 27, 2011)*. "To the extent DOT acquires mortgages, EESA directs DOT to maximize assistance of homeowners and to encourage mortgage servicers to take advantage of government programs to minimize foreclosures." Id.; see *12 U.S.C. § 5219*. To further these goals, DOT, acting through Fannie Mae, entered into agreements with loan servicers. See *Phipps, 2011 U.S. Dist. LEXIS 10550, 2011 WL 302803, at *1*. Plaintiffs assert that Fannie Mae entered into such an agreement with Central. Compl. ¶ 133.

HAMP does not recognize a private right of action against lenders or servicers. See *Phipps, 2011 U.S. Dist. LEXIS 10550, 2011 WL 302803, at *9*. Consequently, Plaintiffs may only recover for a breach of the HAMP agreement if they are third party beneficiaries of the HAMP contract. For third parties to recover on a contract, they must be able to show that they are intended, rather than incidental, beneficiaries of the contract. *Hoffman v. Bank of Am., N.A., No. C 10-2171 SI, 2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773, at *3 (N.D. Cal. June 30, 2010)*. Thus, the third party "must be able to show that the contract was made with the 'express or implied intention **[*28]** of the parties to the contract to benefit the third party.'" Id. (quoting *Klamath v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999))*. When a government contract is at issue, the general presumption is that members of the public are incidental beneficiaries and "may not enforce the contract absent a clear intent to the contrary." *Klamath, 204 F.3d at 1211*.

The Supreme Court recently rejected a third-party beneficiary theory brought by health care facilities that had been overcharged by pharmaceutical companies in violation of a pricing agreement between the pharmaceutical companies and the federal government. See *Astra USA, Inc. v. Santa Clara Cnty., 563 U.S. 110, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011)*. The pricing agreement was created pursuant to the *Public Health Services Act ("PHSA")*, *42 U.S.C. § 256b*, which did not provide for a private right of action. *Id. at 1345*. The Supreme Court explained that the pricing agreements, composed by HHS, enable drug manufacturers to opt into the statutory scheme, and that therefore a third-party suit to enforce the pricing agreements "is in essence a suit to enforce the statute itself." *Id. at 1348*. Consequently, the absence of a private cause of action to enforce statutory obligations "would be rendered meaningless" if a party could bring a third-party suit to enforce a government contract that merely confirms those statutory obligations. Id.

Similarly, **[*29]** the HAMP agreements are form contracts provided by Fannie Mae and allow lenders to opt into a statutory scheme.[9] See *Warner v. Wells Fargo Bank, N.A., No. SACV 11-00480 DOC (PLAx), 2011 U.S. Dist. LEXIS 66551, 2011 WL 2470923, at *3 (C.D. Cal. June 21, 2011)*. As in Astra, allowing Plaintiffs to bring a third party contract claim would allow Plaintiffs to circumvent the absence of a private right of action to enforce HAMP contracts. Moreover, "it would be unreasonable for a qualified borrower seeking a loan modification to rely on the HAMP servicer's agreement as granting him enforceable rights since the agreement does not actually require that the servicer modify all eligible loans, nor does any of the other language of the contract demonstrate that the borrowers are intended beneficiaries." *Hoffman, 2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773, at *4*.

Accordingly, this Court agrees with the majority of the courts that borrowers are not third party beneficiaries and have no right to enforce a HAMP contract between a lender and Fannie Mae. See *Hunter v. CitiMortgage, Inc., No. CV 11-01549-PHX-FJM, 2011 U.S. Dist. LEXIS 115315, 2011 WL 4625973, at *2 (D. Ariz. Oct. 5, 2011)*; *Omega v. Wells Fargo & Co., No. C 11-02621 JSW, 2011 U.S. Dist. LEXIS 103928, 2011 WL 4345046, at *3-4 (N.D. Cal. Sept. 14, 2011)*; *Hoffman, 2010 U.S. Dist. LEXIS 70455, 2010 WL 2635773, at *3* (collecting cases); but see *Reyes v. Saxon Mortg. Servs., Inc., 09-cv-1366 DMS (WMC), 2009 U.S. Dist. LEXIS 125235, 2009 WL 3738177, at *2 (S.D. Cal. Nov. 5, 2009)* (determining the plaintiff's third-party breach of contract claim based on a HAMP agreement stated a plausible claim because "[a]rguably, one **[*30]** of the purposes of the contract is to assist homeowners, like Plaintiff, who are facing foreclosure").

Count VI is DISMISSED WITH PREJUDICE.

G. Count VII - Violation of TILA (Central)

Count VII alleges that Central violated TILA by failing to provide Plaintiffs with accurate material disclosures required under TILA, "including but not limited to the new charges for forced placed insurance that are added to the escrow account of the Plaintiffs." Compl. ¶ 142. Plaintiffs further allege that Central "arbitrarily charged and applied extremely high insurance charges, while neglecting to properly notify the plaintiffs and failing to disclose or explain the significance of the insurance" in "clear violation of the public policy of TILA." Id. ¶ 143. Defendants assert that Plaintiffs' TILA claims are time-barred, and also lack merit, because, inter alia, Central was not the original lender. Defs.' MTD Compl. Mem. at 3, 12-14; Defs.' Reply at 9.

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[9] Plaintiffs did not submit a copy of the HAMP agreement between Central and Fannie Mae and has not asserted that the agreement was not the standard contract used by Fannie Mae.

The purpose of TILA is to assure a meaningful disclosure of credit terms so that consumers can understand more readily various available terms and avoid the uninformed use of credit. See *15 U.S.C. § 1601(a)*. TILA requires the lender to disclose to borrowers specific information, **[*31]** including providing the borrower of his or her right to rescind a transaction. See, e.g., *15 U.S.C. §§ 1635*, *1638*. Regulation Z, 12 C.F.R. Part 226, is issued by the Board of Governors of the Federal Reserve System to implement TILA. See *12 C.F.R. § 226.1(a)*. Four sections of Regulation Z deal with mortgage loan transactions: *Sections 226.17* and *226.18* provide for general disclosures that must be made before consummation of a transaction; *Section 226.19* deals with disclosures required in certain residential mortgage and variable-rate transactions; and *Section 226.20* provides for post-consummation disclosures.

Under TILA, an assignee may be liable for violations that are "apparent on the face of the disclosure statement." See *15 U.S.C. § 1641*. In Count VII, Plaintiffs, however, do not allege that Central is liable under TILA for any other entities alleged violations. Instead, Plaintiffs only make assertions regarding the insurance charges imposed by Central. See Compl. ¶¶ 140-49. Other courts have held that a creditor's actions in force-placing insurance on a borrower's account may have constituted a new transaction and triggered new disclosure requirements under *§ 226.18*, which provides that, "[f]or each transaction, the creditor shall disclose . . . [t]he finance charge." See *Vician v. Wells Fargo Home Mortg., No. 2:05-CV-144, 2006 U.S. Dist. LEXIS 26141, 2006 WL 694740, at *5 (N.D. Ind. Mar. 16, 2006)*; **[*32]** *Travis v. Boulevard Bank N.A., 880 F. Supp. 1226, 1229-30 (N.D. Ill. 1995)*. This Court need not decide whether such a claim is viable here, however, because Plaintiffs claims are untimely.

TILA provides borrowers two remedies for disclosure violations: (1) rescission, *15 U.S.C. § 1635*; and (2) damages, *15 U.S.C. § 1640*. Plaintiffs seek both, which have different requirements, and the Court will address each remedy in turn. See Compl. ¶ 149.

1. Rescission

In credit transactions in which a security interest in a consumer's principal dwelling is retained, TILA gives a consumer three days in which to rescind the transaction. *15 U.S.C. § 1635(a)*. If a lender fails to provide material disclosures, the duration of the borrower's right to rescind extends for "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." *15 U.S.C. § 1635(f)*. "The statute of limitations applicable to TILA rescission is not subject to equitable tolling." *Wells Fargo, 2006 U.S. Dist. LEXIS 26141, 2011 WL 1833020, at *6*. Here, the Property was sold at a foreclosure sale on November 19, 2009. Compl. ¶¶ 82-85. Thus, Count II fails to state a claim upon which relief may be granted. See *Takushi v. BAC Home Loan Servicing, LP, 814 F. Supp. 2d 1073, 2011 WL 3861439, at *7 (D. Haw. Aug. 31, 2011)* (dismissing Plaintiff's TILA claim for rescission because the subject property had been sold at a nonjudicial foreclosure auction before Plaintiff filed the lawsuit). **[*33]**

2. Damages

TILA requires that borrowers bring claims for damages "within one year from the date of the occurrence of the violation," unless the claim is asserted "as a matter of defense by recoupment or set-off." *15 U.S.C. § 1640(e)*. Courts, however, may extend the period if the one-year rule would be unjust or would frustrate TILA's purpose. *King v. California, 784 F.2d 910, 915 (9th Cir. 1986)*. For example, if a borrower had no reason or opportunity to discover the fraud or nondisclosures that form the basis of his or her TILA claim, the court may toll the statute of limitations. Id.; but see *Meyer v. Ameriquest Mortg. Co., 342 F.3d 899, 902-03 (9th Cir. 2003)* (refusing to toll the statute of limitations on a TILA claim because the plaintiff was in full possession of all loan documents and did not allege any concealment of loan documents or any other action that would have prevented discovery of the TILA violations); *Blanco v. Am. Home Mortg. Serv., Inc., No. Civ. 2:09-578 WBS-DAD, 2009 U.S. Dist. LEXIS 119338, 2009 WL 4674904, at *2-3 (E.D. Cal. Dec. 4, 2009)* (same). "Equitable tolling is generally applied in situations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" O'Donnell v. Vencor Inc., *466 F.3d 1104, 1112 (9th Cir. 2006)* (citation omitted).

Plaintiffs' TILA claim **[*34]** is based on the alleged lack of required disclosures related to insurance charges by Central. If the insurance charges constitute a "new transaction," supporting a viable claim under *12 C.F.R. § 226.18*, the limitations period would begin to run at the time of such transaction. See *King, 784 F.2d at 915* ("the limitations period in [*15 U.S.C. §] 1640(e)* runs from the date of consummation of the transaction"). Plaintiffs allege that on or about June 2008, Central informed Plaintiffs that Central had included the Property in its group insurance policy, and that Central increased the mortgage payment to recover the costs of the added insurance coverage in July 2008. Compl. ¶¶ 35, 144. Thus, at the latest the limitations period began in July 2008, and Plaintiffs' claim is time-barred unless the statute of limitations is equitably tolled.

Plaintiffs assert that the limitations period was tolled due to Central's failure to effectively provide the required disclosures and notices. Id. ¶ 147. This assertion, "even if true . . . is insufficient to satisfy equitable tolling because it would establish no more than the TILA violation itself; this allegation does not suggest that any circumstances beyond [Plaintiffs'] control prevented [them] from **[*35]** learning of the TILA violation." *Menashe v. Bank of New York, Civ. No. 10-00306 JMS-BMK, 2011 U.S. Dist. LEXIS 111067, 2011 WL 4527384, at *4 (D. Haw. Sept. 27, 2011)*; see *Jacob v. Aurora Loan Servs., No. 10-1789 SC, 2010 U.S. Dist. LEXIS 65999, 2010 WL 2673128, at *3 (N.D. Cal. July 2, 2010)* (determining that the plaintiff could not rely on the same factual allegations to show that the defendants violated TILA and toll the TILA limitations period, because "[o]therwise, equitable tolling would apply in every case where a plaintiff alleges violations of TILA . . . and the statute[] of limitations would be meaningless"). There are no factual allegations that support an inference that Plaintiffs did not have an opportunity to discover the alleged TILA violations, or that Defendants prevented them from filing a claim. Accordingly, there is no basis for equitable tolling.

Because no amendment can cure the defect of the portion of Count VII seeking rescission, it is DISMISSED WITH PREJUDICE. Because it is possible for Plaintiffs to allege facts that support equitable tolling, the portion of Count VII seeking damages is DISMISSED WITHOUT PREJUDICE.

H. Count VIII — Violation of UDAP (Alliance, ACMC, and Central)

In Count VIII, Plaintiffs allege that Defendants Alliance and ACMC engaged in "fraudulent, deceptive, unfair, and **[*36]** other wrongful conduct" in violation of *H.R.S. §§ 480-2*. Compl. ¶ 159. Plaintiffs assert that Alliance and ACMC engaged in "predatory lending." Id. ¶ 156. Specifically, Plaintiffs allege that ACMC and Alliance placed them in a loan knowing that Plaintiffs would be unable to repay it, failed to disclose the risks of the loan to Plaintiffs, and preyed on Plaintiffs through marketing practices and loan documentation that left Plaintiffs unable to understand the terms of the loan. Id. ¶¶ 153-54. Plaintiffs further allege that ACMC and Alliance "deceptively preyed upon Plaintiffs naive nature in the industry and difficulty with the English language." Id. ¶ 154. Plaintiffs allege that Central aided and abetted these violations by acquiring the loan that contained "flagrant" and "blatant" unfair and deceptive acts in the origination of the loan. Id. ¶ 155.

Defendants assert that "aiding and abetting" liability for an alleged violation of UDAP does not exist, and that Plaintiffs make no specific statements or allegations of fact as to how Central's conduct violated UDAP. Defendants therefore asks for Count VIII to be dismissed as against Central. Defs.' MTD Compl. Mem. at 18.

H.R.S. § 480-2 provides, in relevant part, that **[*37]** "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." UDAP provides for a civil cause of action against "[a]ny person, firm, company, association, or corporation violating any of the provisions of *section 480-2*." *H.R.S. § 480-3.1*. An assignee of a note and mortgage, such as Central, is not liable for damages under *H.R.S. § 480-2* "for the unfair or deceptive acts and practices that may have occurred during the consummation of the loan." *Rodenhurst v. Bank of Am., 773 F. Supp. 2d 886, 895-96 (D. Haw. 2011)*; see *Skaggs v. HSBC Bank USA, N.A., Civ. No. 10-00247 JMS-KSC, 2011 U.S. Dist. LEXIS 98057, 2011 WL 3861373, at *5 (D. Haw. Aug. 31, 2011)* (explaining an assignee is not liable for damages under *H.R.S. § 480-2* "merely because one is an assignee").

Thus, Plaintiffs' claim for damages against Central fails as a matter of law. Because Section 480-12 provides that contracts in violation of Chapter 480 are void, however, a claim for rescission based on a violation of Chapter 480 may stand against a subsequent assignee "if there are sufficient grounds for rendering the note and mortgage void." Skaggs, 2011 U.S. Dist. LEXIS 98057, 2011 WL 3861373, at *5 n.2; see Beazie v. Amerifund Fin., Inc., Civ. No. 09-00562 JMS-KSC, 2011 U.S. Dist. LEXIS 63918, 2011 WL 2457725, at *14 n.14 (D. Haw. June 16, 2011).

With regard to Plantiffs' claim as against ACMC and against Central for rescission, to the extent Plaintiffs' claim is based on "predatory lending," it fails as a matter of law because "lenders generally **[*38]** owe no duty to a borrower not to place borrowers in a loan even where there was a foreseeable risk borrowers would be unable to pay." Marzan v. Bank of Am., 779 F. Supp. 2d 1140, 1152 (D. Haw. 2011) (internal quotations omitted). Plaintiffs have not alleged any facts that suggest ACMC or Alliance "exceed[ed] the scope of [a] conventional role as a mere lender of money," which would allow them to fall outside the scope of this general rule. Id. (alterations in original). Thus, Plaintiffs' claim that Defendants marketing, omissions, and underwriting process violate UDAP fails. See id. (dismissing similar allegations because the plaintiff did not allege facts that defendants were anything other than "mere lender[s] of money").

To the extent Plaintiffs allege that Alliance and ACMC violated UDAP by preying on them in light of their naive nature in the industry and minimal English language skills, Plaintiffs' conclusory allegations are completely devoid of factual detail. These allegations, without supporting facts, fail to put Defendants on fair notice of the ground upon which the claim rests. For example, Plaintiffs' allege that "[t]he terms and concepts used in loan origination documents are already confusing without the added confusion of having **[*39]** them presented in another language" without identifying which "terms and concepts" Plaintiffs found confusing, Compl. ¶ 158, and state that the "loan documentation and marketing disguised the actual payment and schedule and loaned amount," without specifying what loan documentation and marketing they are referring to. Id. ¶ 154.

Count VIII is DISMISSED WITHOUT PREJUDICE.

I. Count IX — Violation of UDAP in Loss Mitigation (Central)

In Count IX, Plaintiffs allege that Central violated H.R.S. § 480-2 by providing "false and misleading statements concerning the loss mitigation process and failed to properly process Plaintiffs' documents and disclose facts relating to Plaintiffs' application for modification of their loan." Compl. ¶ 163. Plaintiffs' allege that Central "used various program changes to confuse Plaintiffs from effectively knowing and pursuing their rights to gain a meaningful review." Id. ¶ 164. Plaintiffs have failed to provide factual details supporting these conclusory allegations. Plaintiffs do not state what "various program changes" were confusing or how Central failed to "properly process" their loan modification request. Plaintiffs have therefore failed to set forth sufficient facts **[*40]** to survive a motion to dismiss. See Twombly, 550 U.S. at 555.

Count IX is DISMISSED WITHOUT PREJUDICE.

J. Counts X and XI — Breach of Fiduciary Duty (Alliance, ACMC, and Central)

In Count X, Plaintiffs allege that ACMC and Alliance breached a fiduciary duty owed to Plaintiffs by failing to disclose that Plaintiffs would likely default on their loan and placing them in a loan "in harms way," and that Central aided and abetted such breach by acquiring the loan. Compl. ¶¶ 170, 172. Plaintiffs further contend that Central breached a fiduciary duty to Plaintiffs by "charging excessive force-placed insurance premiums and finance charges to Plaintiffs' escrow account." Id. ¶¶ 177-78. In Count XI, Plaintiffs allege that Central breached its fiduciary duty to Plaintiffs by delaying and failing to properly process Plaintiffs' loan modification application. Compl. ¶¶ 182-85. Defendants argue that Central, as a lender, owed no fiduciary duty towards Plaintiffs. Defs.' MTD Compl. Mem. at 19. In opposition, Plaintiffs assert that Central is a servicer, not lender, and thus case law regarding lenders does not apply. Pls.' Opp'n at 28.

"Unless a special relationship exists between a borrower and lender that elevates the lender's **[*41]** responsibility, the standard 'arms-length business relationship' applies." *Hoilien v. Bank of Am., Civ. No. 10-00761 DAE-KSC, 2011 U.S. Dist. LEXIS 89155, 2011 WL 3494523, at *9 (D. Haw. Aug. 10, 2011)* (quoting *Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 883 (9th Cir. 2007)*. This general rule also applies to lender's assignees and loan servicers. See *Phillips v. Bank of Am., Civ. No. 10-00551, 2011 U.S. Dist. LEXIS 6745, 2011 WL 240813, at *11 (D. Haw. Jan. 21, 2011)* (determining the plaintiffs failed to state a claim for breach of fiduciary duty because "nothing in the Complaint alleges 'special circumstances' that might impose a fiduciary duty in this mortgage-lending situation, much less a fiduciary duty owed by loan servicers like MERS or assignees"). The Complaint contains no allegations that any special circumstances existed that elevated Plaintiffs' relationship with ACMC, Alliance, or Central beyond that of an ordinary borrower-lender relationship. Thus, Plaintiffs' allegations as stated fail as a matter of law.

Accordingly, Counts X and XI are DISMISSED WITHOUT PREJUDICE.

K. Counts XII, XIII, and XV — Common Law Fraud and Negligent Misrepresentation (ACMC and Alliance)

Counts XII, XIII, and XV allege claims against ACMC and Alliance for common law fraud — concealment, common law fraud — inducement, and negligent misrepresentation. Defendants Central, HSBC, and MERS move for the Court to dismiss these counts as against them because the counts **[*42]** do not state claims against Central, HSBC, and MERS. Defs.' MTD Compl. Mem. at 21. Because the Claims are not brought against Central, HSBC, and MERS, there is nothing to dismiss as against them. As to ACMC, who has joined the motion, Defendants have not argued the merits of these claims and thus the Court will decline to consider the motion to dismiss with respect to ACMC.

The Court DENIES the Motion to Dismiss Complaint as to Counts XII, XIII, and XV.

L. Count XIV — Respondeat Superior Liability (Alliance, Central, and HSBC)[10]

Plaintiffs allege that Alliance, Central, and HSBC, as successors in interest to ACMC, have respondeat superior liability as a result of ACMC's alleged wrongful actions. Compl. ¶ 209. Central and HSBC argue that because Plaintiffs' allegations do not show any agent/principal or employee/employer relationship between them and the originating lenders, and do not allege that any other Defendants were acting within the scope of any agency or authority with respect to Central and HSBC, Plaintiffs fail to state an actionable claim against them for respondeat superior liability. Defs.' MTD Compl. Mem. at 22, 25.

Respondeat superior is not an independent cause of action, **[*43]** but a theory of liability. A principal may be liable for the wrongful actions of its agent that occur while acting within the scope of the agency. *State v. Hoshijo, 102 Haw. 307, 76 P.3d 550, 562-63 (Haw. 2003)*. "'Vicarious liability under the respondeat superior doctrine ordinarily requires some kind of employment relationship or other consensual arrangement under which one person agrees to act under another's control.'" *Id. at 562* (quoting Dan B. Dobbs, The Law of Torts, § 335, at 910 (2000) (footnote omitted)). Plaintiffs have not asserted any facts indicating a "consensual arrangement" under which Alliance agreed to act under the control of Central or HSBC. It is not clear from the pleadings and memoranda whether Alliance and Central ever held an interest in the Note and/or Mortgage at the same time. If they did, Alliance might be a principal of Central per Central's role as nominee set forth in the Mortgage. See Part III.A. The Complaint, however, is insufficient to show that Alliance was an agent of Central (or HSBC). Likewise, there are no allegations in the Complaint that suggest Central and HSBC had an arrangement under which ACMC agreed to act under the control of Central or HSBC.

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[10] In the title of Count XIV, Plaintiffs list the claim as against Alliance, Central, and HSBC. Plaintiffs, however, do not make any assertions with regard to HSBC in this Count.

Plaintiffs assert that their respondeat superior claims are "are an adjunct **[*44]** to the successor-in-interest claim," and consequently, Defendants liability arises not from an agency relationship, but "from the alleged fact that the Moving Defendants were successors in interest." Pls.' Opp'n at 30-31. An assignee can be liable for a predecessor's TILA violations in certain situations. See *15 U.S.C. § 1641*. To the extent Plaintiffs are asserting liability for ACMC's TILA violations, however, as discussed in Section II.G, Plaintiffs' TILA claims are time-barred. With regard to ACMC's other alleged violations, even if a successor in interest can be held liable for a prior debt servicer's actions where the successor either impliedly or expressly assumes responsibility for the actions of the original lenders, see *Prince v. U.S. Bancorp Nat'l Ass'n, No. 2:09-CV-01095 KJD-PAL, 2011 U.S. Dist. LEXIS 30404, 2011 WL 1099124, at *3 (D. Nev. Mar. 21, 2011)*, Plaintiffs have not alleged any facts beyond a conclusory statement that suggests that Central assumed responsibility for the actions of ACMC or Alliance.

Count XIV is DISMISSED WITHOUT PREJUDICE.

M. Count XVI - Civil Conspiracy (All Defendants)

In Count XVI of the Complaint, Plaintiffs assert that Defendants engaged in a civil conspiracy "to originate mortgage loans through a pattern and practice of predatory lending to conceal **[*45]** this unlawful activity for purposes of unjustly enriching the joint venture of the conspirators." Compl. ¶ 219. Plaintiffs further allege that ACMC used "unfair and deceptive trade practices to solicit and obtain borrowers . . . and then to securitize the Plaintiffs' loan without permission." Id. ¶ 221.

A civil conspiracy is defined as "a combination of two or more persons or entities by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." *Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Haw. 224, 982 P.2d 853, 881 n. 28 (Haw. 1999)* (internal quotation omitted). Under Hawaii law, "civil conspiracy" is not an independent cause of action, but rather, derivative of other wrongs. *Long v. Deutsche Bank Nat'l Trust Co., Civ. No. 10-00359 JMS-KSC, 2011 U.S. Dist. LEXIS 72147, 2011 WL 2650219, at *8 (D. Haw. July 5, 2011)*. Plaintiffs have not clearly identified an underlying claim on which their civil conspiracy claim is based. "Predatory lending" does not state a claim upon which relief can be granted. *Campollo v. Bank of Am., Civ. No. 11-00052 SOM-BMK, 2011 U.S. Dist. LEXIS 64074, 2011 WL 2457674, at *11 (D. Haw. June 16, 2011)*. To the extent Plaintiffs rely on their claims of "unfair and deceptive practices" and the securitization of their loan, the Court is dismissing Plaintiffs' claims against the moving Defendants with respect to these allegations. **[*46]** Thus, Plaintiffs civil conspiracy claim cannot survive the Motion to Dismiss Complaint.

Count XVI is DISMISSED WITHOUT PREJUDICE.

N. Count XVII — Wrongful Foreclosure (Central and HSBC)

In Count XVII, Plaintiffs seek punitive damages, alleging that they "were not in default of their loan" and thus "[t]he foreclosure was wrongful and without right." Compl. ¶ 225. Plaintiffs have failed to identify the legal basis for this claim. Courts in this district have recognized the potential of wrongful foreclosure claims that were brought pursuant to H.R.S. Chapter 667. See e.g., *Doran v. Wells Fargo Bank, Civ. No. 11-00132 LEK-BMK, 2011 U.S. Dist. LEXIS 126418, 2011 WL 2160643, at *13 (D. Haw. May 31, 2011)*; *Rundgren v. Bank of N.Y. Mellon, 777 F. Supp. 2d 1224, 1234 (D. Haw. 2011)*. This Court has already considered Plaintiffs' claims brought under Chapter 667, and dismissed those claims without prejudice. Hawaii state courts have not yet recognized an independent substantive "wrongful foreclosure" cause of action. Although a federal court exercising jurisdiction over a state law claim is "at liberty to predict the future course of [a state's] law, plaintiffs choosing the federal forum ... [are] not entitled to trailblazing initiatives under [state law]." *Cervantes, 656 F.3d 1034, 2011 WL 3911031, at *6* (internal quotations omitted) (alteration in original) (affirming dismissal of a claim for wrongful foreclosure when such **[*47]** an action did not exist under state law); see *Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 262-63 (1st Cir. 1997)* (declining to predict whether "Rhode Island courts would countenance the freewheeling 'wrongful foreclosure' claim [the plaintiff] advocates"). The Court declines to predict whether Hawaii courts will recognize a common law "wrongful foreclosure" claim.

Count XVII is DISMISSED WITHOUT PREJUDICE.

O. Count XVIII — Improper Restrictions as a Result of Securitization (All Defendants)

In Count XVIII, Plaintiffs allege that the Mortgage is a security agreement between creditor and debtor, the security agreement may not be modified or amended by one party without the prior written consent of the other, and that through the securitization of their loan, Defendants imposed "additional rules and restrictions upon the Mortgage and Note," which resulted in a unilateral modification of the security agreement. Compl. ¶¶ 228-30. Plaintiff asserts that "[f]ailure to abide by the rules and restrictions imposes liability upon the parties who organize, manage and control the securitization." Id. ¶ 234.

Courts in this district have repeatedly rejected the contention that securitization in general supports a cause of action. See e.g., *Rodenhurst, 773 F. Supp. 2d at 898-99*; *Long, 2011 U.S. Dist. LEXIS 94675, 2011 WL 2650219, at *9*; *Velez, 2011 U.S. Dist. LEXIS 15481, 2011 WL 572523, at *9*. These courts have recognized **[*48]** that plaintiffs making similar allegations to those made in Count XVIII appear to sound in contract.

In *Long v. Deutsche Bank Nat'l Trust Co., Civ. No. 10-00359 JMS-KSC, 2011 U.S. Dist. LEXIS 72147, 2011 WL 2650219 (D. Haw. July 5, 2011)*, the plaintiff asserted a nearly identical claim. The Court held that it was unclear what the legal basis was for the plaintiff's claim, and "to the extent Plaintiff is attempting to assert that the parties agreed that the mortgage and/or note would not be securitized and Defendants breached this provision, Plaintiff has failed to allege even the basic elements of a breach of contract claim, much less factual allegations to support this claim." *2011 U.S. Dist. LEXIS 72147, [WL] at *9*. Similarly, in *Velez v. The Bank Of N.Y. Mellon, Civ. No. 10-00468 JMS-KSC, 2011 U.S. Dist. LEXIS 15481, 2011 WL 572523 (D. Haw. Feb. 15, 2011)*, the Court rejected the plaintiff's assertion that restrictions resulting from securitization left the mortgage and note at issue unenforceable. The Court concluded that to the extent the plaintiff was attempting to assert a breach of contract claim, the Complaint was insufficient because it "fail[ed] to identify (1) the contract at issue; (2) the parties to the contract; (3) whether Plaintiff performed under the contract; (4) the particular provision of the contract allegedly violated by [Defendant]; (5) when and how [Defendant] **[*49]** allegedly breached the contract; or (6) how Plaintiff was injured." *Id. at *3*. The Court further noted that "given that the mortgage expressly states that the mortgage note 'can be sold one or more times without prior notice to Borrower,' it does not appear that securitization breached any particular provision of the mortgage." Id. (internal citation omitted).

In opposition, Plaintiffs argue that they have asserted a sufficient contract claim that meets the elements identified in Velez. Pls.' Opp'n at 37-38. Specifically, Plaintiffs assert that (1) the contract is the Mortgage; (2) "the parties are the Plaintiffs and [ACMC] with C[entral] and HSBC as alleged successors or assigns of the L[oan] or parts of it for [ACMC]"; (3) they performed under the contract because they were not in default; (4) "the provisions violated are set forth in detail in the Complaint"; (5) Alliance "breached the contract when they converted the Loan to a mortgage-backed security, unbundled its parts, and sold part of it to others who created new encumbrances on the loan," and (6) Plaintiffs were injured because they do not know who the real parties in interest are for repayment and foreclosure purposes, who their current **[*50]** lender is, which party has the authority to negotiate a modification of their loan, and whether or not it is possible to currently modify the loan. Id. at 38-39.

First, the Court declines Plaintiffs' invitation to piece together a breach of contract claim from various allegations strewn throughout the sixty-three page Complaint. Second, "[i]n breach of contract actions, [] the complaint must, at minimum, cite the contractual provision allegedly violated. *Otani v. State Farm Fire & Cas. Co., 927 F. 927 F. Supp. 1330, 1336 (D. Haw. 1996)*. Plaintiffs appear to argue that the terms of the Pooling Agreement in which the Mortgage was placed results in a breach of Plaintiffs' contract with Defendants, but do not identify what provision of their Mortgage that they believe Defendants violated. See Compl. ¶ 232. Third, like in Velez, the Mortgage specifically states that the Note "can be sold one or more times without prior notice to Borrower." Defs.' MTD Compl. Ex. 1-2 at ¶ 20. Consequently, "securitization and/or transfer of the mortgage and note does not modify the terms of the agreement-the mortgage expressly provides that it can be sold without notice, and the transferee simply obtained the same rights that the transferor had under the mortgage." *Velez, 2011 U.S. Dist. LEXIS 15481, 2011 WL 572523, at *5*. Plaintiffs have failed to plead **[*51]** a sufficient breach of contract claim.

Count XVIII is DISMISSED WITHOUT PREJUDICE.

P. Count XIX — Wrongful Conversion of Note (All Defendants)

In Count XIX, Plaintiffs allege that the conversion of the Mortgage to a mortgage backed security renders the Mortgage unenforceable. Compl. ¶ 238. Plaintiffs assert that: "Securitization improperly attempts to divide the Note from the Mortgage and to make the Note a separately enforceable interest. A Mortgage cannot be enforced as a separate interest in the property to be foreclosed apart from and independent of the Note." Id.

The Ninth Circuit has rejected the argument that the MERS system results in no party being in a position to foreclose because securitization splits the mortgage deed from the note. See *Cervantes, 656 F.3d 1034, 2011 WL 3911031, at *7*. The Ninth Circuit explained that even if it accepted the assertions that MERS is a sham beneficiary and the note is split from the deed, it "would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose." Id. As Plaintiffs rely on the "separation" of the Note from the Mortgage in claiming securitization rendered the Note unenforceable, they fail to state a viable claim. See *Long, 2011 U.S. Dist. LEXIS 72147, 2011 WL 2650219, at *10*; *Velez, 2011 U.S. Dist. LEXIS 15481, 2011 WL 572523, at *4-5*.

Count XIX is DISMISSED **[*52]** WITHOUT PREJUDICE.

Q. Count XX — Mortgagor Never Consented to Securitization (All Defendants)

Count XX asserts that Defendants securitized Plaintiffs' mortgage without obtaining Plaintiffs' required consent, rendering the mortgage unenforceable. Compl. ¶ 241. As explained in Long and Velez, in which the plaintiffs asserted he same claim, the Court is unable to discern the basis of this claim from Plaintiffs' conclusory allegations. See *Long, 2011 U.S. Dist. LEXIS 72147, 2011 WL 2650219, at *10*; *Velez, 2011 U.S. Dist. LEXIS 15481, 2011 WL 572523, at *4-5*. Furthermore, as discussed above, the Mortgage states that the Note can be sold one or more times without prior notice to Plaintiffs and contemplates that the Mortgage may pass to Lender's successors and assigns.

Count XX is DISMISSED WITHOUT PREJUDICE.

R. Count XXI — Restrictions Imposed Upon the Modification of the Mortgage are a Clog upon the Equity of Redemption (Defendants Claiming an Interest in the Property)

With respect to Count XXI, Plaintiffs assert that: "By restricting the ability to modify the mortgage, securitization interferes with [Plaintiffs'] right[] to redeem the subject property. For example, if the debtor could only afford to pay off 99% of the amount owed, the creditor is barred from accepting the one percent reduction in the payoff." **[*53]** Compl. ¶ 245.

"Equity of redemption is the right of the mortgagor to redeem his property after defaulting in the payment of the mortgage debt, by subsequently paying all costs and interest, in addition to the mortgage debt to the mortgagee." *In re Ehring, 900 F.2d 184, 187 n.1 (9th Cir. 1990)*. Under Hawaii law, there is an equitable right of redemption before an order of foreclosure, and although in some states a statutory right of redemption exists for a period following the foreclosure sale, the H.R.S. does not contain any such authorization. See *Fed. Home Loan Mortg. Corp. v. Transamerica Ins. Co., 89 Haw. 157, 969 P.2d 1275, 1282 (Haw. 1998)*.

A clog upon the equity of redemption is "[a]n agreement or condition that prevents a defaulting mortgagor from getting back the property free from encumbrance upon paying the debt or performing the obligation for which the security was given." Black's Law Dictionary (9th ed. 2009). Plaintiffs do not assert that any clause in the mortgage, or alleged modification, would have prevented them from paying off the mortgage in full and redeeming their property before the nonjudicial foreclosure sale. Thus, their claim fails.

Count XXI is DISMISSED WITHOUT PREJUDICE.

S. Count XXII — Quiet Title (Defendants claiming an interest in the property)

Plaintiffs assert that "[a]t the time of the purported **[*54]** foreclosure sale on November 19, 2009, the Plaintiffs had entered into an application process or other modification of relevant contracts and no sale should have been conducted or any deed issued." Compl. ¶ 248. Plaintiffs assert the purported foreclosure sale "could not have been conducted in conformance" with federal law, HAMP, Hawaii state law, the United States Constitution, and the Hawaii State Constitution. Compl. ¶ 249. Plaintiffs thus ask the court to void the foreclosure sale deed. Id. ¶ 253. Defendants assert that because Plaintiffs have not alleged that they have paid their mortgage loan, a prerequisite to an action to quiet title, the Court should dismiss Count XXII. Defs.' MTD Compl. Mem. at 36. Plaintiffs reply that under Hawaii law, they need only establish they have substantial interest in the property and title superior to that of the defendants, and thus they need not assert that their mortgage is paid in full. Pls.' Opp'n at 40.

Courts in this district have construed similar pleadings as attempting to state a claim pursuant to *H.R.S. § 669-1(a)*, which provides that an "[a]ction may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, **[*55]** an estate or interest in real property, for the purpose of determining the adverse claim." "[F]or a mortgagor to quiet title against the mortgagee, the mortgagor must establish that he is the rightful owners of the property and he has paid, or is able to pay, the outstanding debt on his property." *Enriquez v. Countrywide Home Loans, FSB, 814F. Supp. 2d ,1042, 2011 WL 3861402, at *22 (D. Haw. 2011)*. Plaintiffs have not alleged that they have paid or are able to pay the outstanding debts on the property and thus Count XXII fails to state a viable claim.[11] See *Marzan, 779 F. Supp. 2d at 1156* (dismissing the plaintiffs quiet title action because they had "not indicated that they have paid their outstanding loan balance, much less that they are able to do so").

Count XXII is DISMISSED WITHOUT PREJUDICE.

T. Count XXIII — Declaration of Constructive Trust or Mortgage Trust (Defendants claiming any interest in the Property)

In Count XXIII, Plaintiffs seek the declaration of a constructive trust or mortgage trust against Defendants claiming any interest in the Property. Compl. ¶¶ 254-58.

A constructive trust is an equitable remedy that "will be imposed where the evidence is clear and convincing that one party will be unjustly enriched if allowed to retain the entire property." *Maria v. Freitas, 832 P.2d 259, 274 (Haw. 1992)*; see *Lee v. Wong, 57 Haw. 137, 552 P.2d 635, 638 (Haw. 1976)* ("It is well established in this jurisdiction **[*56]** that a constructive trust will be imposed only when the evidence is clear and convincing."). The Court has dismissed the majority of Plaintiffs' substantive claims, and Plaintiffs have not otherwise alleged sufficient facts suggesting that Defendants will be unjustly enriched if they retain the property. Because a constructive trust is a remedy and the Court has dismissed Plaintiffs' substantive claims as against Defendants claiming an interest in the property, Count XXIII is not tenable.

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[11] Although Plaintiffs claim they were not in default in Count XVII, Plaintiffs also assert that "[n]othing in this action denies the validity of the underlying debt," Compl. ¶ 255, that after the economic slowdown in March 2008, they "began to fall behind in their monthly payments," id. ¶ 34, and that "[h]opelessly behind with the mortgage payment . . . Plaintiffs sought assistance to modify their loan . . . in April 2009." Id. ¶ 41.

Count XXIII is DISMISSED WITHOUT PREJUDICE.

IV. Motion to Dismiss Cross-Claim

ACMC filed a crossclaim asserting claims for reimbursement, contribution, equitable subrogation and/or indemnity against all other Defendants. ACMC's Crossclaim ¶¶ 4-5. Defendants Central, HSBC, Merscorp, and MERS filed a Motion to Dismiss Defendant ACMC's Crossclaim. The pleading standard of Twombly applies to crossclaims. See *Reishus v. Almaraz, No. CV-10-0760-PHX-LOA, 2011 U.S. Dist. LEXIS 1442, 2011 WL 42679, at *3 (D. Ariz. Jan. 6, 2011)*; *Armer v. Openmarket, Inc., No. C08-1731 RSL, 2009 U.S. Dist. LEXIS 92270, 2009 WL 3177623, at *1 (W.D. Wash. Oct. 5, 2009)*. ACMC's allegations are conclusory and ACMC does not assert how or why the other Defendants were negligent or otherwise liable for the Plaintiffs' alleged injuries. As a **[*57]** result, ACMC's Crossclaim does not meet the pleading standard of Twombly. See *Twombly, 550 U.S. at 555*.

ACMC's Crossclaim is DISMISSED WITHOUT PREJUDICE.

CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' Motion to Strike, GRANTS in part and DENIES in part the Motion to Dismiss Complaint, and GRANTS Cross-Defendant's Motion to Dismiss Crossclaim.

Specifically:

Count I is DISMISSED WITH LEAVE TO AMEND; Counts II, III, IV, V, VIII, IX, X, XI, XIV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII are DISMISSED WITHOUT PREJUDICE except to the extent they state a claim against Alliance, who did not join the Motion to Dismiss Complaint; Counts VI, VII, and XVII, are DISMISSED WITH PREJUDICE except to the extent they state a claim against Alliance and to the extent Count VII seeks damages; the Motion to Dismiss Complaint is DENIED as to Counts XII, XIII, and XV; and the Crossclaim is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 4, 2011.

/s/ Alan C. Kay

Alan C. Kay

Sr. United States District Judge

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CompuCredit Holdings Corp. v. Akanthos Capital Mgmt., LLC

United States Court of Appeals for the Eleventh Circuit

November 10, 2011, Decided; November 10, 2011, Filed

No. 11-13254 Non-Argument Calendar

Reporter

661 F.3d 1312 *; 2011 U.S. App. LEXIS 22662 **; 2011-2 Trade Cas. (CCH) P77,672; 23 Fla. L. Weekly Fed. C 550

COMPUCREDIT HOLDINGS CORPORATION, Plaintiff - Appellant, versus AKANTHOS CAPITAL MANAGEMENT, LLC, ARIA OPPORTUNITY FUND LTD., AQR ABSOLUTE RETURN MASTER ACCOUNT, L.P., CC ARBITRAGE, LTD., CNH CA MASTER ACCOUNT, L.P., et al., Defendants - Appellees.

Subsequent History: Sanctions disallowed by, Motion denied by, As moot *Compucredit Holdings Corp. v. Akanthos Capital Mgmt., LLC, 2012 U.S. Dist. LEXIS 198512 (N.D. Ga., Feb. 24, 2012)*

Vacated by, Rehearing, en banc, granted by *Compucredit Holdings Corp. v. Akanthos Capital Mgmt., LLC, 677 F.3d 1042, 2012 U.S. App. LEXIS 7589 (11th Cir. Ga., Apr. 16, 2012)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:11-cv-00117-TCB.

Compucredit Holdings Corp. v. Akanthos Capital Mgmt., 916 F. Supp. 2d 1326, 2011 U.S. Dist. LEXIS 156804 (N.D. Ga., June 17, 2011)

Disposition: AFFIRMED.

Core Terms

Sherman Act, pleadings

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

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

A court of appeals reviews de novo a ruling on a motion for judgment on the pleadings. For the sake of its review, the court of appeals will accept all well-pled factual allegations in the complaint as true. However, the court of appeals is not obligated to accept alleged legal conclusions as true. If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint.

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

HN2[] **Sherman Act, Scope**

It is not a violation of the Sherman Act for debtors to act collaboratively to collect pre-existing debts.

Counsel: For COMPUCREDIT HOLDINGS CORPORATION, Plaintiff - Appellant: Emmet J. Bondurant, Jason James Carter, Michael A. Caplan, Bondurant Mixon & Elmore, LLP, ATLANTA, GA; E. Casey Beckett, Robins Kaplan Miller & Ciresi, LLP, MINNEAPOLIS, MN; Lisa L. Heller, Christopher W. Madel, Randall Tietjen, K. Craig Wildfang, Robins Kaplan Miller & Ciresi, LLP, MINNEAPOLIS, MN.

For AKANTHOS CAPITAL MANAGEMENT, LLC, ARIA OPPORTUNITY FUND LTD., AQR ABSOLUTE RETURN MASTER ACCOUNT, L.P., CC ARBITRAGE, LTD., CNH CA MASTER ACCOUNT, L.P., Defendants - Appellee: Karen B. Bragman, Kevin B. Getzendanner, Heather Smith Michael, Arnall Golden & Gregory, LLP, ATLANTA, GA; Harry N. Niska, Kelly K. Pierce, Jeff I. Ross, Ross & Orenstein, LLC, MINNEAPOLIS, MN.

Judges: Before WILSON, PRYOR and KRAVITCH, Circuit Judges.

Opinion

[*1313] PER CURIAM:

Plaintiff-Appellant CompuCredit Holdings Corporation ("CompuCredit") brought suit alleging antitrust violations against a number of hedge funds (Defendants-Appellees) that hold convertible senior notes issued by CompuCredit. CompuCredit claimed that Defendants acted collectively **[**2]** to force CompuCredit to pay above-market prices to redeem its notes early, thus violating the Sherman Act.[1] The district court granted Defendants' motion for judgment on the pleadings; CompuCredit now appeals.

I. BACKGROUND[2]

CompuCredit is a provider of credit and related financial services products. Defendants are holders of long-term convertible **[*1314]** promissory notes issued by CompuCredit in 2005 in two series. The first series is due and payable in 2025; the second series is due and payable in 2035. These notes were originally issued in a private placement, but are now traded on the secondary market. As of December 2009, the twenty-one hedge fund Defendants collectively owned 70% of the notes issued in 2005.

In December 2009, CompuCredit announced that it was planning to issue a dividend of $25 million to stockholders and was considering spinning off its profitable microloan business. In response, Defendants filed suit under the Uniform Fraudulent Transfer Acts ("UFTA"), alleging that CompuCredit was insolvent on a pro forma basis and requesting **[**3]** that the court enjoin the payment of the dividend and the spinoff to ensure that CompuCredit could pay back its debt obligations. At the time of the suit, CompuCredit had never missed an interest payment on the notes.

The court found that CompuCredit was not insolvent and denied the injunctions. CompuCredit then offered to repurchase up to $160 million of its notes outstanding at a price purportedly at or above market value. None of the Defendants participated in the tender offer, and CompuCredit alleges that they conspired in their refusal of the offer.

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[1] *15 U.S.C. § 1*.

[2] We recite the facts in the light most favorable to the nonmoving party. *See* *Ortega v. Christian, 85 F.3d 1521, 1524 (11th Cir. 1996)*.

CompuCredit was able to repurchase about 11% of the outstanding 2025 notes at roughly 50% of face value and about 10% of its outstanding 2035 notes at approximately 35% of face value.

The Defendants continued to allege CompuCredit's insolvency. In January 2010, they wrote a letter to CompuCredit's auditor, expressing doubt about CompuCredit's financial health. In February 2010, they wrote the Securities and Exchange Commission, alleging that CompuCredit was insolvent. In March 2010, Defendants contacted the indenture trustee, claiming that CompuCredit had violated the terms of the indentures. Finally, on March 8, 2010, Defendants made **[**4]** a collective demand that CompuCredit repurchase their notes at par value. CompuCredit estimates that the 2025 notes were trading at 53.5 percent of par and the 2035 notes were trading at 37 percent of par at the time of this demand.[3]

CompuCredit refused Defendants' request to repurchase the notes at par and brought this suit. CompuCredit alleges that Defendants conspired to boycott its tender offer in order to inflate the redemption price of their notes and thereby violated the Sherman Act. Defendants moved for a judgment on the pleadings, and the district court granted their motion on June 17, 2011. This appeal followed.

II. DISCUSSION

HN1[] We review *de novo* a ruling on a motion for judgment on the pleadings. *Horsley v. Rivera, 292 F.3d 695, 700 (11th Cir. 2002)*. For the sake of our review, we will accept all well-pled factual allegations in the complaint as true. *Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1273 (11th Cir. 2008)*. However, we are not obligated to accept alleged legal conclusions as true. *See Green Leaf Nursery v. E.I. DuPont De Nemours & Co., 341 F.3d 1292, 1304 n.12 (11th Cir. 2003)*. **[**5]** "If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint." *Horsley, 292 F.3d at 700*.

[*1315] Construing the facts most favorably to CompuCredit, we find that the behavior of Defendants alleged by CompuCredit does not constitute a violation of the Sherman Act. The cases that CompuCredit offers in support of its position are factually distinguishable from and thus irrelevant to the current dispute, and we find no other case law that would support the proposition that the actions alleged are illegal under the Sherman Act. Therefore, we affirm the district court.

CompuCredit first argues that the controlling case for this dispute is *FTC v. Superior Court Trial Lawyers Ass'n*, in which the Supreme Court held that it was a violation of the Sherman Act for trial lawyers to boycott taking on court-appointed criminal cases in order to gain leverage in pay negotiations with the District of Columbia Superior Court. *493 U.S. 411, 428, 110 S. Ct. 768, 778, 107 L. Ed. 2d 851 (1990)*. Despite CompuCredit's characterization of Defendants as "horizontal competitors" engaged in **[**6]** a "boycott" of CompuCredit's tender offer, we disagree with CompuCredit's assertion that *Superior Court Trial Lawyers Ass'n* is an appropriate parallel. Defendants here are holders of CompuCredit's promissory notes. This relationship arose when CompuCredit willingly took on an obligation to repay the notes via a free-market transaction. Although these promissory notes are traded on a secondary market, they retain their essential character as debt instruments. The pre-existing debtor and creditor relationship differentiates this case from *Superior Court Trial Lawyers Ass'n*. CompuCredit was not in the same position as a normal buyer of goods or services; instead it wished to pay back the money it already owed (at a price below par value but at or above market value). Defendants' choice to reject this offer and seek full par value is not the same as a boycott intended to raise future sales prices.

CompuCredit also relies heavily on *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)* (per curiam). Although *Catalano* actually involved debtors, the alleged antitrust violations concerned the terms of future transactions, not a pre-existing debt. *Id. at 644-45, 100 S. Ct. at 1926*. **[**7]** The Supreme Court held that an agreement among beer wholesalers to begin denying short-term credit to retailers was "merely one form of price fixing" and thus illegal. *Id. at 650, 100 S. Ct. at 1929*. Here, the par value of the debt was already fixed

[3] Defendants argue that this demand was required under the litigation procedures of the UFTA.

by agreement of the parties. Negotiations about the repayment of a debt are factually dissimilar from a unilateral conspiracy to fix future prices in a market.

Furthermore, other circuits have held that ***HN2***[] it is not a violation of the Sherman Act for debtors to act collaboratively to collect pre-existing debts. In *United Airlines v. U.S. Bank, N.A.*, the Seventh Circuit held that collective action of a group of creditors to recover the full amount of debts arising from "competitively determined contracts" was not in violation of the antitrust laws. *406 F.3d 918, 921 (7th Cir. 2005)*. Similarly, in *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, the Second Circuit firmly rejected the appellant's claim that joint activity by its creditors to collect the debts owed by appellant violated ***antitrust law***. *691 F.2d 1039, 1052-53 (2d Cir. 1982)*.

III. CONCLUSION

We do not find that the facts alleged constitute a violation of the Sherman Act. The order **[**8]** of the district court granting Defendants' motion for judgment on the pleadings is affirmed.

AFFIRMED.

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Heald v. Nat'l City Mortg.

United States District Court for the Southern District of California

November 10, 2011, Decided; November 10, 2011, Filed

CASE NO. 11CV904 JLS (NLS)

Reporter

2011 U.S. Dist. LEXIS 130194 *; 2011 WL 5513226

JAMES D. HEALD, Plaintiff, vs. NATIONAL CITY MORTGAGE; PNC MORTGAGE; et al., Defendants.

Core Terms

allegations, motion to dismiss, unfair, trust deed, misrepresentation, fraudulent, cognovit, business practice, violations, wrongful foreclosure, cognovit note, quiet title, heightened, concealed, fraudulent conduct, sufficient facts, interest rate, pleading requirements, representations, misconduct, practices

Counsel: **[*1]** For James D Heald, Plaintiff: Gary David Tracy, LEAD ATTORNEY, Gary D. Tracy, Attorney at Law, Ontario, CA.

For National City Mortgage, -, a division of National City Bank, PNC Mortgage, Defendants: Jennifer J. Maas, LEAD ATTORNEY, Wolfe & Wyman LLP, Irvine, CA.

Judges: Honorable Janis L. Sammartino, United States District Judge.

Opinion by: Janis L. Sammartino

Opinion

ORDER (1) GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT; AND (2) DENYING AS MOOT DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

(ECF No. 2)

Presently before the Court is Defendants' motion to dismiss Plaintiff's complaint and motion to strike portions of Plaintiff's complaint. (Mot. to Dismiss, ECF No. 2) Also before the Court is Plaintiff James D. Heald's ("Plaintiff") response in opposition, (Resp. in Opp'n, ECF No. 6),[1] and Defendants' reply in support, (Reply in Supp., ECF No.

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[1] As Defendants point out in their reply brief, Plaintiff's opposition was untimely. (Reply in Supp. 2, ECF No. 7) This Court issued a briefing schedule in its May 13, 2011 Order setting **[*2]** May 23, 2011 as the date of filing for Plaintiff's response, and noting that the hearing date on the motion was set for June 24, 2011. (Order, May 13, 2011, ECF No. 3) Although the Court notes that Plaintiff's opposition was filed on June 3, 2011 and was therefore not in compliance with this Court's Order, because the opposition was nevertheless filed within the time for filing an opposition prescribed by *Civil Local Rule 7.1.e.2*, and because Defendants had adequate time and opportunity to file their reply, the Court will consider Plaintiff's opposition in deciding this motion. *See* *Civil Local Rule 7.1.e.2* (noting that any response in opposition should be filed "not later than fourteen (14) *calendar* days prior to the noticed hearing"). Plaintiff is admonished, however, that any future failures to comply with this Court's orders may result in penalties.

7). Having considered the parties' arguments and the law, Defendants' motion to dismiss is **GRANTED** and Defendants' motion to strike is therefore **DENIED AS MOOT.**

BACKGROUND

1. Factual Background

In November 2007, Plaintiff obtained a loan from Defendants in the amount of $417,000.00 in connection with his purchase of a single family residence in San Diego County, California. (Compl. ¶¶ 13-15, ECF No. 1-1) Though Plaintiff was led to believe that he was merely executing loan documents, (*id.* ¶ 15), **[*3]** Plaintiff alleges that the documents he signed "contain[ed] small and hidden and/or disguised provisions which were not explained and do not show acknowledgment of understanding and acceptance from Plaintiff," (*id.* ¶ 21), and that in fact the Deed of Trust securing the loan acts as a cognovit note "to the sole detriment and subsequent depravation of Plaintiff and his rightful possession of property," (*id.*). At the time of entering into these agreements and throughout the entire life of the loan, Defendants allegedly made false and fraudulent representations to Plaintiff. (*Id.* ¶¶ 29-38)

Some time after these events, Plaintiff alleges that "a severance of the ownership and possession of the original Note and Deed of Trust . . . occurred," and therefore, because the true owner and holder are unknown, "defendants cannot legally foreclose." (*Id.* ¶ 24)

2. Procedural Background

Plaintiff filed this action on March 22, 2011 in the San Diego County Superior Court of the State of California. (Compl., ECF No. 1-1) Soon thereafter, Defendants removed the case to this Court pursuant to *28 U.S.C. § 1441(b)* because (1) the parties are completely diverse and the amount in controversy exceeds $75,000.00, **[*4]** or, alternatively (2) Plaintiff's complaint alleges a violation of federal law and as such this Court has federal question jurisdiction. (Not. Removal 2, ECF No. 1)

On May 6, 2011, Defendants filed the instant motion to dismiss and motion to strike. (Mot. to Dismiss, ECF No. 2). Plaintiff responded on June 3, 2011, (Resp. in Opp'n, ECF No. 6), and Defendants replied on June 6, 2011, (Reply in Supp., ECF No. 7). The hearing set for the motion was thereafter vacated, and the matter was taken under submission on the papers. (Order, June 20, 2011, ECF No. 8)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint "fail[s] to state a claim upon which relief can be granted," generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of *Federal Rule of Civil Procedure 8(a)*, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although *Rule 8* "does not require 'detailed factual allegations,' . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 US 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* **[*5]** (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 129 S. Ct. at 1949* (citing *Twombly, 550 U.S. at 557*).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly, 550 U.S. at 570*); *see also* *Fed. R. Civ. P.*

12(b)(6). A claim is facially plausible when the facts pled "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly, 550 U.S. at 556*). That is not to say that the claim must be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts "'merely consistent with' a defendant's liability" fall short of a plausible entitlement **[*6]** to relief. *Id.* (quoting *Twombly, 550 U.S. at 557*). Further, the Court need not accept as true "legal conclusions" contained in the complaint. *Id.* This review requires context-specific analysis involving the Court's "judicial experience and common sense." *Id. at 1950* (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* Moreover, "for a complaint to be dismissed because the allegations give rise to an affirmative defense[,] the defense clearly must appear on the face of the pleading." *McCalden v. Ca. Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990)*.

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992)* (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986))*. In other words, where leave to amend would be futile, the Court may deny leave to **[*7]** amend. *See* *Desoto, 957 F.2d at 658*; *Schreiber, 806 F.2d at 1401*.

ANALYSIS

Plaintiff alleges five claims in his complaint: (1) misrepresentation and fraud; (2) wrongful foreclosure; (3) quiet title; (4) unfair business practices under *California Business and Professions Code § 17200, et seq.;* and (5) RICO statute violations, *18 U.S.C. § 1961*. (Compl., ECF No. 1-1) Defendants move to dismiss each of these claims for failure to allege sufficient facts to state a claim, and also challenge "Plaintiff's foundational argument that the subject deed of trust is a cognovit." (Mot. to Dismiss 4, ECF No. 2) Finally, Defendants move to strike Plaintiff's claim for punitive damages, (*id.* at 10-11), Plaintiff's request for a preliminary injunction, (*id.* at 12), and Plaintiff's claim for rescission, (*id.* at 12-13). The Court considers each of Defendants' arguments in turn.

1. Cognovit Note

Plaintiff alleges that the Deed of Trust contained hidden provisions that were neither explained by Defendants nor acknowledged by Plaintiff, and that in reality the Deed of Trust is a cognovit note. (Compl. ¶ 21, ECF No. 1-1) Defendants argue that the Court should reject Plaintiff's contention that the Deed of Trust **[*8]** is a cognovit because it "includes nothing more than a power of sale clause." (Mot. to Dismiss 4, ECF No. 2)

To begin,

> "The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." . . .
>
> In the states which permit its use, the cognovit note "authorizes an attorney to confess judgment against the person or persons signing it. It is written authority of a debtor and a direction by him for the entry of a judgment against him if the obligation set forth in the note is not paid when due . . . It cuts off every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken on it."

FDIC v. Aaronian, 93 F.3d 636, 637 (9th Cir. 1996) (second alteration in original) (quoting *D.H. Overmyer Co., Inc. of Ohio v. Frick, 405 U.S. 174, 176, 92 S. Ct. 775, 31 L. Ed. 2d 124 & n.2 (1972))*.

Here, Plaintiff has neither attached the Deed of Trust as an exhibit to the complaint nor quoted or summarized the clause or clauses that he contends "operate" as a cognovit note.[2] Plaintiff's allegation of the **[*9]** existence of a cognovit is based on his ambiguous assertion that "[a]s a result" of the "hidden and/or disguised provisions," the "Deed of Trust operates as a Cognovit Note." (Compl. ¶ 21, ECF No. 1-1 (emphasis omitted)) However, a cognovit does not simply arise by virtue of a defendant's fraudulent conduct, but rather is a distinct legal device requiring both parties' consent. *See* *D.H. Overmyer Co., 405 U.S. at 176* & n.2. Thus, Plaintiff has not alleged sufficient facts supporting the existence of a cognovit; to the extent that any of Plaintiff's claims of relief are based upon the existence of a cognovit, those claims must be dismissed.

Moreover, to the extent that, as Defendants posit, Plaintiff is contending that the power-of-sale clause in the Deed of Trust—which would allow Defendants to sell Plaintiff's property in the event that Plaintiff defaulted on his loan—constitutes a cognovit, Plaintiff is mistaken. Several **[*10]** district courts within the Ninth Circuit have previously held that a power of sale clause is not a cognovit, and this Court agrees. *See, e.g.,* *Dotson v. Metrociti Mortgage, No. 10-3484, 2011 U.S. Dist. LEXIS 97754, at *13 (E.D. Cal. Aug. 30, 2011)* (dismissing the case without leave to amend after concluding that the power-of-sale clause is not a cognovit); *Myers v. Bank of Am., N.A., No. 10-00003, 2011 U.S. Dist. LEXIS 50468, at *11 (C.D. Cal. Mar. 2, 2011)* ("A non-judicial power-of-sale clause in a deed of trust is entirely distinct from cognovit note or a confession of judgment and does not raise federal due process concerns." (citing *Cal. Civ. Proc. Code §§ 1132-1134*, *2920, et seq.*)); *Geist v. Onewest Bank, 2010 U.S. Dist. LEXIS 81077, No. 10-1879, at *12-14 (N.D. Cal. Aug. 9, 2010)* ("In short, the power of sale clause is not a cognovit." (citation omitted)).

2. Misrepresentation and Fraud

Plaintiff's first claim for "misrepresentation and fraud" is subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. *See* *Neilson v. Union Bank, N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)*. Under this rule, Plaintiff must "state with particularity the circumstances **[*11]** constituting fraud." *Fed. R. Civ. P. 9(b)*. The allegations of fraud must "be 'specific' enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001))*. Namely, these allegations "must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))*. "'[A] plaintiff must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false.'" *Id.* (quoting *Decker v. GlenFed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994))*.

To state a claim for misrepresentation or fraud under California law Plaintiff must plead "'(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.'" *Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601, 608 n.4 (Cal. 1995)* **[*12]** (quoting *Molko v. Holy Spirit Ass'n, 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46, 53 (Cal. 1988))*.

As to the element of misrepresentation, Plaintiff alleges that Defendants "knowingly and intentionally concealed material information," including

> the final exact interest rate set forth in the Promissory Note; how and when any adjustments to that interest rate and the recurring monthly payment would occur; what index or basis would be used for calculating any such interest rate adjustments, nor what the effect of any negative amortization would be; the negative effect to his home equity in the event that the scheduled or option ARM monthly payments were not sufficient to pay all

[2] Plaintiff alleges that a copy of the document "is presently not available to Plaintiff, inasmuch as the at the time of his purported execution of said Promissory Note he was not provided a copy thereof, nor was one provided to him thereafter." (Compl. ¶ 15, ECF No. 1-1)

accruing interest, resulting in an ever increasing balance owing on the loan and the eventual total dissipation of Plaintiff's home equity.

(Compl. ¶ 30, ECF No. 1-1) Although this level of specificity as to *what* information was allegedly concealed may be sufficient to satisfy *Rule 9(b)*, Plaintiff fails to supplement these allegations with any indication of who was responsible for concealing this information or when, where, or how it occurred. *See* *Vess, 317 F.3d at 1106*. Without more information regarding the alleged concealment, however, Defendants **[*13]** cannot adequately defend against the allegation because all they can do is merely "deny that they have done anything wrong." *Id.* (quoting *Bly-Magee, 236 F.3d at 1019*). This is exactly the type of inadequacy that the specificity requirements of *Rule 9(b)* guard against.

Moreover, Plaintiff alleges that Defendants made false representations, but fails to identify what those false representations consisted of, instead merely stating that "[t]he true facts were that Plaintiff was deceived into unknowingly signing a cognovit note, waiving his equitable rights to ownership of his property, without warning and just compensation for waiving his said rights." (Compl. ¶ 31, ECF No. 1-1) Identifying the "true facts" without alleging any "false facts" represented by the Defendants is insufficient under either *Rule 9(b)* or *8(a)*.

Thus, because Plaintiff has failed to allege sufficient facts to state a claim for misrepresentation or fraud, the Court **GRANTS** Defendants' motion to dismiss this claim.[3] Plaintiff's claim for misrepresentation and fraud is **DISMISSED WITHOUT PREJUDICE.**

3. Wrongful Foreclosure

To the extent that Plaintiff's wrongful foreclosure claim is based on his claim that the Deed of Trust "proceed[s] as a cognovit note," (Compl. ¶ 41, ECF No. 1-1), it necessarily fails because the Court has already concluded that Plaintiff failed to allege sufficient facts of the existence of a cognovit, *see supra* at 5-6.

Alternatively, to the extent that Plaintiff's wrongful foreclosure claim is based on the fact that Defendants do not possess the "genuine original" **[*15]** promissory note, allonge, or deed of trust it necessarily fails as well. (*See* Compl. ¶¶ 45-53, ECF No. 1-1) California does not require possession of the original note before initiating a foreclosure. *See* *Ngoc Nguyen v. Wells Fargo Bank, N.A., 749 F. Supp. 2d 1022, 1035 (N.D. Cal. 2010)* ("California law does not require possession of the [original] note as a precondition to non-judicial foreclosure under a deed of trust." (internal quotation marks omitted)); *Quintero Family Trust v. OneWest Bank, FSB, No. 09-1561, 2010 U.S. Dist. LEXIS 6618, at *20-21 (S.D. Cal. Jan. 27, 2010)* (rejecting a wrongful foreclosure claim because producing an original note is not a prerequisite to foreclosure in California).

Moreover, California's "tender rule" bars this claim. *See* *Guerrero v. Greenpoint Mortg. Funding, Inc., 403 F. App'x 154, 157 (9th Cir. 2010)* (holding that plaintiffs lacked standing to bring a wrongful foreclosure claim because they did not allege "actual, full, and unambiguous tender" of the debt owed on the mortgage); *Lofgren v. Nat'l City Mortg., Inc., No. 10-1644, 2011 U.S. Dist. LEXIS 3358, at *4-5 (S.D. Cal. Jan. 11, 2011)* (granting defendant's motion to dismiss plaintiff's wrongful **[*16]** foreclosure claim for failure to allege tender). As discussed *infra,* Plaintiff has not alleged that he is able to tender the amount of his indebtedness. Thus, Plaintiff's wrongful foreclosure claim fails for this reason as well.

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[3] Having found that Plaintiff has failed to allege sufficient facts to establish one of the essential elements of a claim for **[*14]** fraud—namely, misrepresentation—the Court will not consider whether the other elements have been sufficiently alleged, and makes no final judgment as to their presence or absence in the complaint.

In his opposition brief, Plaintiff does not address whether he has alleged sufficient facts of misrepresentation under *Rule 9(b)*, instead focusing on his allegations regarding the element of justifiable reliance. (*See* Resp. in Opp'n 7-8, ECF No. 6) Plaintiff notes, however, that he is "in the process of assembling more evidence in support of all [his] claims, including the cause of action for fraud," urging the Court to consider granting leave to amend should it grant Defendants' motion to dismiss. (*Id.* at 8)

Finally, the Court notes that Plaintiff failed to provide any argument in his opposition regarding Defendants' motion to dismiss his claim for wrongful foreclosure.[4] Thus, for the reasons stated above and because Plaintiff does not oppose Defendants' motion to dismiss on this basis, the Court **GRANTS** Defendants' motion to dismiss Plaintiff's claim for wrongful foreclosure; the claim is **DISMISSED WITHOUT PREJUDICE.**

4. Quiet Title

Plaintiff's third claim seeks to quiet title to the property. (Compl. ¶¶ 61-66, ECF No. 1-1) Plaintiff asserts that "Defendants have no legal or equitable right, claim, or interest in [the] property," (*id.* ¶ 63), but that Defendants nevertheless "allege ownership, and claim an interest in the property adverse to Plaintiff," **[*17]** (*id.* ¶ 64). Thus, "Plaintiff seeks a declaration that the title to the Subject Property is vested in Plaintiff alone to quiet title against the other claimants." (*Id.* ¶ 65)

Quiet title claims may establish title against adverse claims to real property or any interest therein. *Cal. Civ. Proc. Code § 760.020*. A complaint alleging such a claim must be verified and include (1) a description of the property, (2) the basis for plaintiff's title, (3) the adverse claim or claims to title, (4) the date as of which the determination is sought, and (5) a prayer for determination of plaintiff's title against the adverse claims. *Id.* *§ 761.020*.

The Court finds that this claim must be **DISMISSED** because Plaintiff has not alleged that he is able to tender the amount of his indebtedness. Under California's "tender rule," "a mortgagor cannot quiet title against the mortgagee without paying the debt secured." *Shimpones v. Stickney, 219 Cal. 637, 28 P.2d 673, 678 (Cal. 1934)*; *see also* *Mehta v. Wells Fargo Bank, 737 F. Supp. 2d 1185, 1206 (S.D. Cal. Aug. 26, 2010)* (Sammartino, J.) (dismissing the quiet title claim because the plaintiff failed to allege tender); *Kozhayev v. Am.'s Wholsale Lender, No. 09-2841, 2010 U.S. Dist. LEXIS 77553, at *12-13 (E.D. Cal. Aug. 2, 2010)* **[*18]** (same); *Karlsen v. Am. Sav. & Loan Ass'n, 92 Cal. Rptr. 851, 854 (Cal. Ct. App. 1971)*. Here, Plaintiff does not allege that he has tendered the balance owing on the note, or that he is able to do so. Absent this key offer, the Court must **DISMISS** this claim **WITHOUT PREJUDICE.**

Plaintiff contends that he should be excused from the tender requirement. (Resp. in Opp'n 8, ECF No. 6) Though Plaintiff lists several exceptions to the tender rule, he does not indicate which one or ones should apply to the instant case. (*See id.*) The Court finds that none of Plaintiff's proposed exceptions apply: Plaintiff does not allege in his complaint and provides no supporting argument in his opposition brief that Defendants "lulled [Plaintiff] into not paying," (*id.* (citing *McCue v. Bradbury, 149 Cal. 108, 84 P. 993, 994-95 (Cal. 1906))*; that "payment could be construed as a waiver of the right to rescind," (*id.* (citing *Stockton v. Newman, 148 Cal. App. 2d 558, 307 P.2d 56, 61 (Cal. Ct. App. 1957))*; or that "nothing is due" on the loan, (*id.* (citing *Hauger v. Gates, 42 Cal. 2d 752, 269 P.2d 609 (Cal. 1954))*. Thus, even assuming that these exceptions are tenable, Plaintiff has failed to invoke any of them here.

5. Unfair Business Practices, *Cal. Business and Professions Code § 17200,et seq.*

Plaintiff's **[*19]** fourth claim for relief is for unfair business practices in violation of *California Business and Professions Code § 17200, et seq.* ("Unfair Competition Law" or "UCL"). California's UCL prohibits acts of unfair competition, which includes "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*; *see also* *In re Pomona Valley Medical Grp. Inc., 476 F.3d 665, 674 (9th Cir. 2007)*. "Because [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition?acts or practices which are unlawful, or unfair, or fraudulent." *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89, 98 (Cal. Ct. App. 1996)*. In the instant case, Plaintiff's complaint identifies the following unlawful, unfair, or fraudulent business practices: "[I]nducing Plaintiff to enter into a purported agreement based on Defendants' fraudulent representations,

[4] The Court also notes that Plaintiff has excluded its wrongful foreclosure claim from its proposed amended complaint, which is attached as an exhibit to Plaintiff's Response in Opposition. (*See* Ex. 1 at 1, ECF No. 6)

slandering Plaintiff's title in the Subject Property, and deceiving Plaintiff through unlawful false advertising." (Compl. ¶ 68, ECF No. 1-1); (*see also id.* ¶¶ 69-70)

A. Unlawful Business Practice

"[A]n action based on [the UCL] to redress an unlawful business practice 'borrows' violations of other laws and **[*20]** treats these violations . . . as unlawful practices, independently actionable under *section 17200, et seq.* and subject to the distinct remedies provided thereunder." *Farmers Ins. Exch. v. Super. Ct. of L.A. County, 2 Cal. 4th 377, 6 Cal. Rptr. 2d 487, 826 P.2d 730, 734 (Cal. 1992)* (citation omitted); *see also Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*. A business practice that violates almost any federal, state, or local law is an "unlawful practice" under *section 17200* and thereby may serve as the basis for a UCL claim. *See CRST Van Expedited, Inc. v. Werner Enters., Inc., 479 F.3d 1099, 1107 (9th Cir. 2007)*; *Saunders v. Super. Ct. of L.A. County, 27 Cal. App. 4th 832, 33 Cal. Rptr. 2d 438, 441 (Cal. Ct. App. 1994)*.

In the instant case, Plaintiff can state a UCL claim if he can state a claim under a "borrowed" law. *See Webb v. Smart Document Solutions, LLC, 499 F.3d 1078, 1082 (9th Cir. 2007)* (finding that the alleged conduct "must violate a law . . . in order for Plaintiffs to state a claim for relief under *Section 17200*' s 'unlawful' prong"). Here, Plaintiff's complaint does not identify what "borrowed" law he purports to state a UCL claim under. In his opposition brief, however, Plaintiff claims that because **[*21]** he has stated a claim for misrepresentation and fraud, he has sufficiently pleaded an "unlawful practice" under the California UCL. (Resp. in Opp'n 9, ECF No. 6) However, the Court has already concluded that Plaintiff failed to allege sufficient facts of misrepresentation and fraud. *See supra* at 6-8. Thus, the Court finds that the complaint does not adequately state an "unlawful practice" under *section 17200* to serve as the basis for a UCL claim.

B. Unfair Business Practice

Even if a practice is not "unlawful," it may still be "unfair." *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 540 (Cal. 1999)*. In *Cel-Tech,* the California Supreme Court held that conduct is "unfair" between business competitors only if it is "tethered" to an underlying law. *Id. at 544*; *see also In re Nat'l W. Life Ins. Deferred Annuities Litig., 268 F.R.D. 652, 667 (S.D. Cal. 2010)*. Specifically, in interpreting the unfairness prong, the California Supreme Court stated the following:

> [T]o guide the courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively **[*22]** declared policy or proof of some actual or threatened impact on competition. . . . [T]he word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech, 973 P.2d at 544.

Here, Plaintiff has not alleged any act that would be an "incipient violation of an ***antitrust law***." Though Plaintiff argues that "[i]t is clearly unethical and substantially injurious to consumers for a loan servicer to, among other things, charge a higher interest rate than represented and promised to Plaintiff, to omit and fail to disclose information about the loan, and to foreclose upon a home when the true owner of the Deed of Trust and Note are unknown," none of these acts threaten antitrust violations and thus are better suited to the UCL's fraudulent business practice prong. Accordingly, the Court finds that Plaintiff's complaint does not adequately state an "unfair practice" under *section 17200* to serve as the basis for a UCL claim.

C. Fraudulent Business Practice

"Fraud is not **[*23]** an essential element of a claim under [the UCL]," but that does not mean that *Rule 9(b)*'s heightened pleading requirements never apply to such claims. *Vess, 317 F.3d at 1103*. With regard to the application of *Rule 9(b)* in claims pursuant to *section 17200*, the Ninth Circuit has stated the following:

> In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*.
>
> . . .
>
> In other cases, however, a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-fraudulent conduct. In such cases, only the allegations of fraud are subject to *Rule 9(b)*'s heightened pleading requirements.

Id. at 1103-04.

In addition to satisfying *Rule 9(b)*, if applicable, all allegations under *section 17200* **[*24]** must "state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 17 Cal. Rptr. 2d 708, 712 (1993)*. Under the "fraudulent practice" prong of *section 17200*, "[t]his merely requires allegations that the public is likely to be deceived and, to the extent injunctive relief is sought, that the complainant suffered actual injury." *Patent Trust v. Microsoft Corp., 525 F. Supp. 2d 1200, 1218 (S.D. Cal. 2007)*.

Here, the Court finds that Plaintiff's complaint "sounds in fraud." Plaintiff alleges that Defendants' actions were "aimed at deceiving Plaintiff before and during the loan process," (Compl. ¶ 69, ECF No 1-1); that Defendants' "officers, employees, and agents" "failed to disclose that the interest rate actually charged on this loan was higher than the rate represented and promised to Plaintiff," and "concealed, omitted, and/or otherwise failed to disclose information," (*id.*); and that Defendants "failed to disclose the true variable nature of interest rates on adjustable rate mortgage loans and adjustable rate home equity loans" and "failed to properly disclose th[e] values of the property and their concerns of **[*25]** such an overinflated house price, (*id.*). Accordingly, the Court concludes that the heightened pleading requirements apply to Plaintiff's claims in their entirety. *See* *Stickrath v. Globalstar, Inc., 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007)* (applying *Rule 9(b)* to the plaintiffs' claims pursuant to *section 17200* where the court found that the allegations were based on a "unified course of fraudulent conduct").

As with Plaintiff's claim for misrepresentation and fraud, the Court finds that these allegations are insufficient to satisfy *Rule 9(b)*'s heightened pleading standards. Plaintiff does not identify which of Defendants' "officers, employees, and agents" were responsible for the allegedly deceptive actions, what the allegedly false representations were or what information was concealed, or when these actions occurred (other than the broad assertion that the deceptive practices occurred "before and during the loan process"). Thus, the Court finds that Plaintiff's allegations are insufficient to state a "fraudulent practice" under *section 17200* to serve as the basis for a UCL claim.

Because the Court concludes that Plaintiff's complaint fails to state a claim for unlawful, unfair, or **[*26]** fraudulent business practices under *section 17200*, Defendants' motion to dismiss Plaintiff's fourth claim for relief is **GRANTED.**

6. RICO Statute Violations, 18 U.S.C. § 1961

Plaintiff raises his final cause of action under *18 U.S.C. §§ 1961, et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). (Compl. ¶¶ 72-79, ECF No. 1-1) The RICO Act prohibits certain conduct involving a "pattern of racketeering activity," and makes a private right of action available to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions, provided that the alleged violation was the proximate cause of the injury. *Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. Plaintiff's RICO claims are based on violations of *§ 1962(a)* and *§ 1962(c)*. (*See* Compl. ¶¶ 74-75, ECF No. 1-1) *Section 1962(a)* prohibits investment of income derived "from a pattern of racketeering activity or through collection of an unlawful debt" in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id. § 1962(a)*. *Section 1962(c)* states that no one "employed by or associated with any enterprise" may conduct **[*27]** the "enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id. § 1962(c)*.

To the extent that Plaintiff's fifth claim for RICO violations is predicated on fraudulent conduct in that Plaintiff alleges that Defendants "compromise a group of corporations associated in fact to defraud and profiteer from individual borrowers through the use of intentional nondisclosure, material misrepresentation, and creation of fraudulent loan documents," (Compl. ¶ 73, ECF No. 1-1), and asserts predicate acts including mail and wire fraud, among other deceptive practices, (*id.* ¶ 76), the Court finds that *Rule 9(b)*'s heightened pleading standards apply to Plaintiff's RICO allegations. *See* *Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)* ("*Rule 9(b)*'s [heightened pleading requirement] . . . applies to civil RICO fraud claims.") (citing *Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988))*. Applying *Rule 9(b)*, the Court finds that Plaintiff's complaint is deficient.

First, the majority of Plaintiff's allegations are pleaded "on information and belief," and are not otherwise supported by any independent factual basis. (*See* Compl. **[*28]** ¶¶ 73-75, ECF No. 1-1) As such, the Court finds that Plaintiff's allegations are insufficient under *Rule 9(b)*. *See, e.g.,* *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)* (holding, in the RICO context, that "a plaintiff who makes allegations on information and belief must state the factual basis for the belief" (citations omitted)); *New England Data Servs., Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987)* (applying *Rule 9(b)* to a civil RICO claim and stating that allegations based on "information and belief" are insufficient to satisfy *Rule 9(b)*'s particularity requirement).

Second, as with Plaintiff's misrepresentation and fraud claim and UCL fraudulent practices claim, Plaintiff fails to identify with sufficient particularity "'the who, what, when, where, and how' of the misconduct charged." *Vess, 317 F.3d at 1106* (quoting *Cooper, 137 F.3d at 627*)). In his allegations of mail fraud, for example, Plaintiff merely asserts that Defendants "us[ed] the mails for sending out materials among themselves and to investors," without any information as to who sent what mailings to whom and when. (Compl. ¶ 76, ECF No. 1-1) The other allegations are in accord. (*See id.*)

Third and finally, the Court **[*29]** notes that Plaintiff did not oppose Defendants' motion to dismiss the RICO violations claim, and in fact dropped this claim from his proposed amended complaint. (*See* Resp. in Opp'n, ECF No. 6); (Ex. 1 at 1, ECF No. 6) Thus, for the reasons stated above and because Plaintiff does not oppose Defendants' motion to dismiss on this basis, the Court **GRANTS** Defendants' motion to dismiss Plaintiff's claim for violations of the RICO Act; the claim is **DISMISSED WITHOUT PREJUDICE.**

CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' motion to dismiss, and Plaintiff's complaint is **DISMISSED WITHOUT PREJUDICE** in its entirety.[5]

IT IS SO ORDERED.

DATED: November 10, 2011

/s/ Janis L. Sammartino

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[5] Because the Court grants Defendants' motion to dismiss the entire complaint, it **DENIES AS MOOT** Defendants' motion to strike various portions of the complaint.

Honorable Janis L. Sammartino

United States District Judge

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